



**Palestinian Centre for Human Rights (PCHR)**

**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**

**February 2010**



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## ■ Introduction

On 5 November 2009, the General Assembly of the United Nations (UN) voted to endorse the Report of the UN Fact Finding Mission on the Gaza Conflict (the Goldstone Report). The adopted Resolution called upon the Government of 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”.<sup>1</sup>

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.”<sup>2</sup> On 5 February 2010, the Secretary-General will present his report to the General Assembly.

Since 1995 the Palestinian Centre for Human Rights (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 Israel’s offensive on the Gaza Strip (Operation ‘Cast Lead’, 27 December - 18 January 2009), 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 1,028 civil complaints to the Compensation Officer in the Israeli Ministry of Defense, and 450 criminal complaints on behalf of 941 affected individuals to the Israeli Military Prosecution. To date, only 22 responses denoting the opening of an investigation have been received.<sup>3</sup> The serious nature of these crimes, the existence of strong prima facie evidence relating to their commission, and the associated violation of civilians’ fundamental rights, result in an international obligation to provide effective judicial redress, including genuine investigations, and where appropriate,

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

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

3 15 responses indicating the opening of a criminal investigation from the Military Prosecution, and 7 responses from the compensation officer at the Ministry of Defense, indicating the receipt of Compensation Claim forms.

prosecutions.

In anticipation of the Secretary-General's report, "Genuinely Unwilling" 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*,<sup>4</sup> and *Gaza Operation Investigations: An Update*,<sup>5</sup> this report concludes that the Israeli system is incapable of conducting independent, credible investigations in conformity with international standards. Israel's failure to conduct such investigations is in violation of its international legal obligations, and UN General Assembly Resolution A/Res/64/10.

The Goldstone Report concluded that "The prolonged situation of impunity has created a justice crisis in the Occupied Palestinian Territory that warrants action",<sup>6</sup> and further that "the prosecution of persons responsible for serious violations of international humanitarian law would contribute to ending such violations, to the protection of civilians and to the restoration and maintenance of peace."<sup>7</sup> In accordance with the demands of international law, including victims' fundamental human rights, it is essential that allegations of crimes committed during Israel's offensive on the Gaza Strip be investigated and - if the allegations prove well founded - those responsible prosecuted. PCHR emphasize that Israel is under a legal obligation to investigate all suspected violations of international law, including - but not limited to - those contained in the Goldstone Report.

While this report necessarily analyses international obligations with respect to the administration of justice, and Israel's compliance with these obligations, PCHR note that Israel has consistently proven itself unwilling to conduct genuine investigations and prosecutions into cases of alleged violations of international law. This illegal pattern has been repeated with respect to allegations arising out of Israel's conduct of hostilities during last year's offensive on the Gaza Strip. Virtually all aspects of Israel's offensive were sanctioned, approved, and decided upon by the highest echelons of Israel's civilian and military leadership. Any investigation must necessarily evaluate this policy, and those responsible for its creation. Where appropriate, responsible individuals - regardless of their rank, or political standing - must be held to account. As will be discussed herein, the Israeli legal system prevents such genuine investigations.

International justice - either through the International Criminal Court or the exercise of universal jurisdiction - is thus the only possible recourse.

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

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

6 §1958

7 §1966.

## Recommendations

In light of Israel's genuine unwillingness, the Secretary-General and the UN General Assembly must 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).

It is also imperative that, in the best interests of the victims and the rule of international law, individual States concurrently exercise their obligation to investigate and prosecute suspected war criminals in accordance with the principle of universal jurisdiction.

Victims' rights, and the rule of international law, must be upheld.

## Applicable Legal Framework

The situation between the State of Israel and the Palestinians is one of international armed conflict and belligerent occupation. As such, the applicable bodies of international humanitarian law (IHL) include the four Geneva Conventions of 1949,<sup>8</sup> the Hague Regulations of 1907, and customary IHL. The Additional Protocols to the Geneva Conventions are also relevant; certain provisions within the Additional Protocols have gained the status of customary international law and are thus legally binding on all States. Additionally, although the State of Israel has not ratified the Protocols, they were intended to expound upon the provisions codified in the Fourth Geneva Convention and customary IHL, particularly as these relate to the principle of distinction, and the conduct of hostilities. As such, they are of primary interpretive relevance.

As a State Party to the major international human rights law treaties - including the International Covenant on Civil and Political Rights,<sup>9</sup> the International Covenant on Economic, Social and Cultural Rights,<sup>10</sup> and the Convention on the Rights of the Child (CRC)<sup>11</sup> - Israel is also bound by its human rights law obligations. In its Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, the International Court of Justice confirmed the extraterritorial application of the ICCPR, the ICESCR, and the CRC with respect to Israel's actions in the occupied Palestinian territory.<sup>12</sup> The ICCPR is particularly relevant to the current discussion: Article 2 concerns the right to an effective remedy, Article 14 contains the right to a fair trial, while Article 26 affirms that all people are entitled to the protection of the law.

<sup>8</sup> Israel's date of ratification.

<sup>9</sup> Israel ratified the ICCPR on 3 Jan., 1992.

<sup>10</sup> Israel ratified the ICESCR on 3 Jan., 1992.

<sup>11</sup> Israel ratified the CRC on 2 Nov., 1992.

<sup>12</sup> Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C. J. 136 (July 9) §111, §112, §113.

## Structure

In order to provide the appropriate overall legal framework, this paper will begin by discussing international obligations relevant to the effective administration of justice. Section 3 then analyses Israel's investigative and judicial system, focusing on the perceived status of the Gaza Strip and the classification of the civilian population as 'enemy aliens'; Israel's legal and judicial mechanisms; investigative mechanisms, including the opening of criminal and civil investigations; and the obligation to provide a prompt and timely remedy. Finally section 4 discusses specific issues relating to Israel's offensive on the Gaza Strip.



## International Obligations Relating to the Administration of Justice with Respect to Violations of International Human Rights and Humanitarian Law

International law extends explicit protections to civilians in times of occupation and armed conflict. Crucially, it also regulates the manner in which hostilities are conducted, ensuring that - as far as possible - civilians and non-combatants are spared the effects and consequences of hostilities. However, in order for the law to be relevant - in order for it to prove capable of protecting civilians - it must be enforced. History, and the reality of over 42 years of Israeli occupation, has shown that as long as impunity is granted, international law will continue to be violated. It is innocent civilians who are forced to suffer the often horrific consequences. Ending impunity serves a two-fold purpose. First, it ensures victims' legitimate right to an effective judicial remedy and the equal protection of the law. Second, it ensures that those who violate international law are held to account, ending the cycle of impunity, deterring the commission of future crimes, and raising the prospect of a just, and lasting, peace.

The effective administration of justice is an essential component with respect to enforcing the rule of law, and protecting and promoting individual's rights; it is through the courts that the obligations to, inter alia, prosecute and punish, are discharged. International law codifies explicit obligations in this regard, States are placed under a clear obligation to investigate, and if appropriate, prosecute those suspected of committing serious violations of international law. These obligations are codified in, inter alia, Article 146 of the Fourth Geneva Convention,<sup>13</sup> and the ICCPR; Article 2 codifies the right to an effective judicial remedy, while Article 26 affirms that all people are entitled to the equal protection of the law. The obligation to investigate forms part of customary international law.<sup>14</sup>

The importance of the legal system is evident when one considers that an independent and impartial judiciary, free from governmental interference and guaranteeing due process rights, is essential both for the protection of individuals' rights, and the law itself.<sup>15</sup> It is a condition sine qua non for respect for the rule of law. This importance is emphasized with respect to international crimes,<sup>16</sup> given that it is often States themselves who are involved in the commission of such acts.

<sup>13</sup> This provision is replicated in Article 49 First Geneva Convention, Article 50 Second Geneva Convention, and Article 129 Third Geneva Convention.

<sup>14</sup> Rule 158, ICRC, Study on Customary International Humanitarian Law, 2005.

<sup>15</sup> International Commission of Jurists, *Military Jurisdiction and International Law, Military courts and gross human rights violations* vol. 1, 9 (2004).

<sup>16</sup> International crimes are those crimes capable of giving rise to universal jurisdiction, they include genocide, crimes against humanity, torture, grave breaches of the Geneva Conventions (1949) and select other war crimes.

Significantly, States are obliged to guarantee - and not merely respect - individuals' rights.<sup>17</sup> As guarantors of human rights, States are obliged to prevent violations, investigate them should they occur, bring to justice the perpetrators, and provide reparations to victims. The necessity of the duty to guarantee human rights has been eloquently explained by the Inter-American Commission on Human Rights:

“These duties of the State, to respect and to guarantee, form the corner-stone of the international protection system since they comprise the States' international commitment to limit the exercise of their power, and even of their sovereignty, vis-à-vis the fundamental rights and freedoms of the individual. [...] The duty to guarantee, for its part, entails that the States must ensure the effectiveness of the fundamental rights by ensuring that the specific legal means of protection are adequate either for preventing violations or else for reestablishing said rights and for compensating victims or their families in cases of abuse or misuse of power. [...] there is the duty to prevent violations and the duty to investigate any that occur since both are obligations involving the responsibility of the States”.<sup>18</sup>

The jurisprudence of international human rights tribunals, and mechanisms such as the United Nations Human Rights Committee, have established five basic obligations in this regard. States must:

- investigate,
- bring to justice and punish those responsible,
- provide an effective remedy for victims,
- provide fair and adequate compensation,
- and establish the truth.<sup>19</sup>

By their nature these obligations are complimentary and mutually reinforcing. The United Nations Special Rapporteur on extrajudicial, summary or arbitrary executions has noted that: “Governments are obliged under international law to carry out exhaustive and impartial investigations into alleged violations of the right to life, to identify, bring to justice and punish their perpetrators, to grant compensation to the victims or their families, and to take effective measures to avoid future recurrence of such violations. The first two components of this fourfold obligation constitute in themselves the most effective deterrent for the prevention of human rights violations.”<sup>20</sup> This

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17 Article 2, ICCPR.

18 Report N° 1/96, Case 10,559, *Chumbivilcas* (Peru), 1 March 1996.

19 International Commission of Jurists, *Military Jurisdiction and International Law, Military courts and gross human rights violations* vol. 1, 22 (2004).

20 Commission on Human Rights, *Question of the violation of human rights and fundamental freedoms, in any part of the world, with particular reference to colonial and other dependent countries and territories: Extrajudicial, summary or arbitrary executions*, Report by the Special Rapporteur, U.N. Doc. E/CN.4/1994/7, §688 and §711

sentiment was echoed in 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, adopted by the UN General Assembly on 16 December 2005.<sup>21</sup> Principle 3 of this Resolution states that:

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.

Additionally, the European Court of Human Rights, has stated that “the notion of an ‘effective remedy’ entails ... a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the complainant to the investigative procedure.”<sup>22</sup>

As regards the relationship between investigations under IHL and international human rights law, it must be noted that IHL contains a number of requirements for investigations, primarily for war crimes - implicit in the obligation to search for persons alleged to have committed grave breaches and bring them to justice - but also for, inter alia, the deaths of prisoners of war,<sup>23</sup> or civilian internees.<sup>24</sup> Equally, as Cordula Droege notes, “[i]nvestigatory obligations have also been developed in treaty law, soft law and jurisprudence in human rights law and are now rather more detailed than in international humanitarian law.”<sup>25</sup> Significantly, however, human rights bodies have applied the investigative standards associated with violations of human rights

<sup>21</sup> 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

<sup>22</sup> *Aksoy v. Turkey*, (Preliminary Objection), European Court of Human Rights, 18 December 1996, 598.

<sup>23</sup> Article 121, Third Geneva Convention.

<sup>24</sup> Article 131, Fourth Geneva Convention.

<sup>25</sup> Cordula Droege, *Elective Affinities? Human Rights and Humanitarian Law*, *International Review of the Red Cross*, Volume 90, Number 871, September 2008, p. 540.

law to situations of armed conflict.<sup>26</sup> In this regard, it is presented that the investigative standards and obligations associated with human rights law must be regarded as the *lex specialis* with respect to investigating IHL violations.

Given their relationship to the investigations associated with last year's Israeli offensive on the Gaza Strip, including UN General Assembly Resolution A/Res/64/10, two components of the obligations to investigate and prosecute must be highlighted: any investigation or prosecution must be conducted in good faith, and in a timely manner.

### The Good Faith Requirement

The good faith requirement is reflected in Article 16 of the Statute of the International Criminal Court, which affirms that the Court may exercise jurisdiction if a State is unwilling genuinely to carry out an investigation or prosecution. This requirement is intended to protect against 'sham' trials or investigations, whose primary purpose is to shield perpetrators from justice, rather than to pursue justice itself. Such actions serve to perpetuate a climate of impunity. It must also be noted that Articles 26 and 31 of the Vienna Convention on the Law of Treaties (1969) require that all Treaties - such as the Geneva Conventions or the ICCPR - be interpreted, and their obligations performed, in good faith.

The separation of powers principle - whereby the executive, the legislative, and the judiciary have separate and independent powers and areas of responsibility - is a key component with respect to adequate 'good faith' investigations and effective judicial remedy. As noted this requirement is particularly relevant to the investigation and trial of international crimes, given the often high level of State involvement in the commission of these acts. International human rights law recognizes that an independent and impartial judiciary, due process of law, and the existence of judicial guarantees are essential components in the administration of justice.<sup>27</sup> As noted by Professor Singhvi,

“The principles of impartiality and independence are the hallmarks of the rational and the legitimacy of the judicial function in every States. The concepts of the impartiality and independence of the judiciary postulate individual attributes as well as institutional conditions. These are not mere vague nebulous ideas but fairly precise concepts in municipal and international law. Their absence leads to a denial of justice and makes the credibility of the judicial process dubious. It needs to

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<sup>26</sup> 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.

<sup>27</sup> Article 14 ICCPR.

be stressed that impartiality and independence of the judiciary is more a human right of the consumers of justice than a privilege of the judiciary for its own sake.”<sup>28</sup>

The Special Rapporteur on the Independence of Judges and Lawyers has emphasized that “the principle of the separation of powers [...] is the bedrock upon which the requirements of judicial independence and impartiality are founded.” Any interference on the part of the executive, for example, will seriously infringe upon the obligation to investigate and prosecute, thereby calling into question adherence to the good faith requirement.

Given that the principal international crimes discussed herein relate to violations of IHL, and the fact that initial Israeli investigations are conducted by the military (as discussed below), military investigations must also be briefly discussed. Indeed, as noted by the International Commission of Jurists, “military jurisdiction is often used as a means of escaping the control of the civilian authorities”.<sup>29</sup> It is apparent that no investigation conducted or supervised by persons associated with those responsible can be considered truly independent or impartial. In 1969, the Special Rapporteur on Equality in the Administration of Justice, noted with respect to military courts comprised of military officials subject to hierarchical obedience, 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.”<sup>30</sup> Indeed the Human Rights Committee has consistently stated that States must take measures to ensure that military forces are subject to civilian authority,<sup>31</sup> i.e. that investigations and prosecutions must be subjected to the oversight of the civilian judicial system. As noted in the Human Rights Committee’s Concluding Observations on Venezuela, “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 the police and other security forces, to be followed, where appropriate, by prosecution of those who appear to be responsible for them.”<sup>32</sup>

<sup>28</sup> United Nations document E/CN.4/Sub.2/1985/18, paragraph 75.

<sup>29</sup> International Commission of Jurists, *Military Jurisdiction and International Law, Military courts and gross human rights violations* vol. 1, 28 (2004).

<sup>30</sup> U.N. Doc. E/CN.4/Sub.2/296, 10 June 1969, §195. Spanish original, in ICJ.

<sup>31</sup> See, *inter alia*, Concluding Observations - Romania, *op. cit.* paragraph 9; Concluding Observations - Lesotho, United Nations document CCPR/C/79/Add. 106, paragraph 14; and Concluding Observations - El Salvador, United Nations document CCPR/C/79/Add.34, 18 April 1994, paragraph 8.

<sup>32</sup> Concluding Observations - Venezuela, §8, UN. Doc. CCPR/CO/71/VEN, 26 April 2001.

## Prompt and Timely Remedy

The obligation to investigate is a component of customary international law, and one of the core components of a State's duty to guarantee human rights.<sup>33</sup> As noted by the Human Rights Commission, such investigations must be conducted promptly and impartially.<sup>34</sup> Timely investigations are thus essential; it is presented that the unjustifiable prolongation of investigations may be considered as constituting an attempt to shield perpetrators from justice. In *Isayeva v. Russia*, the European Court of Human Rights held that: "a prompt response by the authorities in investigating a use of lethal force 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 (see, for example, *Hugh Jordan v. the United Kingdom*, cited above, §§ 108, 136-140)."<sup>35</sup> 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 identified or punished, constitute "a situation of serious impunity and [...] a breach of the State's duty".<sup>36</sup> 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. Indeed, such delays, constitute a violation of State's international obligations, incurring international responsibility.

## Effects of Non-Compliance with the Obligation to Investigate

A State becomes internationally accountable when it fails to take appropriate investigative action. As noted by the Permanent Court of International Justice, in a judgment delivered on 1 May 1925, under international law a "State may become accountable [...] also as a result of insufficient diligence in criminally prosecuting the offenders. [...] It is generally recognized that the curbing of crime is not only a legal obligation incumbent on the competent authorities but also [...] an international duty that is incumbent on the State."<sup>37</sup> As emphasized by the UN Observer Mission in El Salvador, "State responsibility can ensue not only as a result of a lack of vigilance in preventing harmful acts from occurring but also as a result of a lack of diligence in criminally prosecuting those responsible for them and in enforcing the required civil

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33 International Commission of Jurists, *Military Jurisdiction and International Law, Military courts and gross human rights violations* vol. 1, 33 (2004).

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

35 *Isayeva v. Russia*, European Court of Human Rights, App. No. 57950/00, 24 February 2005, §213.

36 *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).

37 *Recueil de sentences arbitrales*, United Nations, Vol. II, pp. 645 and 646, quoted in International Commission of Jurists, *Military Jurisdiction and International Law, Military courts and gross human rights violations* vol. 1, 55 (2004).

penalties”.<sup>38</sup> This obligation is further underlined in General Comment 31 of the Human Rights Committee, who note that “A failure by a State Party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant [ICCPR].”<sup>39</sup> The same General Comment also states that:

“There may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by States Parties of those rights, as a result of States Parties’ permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities. States are reminded of the interrelationship between the positive obligations imposed under article 2 and the need to provide effective remedies in the event of breach under article 2, paragraph 3.”<sup>40</sup>

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38 ONUSAL, §29 cited in International Commission of Jurists, *Military Jurisdiction and International Law, Military courts and gross human rights violations* vol. 1, 26 (2004).

39 Human Rights Committee, General Comment 31, 26 May 2004, U.N. Doc. CCPR/C/21/Rev.1/Add.13, §15.

40 Human Rights Committee, General Comment 31, 26 May 2004, U.N. Doc. CCPR/C/21/Rev.1/Add.13, §8.





## ■ Genuinely Unwilling: The Israeli Legal System as it Relates to Palestinian Victims

The UN General Assembly has required that Israel “... 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”.<sup>41</sup> The existence of prima facie evidence indicating the commission of, inter alia, grave breaches of the Geneva Conventions, places Israel under a legal obligation to investigate and prosecute those suspected of committing such crimes.<sup>42</sup> This section will detail the legal obligations inherent upon Israel, as an Occupying Power, as well as Israel’s mechanisms of investigation and their compliance - or lack thereof - with international standards.

In light of the pressing need to uphold victims’ rights and to enforce the rule of law, a proper understanding of the judicial mechanisms available to Palestinian victims of Israeli offenses is essential. The importance of such an understanding is highlighted by the fact that mechanisms of international justice are typically only enacted when State’s with a more traditional jurisdictional nexus to the alleged crime - such as nationality, territoriality, the protective principle, or the passive personality principle - prove unwilling or unable to investigate and prosecute alleged crimes.

It must be concluded that, in light of Israel’s well-documented unwillingness, it is essential that recourse be had to all appropriate mechanisms of international justice.

### Israel’s Obligation to Investigate

As the Occupying Power, and a belligerent in the hostilities discussed herein, Israel is bound by a number of pressing legal obligations. The State of Israel has ratified several relevant international treaties, such as the Geneva Conventions, the ICCPR, and CAT, and is therefore bound by the provisions contained therein. For example, Article 146 of the Fourth Geneva Conventions requires that Israel enact “any legislation necessary to provide effective penal sanctions for person committing, or ordering to be committed” any grave breaches of the Geneva Conventions, and places Israel “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.” Equally, as illustrated previously, the ICCPR obliges Israel to facilitate victims in their pursuit of an effective remedy, and to guarantee their equal protection before the law; Israel has

<sup>41</sup> UN General Assembly Resolution, 5 November 2009, U.N. Doc. A/Res/64/10.

<sup>42</sup> As evidenced, inter alia, by Article 146 Fourth Geneva Convention.

a legal responsibility with respect to Palestinian victims of Israeli violations of international law. Customary international law also obliges Israel to investigate all violations of international law.

To date, however, Israel's investigations have proved inadequate, while prosecutions - particularly at the command level - have not been forthcoming.

Many of the violations of international law perpetrated during the course of the Israeli offensive on the Gaza Strip - such as the targeting of civilian police forces, and the use of the Dahiya Doctrine - were the direct result of policies adopted by the highest echelons of the civilian and military leadership; raising key concerns, often associated with the perpetration of international crimes, as regards the willingness of the authorities to, in effect, investigate and indict themselves. These concerns are reinforced by Prime Minister Netanyahu's public statement on 12 October 2009, vowing that Israeli soldiers and leaders will not stand trial for war crimes committed during the Israeli offensive.<sup>43</sup> It is presented that, in this respect, Israel is in violation of its legal obligations, and effectively denies Palestinian victims effective legal remedy. This finding was confirmed by the Dutch Court of Appeals in the Al-Shami v. Ayalon case on 26 October 2009 which ruled that the Israeli authorities were not willing to investigate and bring to trial persons responsible for international crimes.<sup>44</sup> 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.<sup>45</sup>

However, as will be demonstrated, although Israel does have a functioning legal system, when it comes to Palestinian victims and the prosecution of members of the Israeli military and civilian administration, this system is fundamentally biased, making the pursuit of justice impossible. This claim is emphasized by the fact that no senior figures - civilian or military - have ever been prosecuted for crimes committed against Palestinian civilians. Indeed, although over a year has passed since the offensive on the Gaza Strip, Israel has

43 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 14 October 2009); 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 14 October 2009).

44 See further, PCHR, Justice Denied: Dutch Court Denies Appeal Petition in Ayalon Torture Case, 30 October 2009, <http://www.pchrgaza.org/files/PressR/English/2009/111-2009.html> and the ruling of the Spanish Audencia Nacional, unofficial English translation available at: <http://www.pchrgaza.org/files/PressR/English/2008/04-05-2009-2.html>

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

only opened 150 investigations, of which only 36 are criminal proceedings. As noted above, PCHR alone have submitted 450 criminal complaints requesting that an investigation be opened, positive replies have only been received in relation to 15 cases. 1,419 Palestinians were killed during the course of the offensive, of whom the overwhelming majority, 82%, were civilian. A further 5,300 were injured, and public and private property throughout the Gaza Strip was extensively destroyed.

A number of cumulative factors have been identified which fundamentally frustrate Palestinian's pursuit of justice before the Israeli courts. These are: the perceived status of the Gaza Strip and the classification of its civilian population as 'enemy aliens', Israel's legal and judicial mechanisms, the mechanisms of investigation, and the lack of a timely remedy.

Two issues of particular concern have been highlighted. The first relates to the initial phase of investigation, which in the majority of cases precedes a criminal investigation. These are operational probes, or command investigations, conducted by the military. Such investigations are conducted for operational purposes, in order to evaluate 'lessons learned' for the Israeli forces. Effectively, these investigations - which have been condemned in the Goldstone Report - are conducted by those accused, and, despite their inherent flaws, form the basis of the decision to open a subsequent criminal investigation. The second, related, factor is the wide margin of appreciation awarded by the Israeli legal system - including the Supreme Court - to the decisions of the military, and the Military Advocate General. When combined with operational probes, this margin of appreciation effectively precludes independent, impartial, investigation. Those investigations that are opened are subjected to the flaws of the Israeli legal system, as discussed below. Ultimately, the bias inherent in the Israeli military and civilian system fundamentally frustrates the pursuit of justice.

These issues will be explained briefly herein as they illustrate the bias and lack of independence inherent in the Israeli legal system, and Israel's unwillingness to genuinely investigate and prosecute those suspected of committing crimes against the Palestinian population.

## **Israeli Legal and Judicial Mechanisms**

The mechanisms of the Israeli legal and judicial system prevent the impartial pursuit of justice. As will be outlined below, there is no separation of powers between the military and the military legal system (preventing independent non-biased investigation), and the hierarchical structure of the military has evident implication with respect to any claim of impartiality. When combined with ineffective civilian oversight, serious flaws in the civilian judicial system, and significant - in some cases virtually indefinite - delays these factors combine to promote a climate of pervasive impunity.

Within the Israeli military system, the Military Advocate General (MAG) serves a twofold function: acting as legal advisor to the military authorities, and enforcing penal laws intended to represent the rule of law and the public interest. In this respect, the MAG performs a similar role to that of the Attorney General (AG) in the civilian sphere. However, as noted by the Israeli High Court of Justice, although there is a great deal of similarity between the MAG and the AG regarding their independence as to arraignment, 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, the military hierarchy within which the MAG operates cannot be ignored:<sup>46</sup>

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 [...].<sup>47</sup>

As illustrated in a previous section, this situation presents clear implications with respect to the impartiality or independence of any investigation.<sup>48</sup>

The Military Justice Law (1955) 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,<sup>49</sup> to consent to a military court's final judgment as a confirming authority,<sup>50</sup> and significantly, to order the quashing of a charge sheet.<sup>51</sup> This relationship raises serious issues with respect to the independence of the military legal system and the separation of powers principle.<sup>52</sup> Simply put, such influence is not conducive to either independence or impartiality; rather, it has the potential to fundamentally undermine it.

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

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

48 See supra, Section 2: 'International Obligations Relating to the Administration of Justice'.

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

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

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

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

Finally, the extensive 'margin of appreciation' awarded to the AG and the MAG by the Israeli Supreme Court must be addressed. Although, issues of independence and impartiality have already been highlighted, the lack of effective civilian judicial oversight may be regarded as the ultimate cumulative factor which fundamentally undermines the pursuit of criminal accountability. In *John Doe*, the 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.<sup>53</sup> A similar conclusion was reached with respect to the authority of the MAG in the *Suffan* case.<sup>54</sup> 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.<sup>55</sup>

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, including military/operational probes; in many instances the accused are intrinsically involved in the investigations. The civilian judicial system is left with an extremely - often non-existent - margin to which to review such decisions, effectively 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.

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

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<sup>53</sup> HCJ 5699/07, *Jane Doe (A) v. The Attorney General* (decision delivered on 26 February 2008)

<sup>54</sup> HCJ 425/89, *Suffan v. The Military Advocate General*, PD 43(4) 718, 727 (1989).

<sup>55</sup> 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.

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]).<sup>56</sup>

It is presented that no decision made on the basis of flawed and biased information can be considered to have been made in “good faith”. 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.

## Investigative Mechanisms

Currently, a criminal case is presented, on behalf of a Palestinian victim, to the MAG, who will then consult with the relevant field commander. If requested, an investigation will then be conducted. These investigations take two principal forms, constituting either operational probes (also known as military probes, or ‘command investigations’), or criminal investigations. In the majority of instances operational probes constitute the initial investigation, and decisions to open a criminal investigation are made on the basis of this operational probe. Article 539(A)(a) of the Law on Military Justice defines an operational probe as: “a procedure held by 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”. An operational probe is intended to investigate an incident from an internal military perspective, so that lessons may be learned, operational conclusions drawn, and so on. The distinction between a criminal investigation and a military probe was elaborated upon by the Israeli Supreme Court in *Al-Nebari*:

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.<sup>57</sup>

<sup>56</sup> 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).

<sup>57</sup> HCJ 2366/05, *Al-Nebari v. The Chief of Staff of the Israeli Army* (decision delivered on 29 June 2008),

Operational probes are conducted by military personnel, as distinct from officers of the military police. The Israeli forces justify this practice on the basis that such personnel are better placed to evaluate the propriety of military action than individuals without combat experience.<sup>58</sup> It is believed that during a military probe, no external witnesses are interviewed; a fundamental flaw given that this precludes a cross-examination of facts, and presumes that those suspected of crimes will not act in their own self-interest. Findings are intended to be confidential so that soldiers will speak openly. Additionally, it appears that operational probes are not conducted in accordance with identifiable standards, other than the basic requirements of the Military Justice Law. In 2002, Col. Daniel Reisner, deputy Judge Advocate General, remarked: "Every commander determines whether he's reached the truth... There is no textbook on investigations ... We see a great variety".<sup>59</sup>

Further, the Military Justice Law and the General Security Services Law stipulate that all materials related to an operational probe, including what is said during the course of a probe, the protocols of its hearings, its findings, conclusions and recommendations, shall not be used as evidence in court, and are confidential;<sup>60</sup> the findings of the operational probe cannot be used as evidence in subsequent proceedings. However, and with evident implications for the 'good faith' requirement, this operational probe invariably forms the basis of the decision to open a criminal investigation. As noted by the State of Israel in *Gaza Operation Investigations: An Update*, operational probes "serve as a means of compiling an evidentiary record for the Military Advocate General, and enabling him, from his central vantage point, to determine whether there is a factual basis to open a criminal investigation."<sup>61</sup> The IDF fail to address the flaws inherent in this form of decision making.

Following the outbreak of the second intifada an official change in policy was introduced whereby the use of operational probes to address incidents emerging from military operations became the rule. This means that criminal investigations are not necessarily a first step even in the face of credible allegations of serious offences committed by military personnel; a fact that is in itself in violation of Israel's obligations under Article 146 of the Fourth

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para. 6-10 of Justice Arbel's ruling. Emphasis added.

58 Human Rights Watch, *Promoting Impunity: The Israeli Military's Failure to Investigate Wrongdoing*, (2005).

59 Tracy Wilkinson, "Israeli Army Probes Slaying of Palestinian Grandmother," *Los Angeles Times*, December 29, 2002. Emphasis added.

60 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."

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

Geneva Convention.<sup>62</sup> This has significant negative implications on any future investigation, making subsequent investigation nearly impossible. As noted by Col. (res) Ilan Katz (Deputy MAG, until March 2003):

“...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 [Military Police Criminal Investigation Division] 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. The debriefing law has a certain logic because it raises the level of credibility of the operational debriefings, but the way it is exploited by commanders in order to prevent [Military Police Criminal Investigation Division] investigations is not reasonable.”<sup>63</sup>

It must be emphasised that these operational probes often form the basis of any decision relating to the launching of a further investigation; including those decisions made by the MAG and the AG. Therefore, in addition to significantly delaying any subsequent investigation - with evident repercussions with respect to the collection of evidence, the degradation of the crime scene, and so on - these probes constitute an integral but flawed component of the legal system. Such probes are patently ineffective, and cannot be considered either independent or impartial. The report of the UN Fact Finding Mission found that operational probes “can hardly be an effective and impartial investigation mechanism ... It does not comply with internationally recognized principles of independence, impartiality, effectiveness and promptness in investigations.”<sup>64</sup>

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 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 initiate, and do initiate, direct criminal investigations of those complaints alleging conduct that is clearly criminal in nature. For example, in the case of the alleged firing of a rubber bullets at the feet of a detainee, the Military Advocate General conducted

62 Article 146 Fourth Geneva Convention, which is common to all four Geneva Conventions of 1949 requires 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.”

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

64 Report of the UN Fact Finding Mission on the Gaza Conflict, §1628.



a direct criminal investigation immediately after the incident was published in the media, and filed an indictment within two weeks.”<sup>65</sup>

However, it must be emphasized that although they do occur, such direct criminal investigations are the exception rather than the rule. Despite PCHR's submission of cases involving clearly illegal acts to the MAG, *inter alia*, the direct targeting of civilians (willful killing), or the destruction of property not justified by military necessity, the only criminal investigations referred to in Israel's reports concerned the firing of rubber-coated bullets at the feet of a detainee, the use of human shields, and the theft of a credit card.

Operational probes give rise to a clear conflict of interest, wherein the accused is intrinsically involved in the investigation.<sup>66</sup> Such conflict of interest is, *inter alia*, in conflict with Israeli law; indeed, the High Court of Justice 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.”<sup>67</sup>

These probes, which form the basis of subsequent decision to open criminal investigations, in no way comply with international standards; reliance on such methods of investigation virtually guarantee that investigations cannot be impartial or independent. As noted by the European Court of Human Rights, “For an investigation into alleged unlawful killing by State agents to be effective, it may generally be regarded as necessary for the persons responsible for and carrying out the investigation to be independent from those implicated in the events (see, for example, *Güleç v. Turkey*, judgment of 27 July 1998, Reports 1998-IV, §§ 81-82; *Oğur v. Turkey* [GC], no. 21594/93, §§ 91-92, ECHR 1999-III). This means not only a lack of hierarchical or institutional connection but also a practical independence”.<sup>68</sup>

## The Opening of Criminal Investigations

The MAG can order the Criminal Investigation Division to open a criminal investigation if there is reasonable suspicion that a criminal offence may have been committed. Typically, a summary of the operational probe is sent to the MAG, but the full file may be requested. Again, it must be emphasised that no materials from the operational probe can be used in a criminal investigation,

<sup>65</sup> State of Israel, Gaza Operation Investigations: An Update, January 2010, §53.

<sup>66</sup> Israel has noted that only certain ‘special command investigations’ involve military commanders outside the relevant chain of command. See, State of Israel, Gaza Operation Investigations: An Update, January 2010, §57.

<sup>67</sup> 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).

<sup>68</sup> *Isayeva v. Russia*, European Court of Human Rights, App. No. 57950/00, 24 February 2005, §211.

and any findings will remain confidential from the investigative authorities.<sup>69</sup>

The decision of the MAG may be reviewed by the AG and, ultimately, the Israeli Supreme Court. However, as detailed above, the Court awards an extensive margin of appreciation to the military authorities, severely restricting the scope of judicial review.

Again, it must be emphasized that these decisions, by the MAG, the AG, and potentially the Supreme Court are formed on the basis of either partial or full operational probes. It is impossible that such investigations - conducted by those responsible - can be said to constitute effective, impartial or independent investigations; any decisions which rely on these probes will be inevitably flawed.

## The Opening of Civil Investigations

In order to begin civil investigations, claims are submitted to the compensation officer at the Ministry of Defence. These claims must be submitted within 60 days of the incident. Upon opening a file, the compensation officer will look for relevant information, including from the Military prosecutor. The vast majority of compensation claims are rejected.

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

## Prompt and Timely Remedy

The State of Israel has, on numerous occasions, failed to carry out investigations related to Palestinian victims in a prompt and timely manner, thereby violating victims' right to an effective remedy, and contributing to a climate of impunity. In this respect, a few illustrative examples will be presented.

On 17 August, 2006, a petition was filed to the Israeli Supreme Court against the Prime Minister of Israel to establish an official commission of inquiry into the government's actions in relation to the Second Lebanon War. A final

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<sup>69</sup> Article 539(A)(b)(4), Law on Military Justice.

decision was delivered three and a half months later, on 30 November 2006.<sup>70</sup>

A petition submitted to the Supreme Court in June 2007, challenged the authority of the AG to reach a plea bargain agreement with the former President of Israel, Moshe Katzav, for various sexual offenses rather than going to trial against him on rape charges. A final decision was delivered eight months later, on 26 February 2008.<sup>71</sup>

While PCHR do not endorse the above mentioned findings of the HCJ, they are used illustratively: by contrast cases involving Palestinian victims have been delayed for considerable periods of time. For example, in 2003, Israeli human rights organizations submitted a petition to the Israeli Supreme Court, asking the court to order the MAG to open a criminal investigation into the circumstances of the deaths of eight Palestinians from the West Bank and Gaza. The petition also asked the court to order the MAG to open a criminal investigation within a reasonable time into every case brought to the MAG's attention regarding the killing or injury of Palestinians not involved in hostilities. Six years later (April 2009), this petition is still pending before the court.<sup>72</sup>

On 24 January 2002, a petition was submitted to the Israeli Supreme Court challenging the Israeli government's policy of "assassinations" against Palestinians. Nearly five years later, on 14 December 2006, the court delivered its judgment dismissing the petition and upholding the legality of the assassinations.<sup>73</sup>

On 5 April 2007 a petition was submitted by Palestinian human rights organizations to the Israeli Supreme Court asking the court to order a criminal investigation into the killings of Palestinians by the Israeli military in Rafah, Gaza and the extensive demolition of homes there in 2004. Two years later, the court has not held one hearing on the case.<sup>74</sup>

Consequent to last year's offensive on the Gaza Strip, Israel has only opened 36 investigations, 7 of which have been closed without prosecution. Only one of these investigations - for the theft of a credit card - has resulted in a successful prosecution. Over a year has now past, and Israel - as confirmed in the Goldstone Report - has proved itself unwilling to conduct genuine investigations in a prompt and timely manner. Those limited investigations which have been open, are wholly inadequate with respect to international obligations - as discussed above - while no investigations have been opened

70 See HCJ 6728/06, Ometz Association v. The Prime Minister (decision delivered on 30 November 2006).

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

72 See HCJ 9594/03, B'Tselem, et al. v. The Military Judge Advocate General (case pending).

73 See HCJ 769/02, The Public Committee Against Torture in Israel v. The Government of Israel (decision delivered on 14 December 2006).

74 See HCJ 3292/07, Adalah, et al. v. Attorney General (case pending).

into the majority of alleged crimes, despite the presence of, at a minimum prima facie evidence of the commission of international crimes.

These examples highlight the Israeli authority's unwillingness to order genuine criminal investigations and to prosecute alleged crimes involving Palestinian victims. As noted previously, the prolongation of investigations is considered as constituting an attempt to shield alleged perpetrators from justice. As noted by, the Inter-American Court of Human Rights in *Del Caracazo*, investigations which persist for a long-period of time, without those responsible for gross human rights violations being identified or punished, constitute "a situation of serious impunity and [...] a breach of the State's duty".<sup>75</sup>

### **The Perceived Status of the Gaza Strip and the Classification of its Civilian Population as 'Enemy Aliens'**

The Israeli authorities - including the AG, the Supreme Court, and the legislative - have consistently advanced the position that the Gaza Strip is a 'hostile territory' and that its inhabitants are 'enemy aliens'.<sup>76</sup> In a statement issued on 19 September, 2007, the Israeli Ministry of Foreign Affairs stated that: " Hamas is a terrorist organization that has taken control of the Gaza Strip and turned it into hostile territory. This organization engages in hostile activity against the State of Israel and its citizens and bears responsibility for this activity."<sup>77</sup> This statement followed former Prime Minister Ariel Sharon's claim - made before the General Assembly of the United Nations on 15 September, 2005 - that disengagement represented "the end of Israeli control over and responsibility for the Gaza Strip".<sup>78</sup> Israel has used the allegedly modified status of the Gaza Strip to illegally renounce its obligations as an Occupying Power,<sup>79</sup> and to justify the imposition of methods of collective punishment which indiscriminately affect all of Gaza's 1.5 million inhabitants.

For example, in *al-Basyuni* - a case which challenged the legality of restricting the supply of fuel and electricity to the Gaza Strip - the State argued that such measures were intended to, inter alia, "defeat the military efforts of all terrorist organisations in the Strip by reducing the sum of all resources available to these organizations"<sup>80</sup> and to "exert pressure on the Hamas

<sup>75</sup> *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).

<sup>76</sup> See, Israel Government Communiqué, Security Cabinet Declares Gaza Hostile Entity, (Sep. 19, 2007).

<sup>77</sup> *Ibid.*

<sup>78</sup> Ariel Sharon, Prime Minister of the State of Israel, Speech before the General Assembly of the United Nations, (Sep. 15, 2005).

<sup>79</sup> Despite these assertions, Israel remains the Occupying Power in the Gaza Strip, based, inter alia, on the level of effective control - including control of all land, sea, and air borders - which it still exercises.

<sup>80</sup> See the state's response of 7 November 2007 in HCJ 9132/07, *Gaber Albasyouni Ahmad, Najer Maher, Adalah, Gisha, HaMoked, Alhaq, Almezan Center for Human Rights, Physicians for Human Rights, Palestinian Centre for Human Rights, The Public Committee Against Torture in Israel, Gaza Center for Mental Health, B'Tselem v. The Prime Minister and The Minister of Defence*, IsrSC (Jan. 30, 2008), para. 71. Emphasis added.

regime aimed at impelling it to limit the scope of its hostile activities against Israel from within the Gaza Strip.”<sup>81</sup> The civilian population have been used as a means of political leverage - in violation of their inherent human dignity - and subject to collective punishment; an argument made possible by their classification as enemy aliens.

With respect to the effective administration of justice, it must be highlighted that the “enemy aliens” doctrine effectively treats all inhabitants of the Gaza Strip as enemies, and thus as potential ‘terrorists’. In a petition challenging the legality of a law preventing residents of Gaza from entering Israel,<sup>82</sup> the Israeli Supreme Court expanded upon this doctrine:

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 from this that the residents of the territories – Judaea, Samaria and the Gaza Strip – are enemy aliens.<sup>83</sup>

Justice Cheshin further added 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.<sup>84</sup>

This presumption was reiterated by the AG in his statement before the Supreme Court on 31 July 2008, in the context of another petition questioning the legality of the same law. The AG argued that:

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

<sup>81</sup> Ibid.

<sup>82</sup> The Citizenship and Entry into Israel Law (temporary provision) 5763 - 2003.

<sup>83</sup> HCJ 7052/03, Adalah v. The Interior Minister (decision delivered in 14 May 2006), para. 12 (emphasis added).

<sup>84</sup> Ibid., para. 78 (emphasis added).

and states, there is an assumption that each human being owes loyalty to the collective to which he belongs.<sup>85</sup>

The claim - presented and accepted at the highest levels of the Israeli political and legal system - that all residents of the Gaza Strip are presumed to endanger the State of Israel's national security and public security, has clear and evident repercussions with respect to the pursuit of justice. 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.<sup>86</sup> It is also evident that in perpetuating this doctrine the Israeli courts cannot be considered impartial. Under such circumstances it is difficult, if not disingenuous, to argue that Palestinian victims can expect to receive a fair trial, or an effective judicial remedy. This is particularly evident given the role of the AG and the Military Attorney General (MAG) in the decision to open criminal investigations, discussed below. The UN Fact Finding Mission on the Gaza Conflict noted that "the extent to which Palestinian right to access a court of law and an effective remedy are limited or denied by Israeli laws"<sup>87</sup> may amount to the crime against humanity of persecution.<sup>88</sup>

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

86 Article 14(2), ICCPR.

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

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

## ■ Operation ‘Cast Lead’

Both the MAG and the AG were heavily involved in the planning and execution of ‘Operation Cast Lead’, Israel’s 23 day offensive on the Gaza Strip (27 December 2008 - 18 January 2009). As revealed in the Israeli media, and confirmed by Israeli forces, the offices of the MAG and the AG provided the legal framework regulating the attacks on Gaza.<sup>89</sup> In light of this close relationship, it is unsurprising that the AG rejected Israeli human rights organizations’ demands that an independent mechanism be established in order to investigate the killing and injuring of civilians during Operation Cast Lead, and address “the legality of the actual orders and directives given to forces in the field”. In their letter, the organizations detailed statistics regarding the killing of civilians, while highlighting the requirements of international humanitarian law. In a response dated 24 February 2009, the AG remarked that:

In conclusion, we shall state that listing of contentions regarding the general patterns of action employed by the IDF, as set forth in your letter, cannot constitute a basis for the launching of a criminal investigation. Nonetheless, insofar as you have any concrete and pertinent arguments concerning the IDF activity in Operation “Cast Lead”, you have the possibility of addressing the relevant entities, and your inquiry will be checked and examined in the customary manner.<sup>90</sup>

The Israeli authorities opened two sets of internal investigations into events associated with Operation Cast Lead. PCHR regard these investigations as inadequate and inappropriate, inter alia, on the basis of the fundamental flaws inherent in such investigations, as outlined above. Both sets of investigations concluded that Israeli forces acted in accordance with the law.

On Monday, 30 March 2009, Military Advocate-General Avichai Mandelblit closed Israel’s inquiry into Israeli soldiers accounts of alleged crimes committed in the Gaza Strip. Soldiers had made serious allegations that included war crimes, and grave breaches of the Geneva Conventions (1949). However, the inquiry was closed after just eleven days.<sup>91</sup>

On 22 April 2009, Israeli Military Authorities announced the conclusion of

<sup>89</sup> “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>.

<sup>90</sup> Both the initial request, and the AG’s response are available on the website of the Association for Civil Rights in Israel (ACRI): <http://www.acri.org.il/eng/story.aspx?id=602>.

<sup>91</sup> See, PCHR Press Release, Israel Closes Investigation into Alleged War Crimes Committed in the Gaza Strip, 31 March 2009. Available at, <http://www.pchrgaza.org/files/PressR/English/2008/45-2009.html>.

five internal investigations examining the conduct of Israeli forces during the recent military offensive in the Gaza Strip. The investigations, supervised by IDF Chief of Staff Gabi Ashkenazi, and conducted by officers of the rank of colonel, addressed 5 issues:

- a) Claims regarding incidents where United Nations and international facilities were fired upon and damaged;
- b) Incidents involving shooting at medical facilities, buildings, vehicles and crews;
- c) Claims regarding incidents in which a large number of uninvolved civilians were harmed;
- d) The use of weaponry containing phosphorous;
- e) Destruction of private property and infrastructure by ground forces.

These investigations concluded that a very small number of incidents involved intelligence or operational errors, but that “throughout the fighting in the Gaza Strip” Israeli forces “operated in accordance with international law”.<sup>92</sup> These claims were later repeated in the IDF’s comprehensive report on the offensive on the Gaza Strip, published in June 2009. The UN Fact Finding Mission held that: “these investigations did not comply with international legal standards.”<sup>93</sup>

Israel has opened a limited number of criminal investigations into events occurring during Operation Cast Lead; the State of Israel has reported that it has opened 36 criminal investigations into events arising from the offensive on the Gaza Strip. Seven of these have already been closed without charges as the MAG decided that “complainants refused to give testimony and/or there was insufficient evidence of a criminal violation.”<sup>94</sup> In the months after the offensive, PCHR submitted complaints requesting the opening of an investigation - in accordance with Israeli requirements - to the Israeli Military Prosecutor and the compensation officer at the Ministry of Defense.

In total, 450 criminal cases were submitted to the Israeli Military Prosecutor, on behalf of 941 affected individuals, and 1,028 files were submitted to the compensation officer, on behalf of 1,028 affected individuals.<sup>95</sup> The Israeli Military Police have notified PCHR that they have opened investigations in 15 cases - 35 witnesses have been summoned to Erez crossing - while 7

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92 See, PCHR Press Release, PCHR Condemn Israeli Attempts to Legitimise Crimes in Gaza and Shield Perpetrators from Justice, 27 April 2009. Available at, <http://www.pchrgaza.org/files/PressR/English/2008/56-2009.html>.

93 Report of UN Fact Finding Mission on the Gaza Conflict, §1616.

94 The State of Israel, Gaza Operation Investigations: An Update, January 2010, §137. See further, Yaakov Katz, IDF Nearly Done With Goldstone Counter-Report, Jerusalem Post, 11 January 2010, which claims that Israel has closed 30 of the 36 investigations.

95 PCHR does not believe that these investigations - for the reasons outlined in this report - are an appropriate response to the serious allegations of violations of international law. However, as an organization and in the best interests of victims and clients, PCHR must pursue all possible legal remedies.



responses, on behalf of 20 affected individuals, have been received from the compensation officer.

PCHR note, however, that those criminal cases currently open relate to only 140 victims, less than 15 percent, while opened civil claims only relate to only 0.019 percent of the victims. To date, there has only been one successful prosecution, concerning a case taken by PCHR on behalf of the victims of credit card theft by an Israeli soldier.

PCHR emphasize that these investigations are conducted in a manner inconsistent with the requirements of international law - as illustrated above. In addition, investigations have only been opened in a minority of cases; impunity is being granted in the overwhelming majority of cases, despite the availability of significant evidence indicating the commission of international crimes. Given the nature of the opened investigations, and the official unwillingness to pursue justice, as evidenced by Prime Minister Netanyahu's public statement on 12 October 2009, vowing that Israeli soldiers and leaders will not stand trial for war crimes committed during the Israeli offensive 'Operation Cast Lead' it must be concluded that the Israeli legal and political authorities perpetuate a climate of pervasive impunity, which in effect serves to comprehensively shield suspected war criminals from justice.<sup>96</sup>

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<sup>96</sup> 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 14 October 2009); 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 14 October 2009).

## ■ Conclusion

As has been illustrated, the Israeli system - as it relates to Palestinian victims of Israeli violations - does not meet the necessary international standards with respect to the effective administration of justice. The hierarchical nature of the military, the ineffective manner in which investigations are conducted, the lack of civilian oversight - as epitomised by the wide margin of discretion awarded by the Israeli Supreme Court - and the ineffectiveness of such oversight when it does occur, all combine to fundamentally frustrate the pursuit of justice. Justice for Palestinians is not attainable within the Israeli legal system.

Significantly, a number of Israel's violations of international law - as documented in the Goldstone Report and elsewhere - were the result of official policy decisions taken by the highest echelons of the Israeli civilian and military authorities. For example, an Israeli Ministry of Foreign Affairs communiqué dated 24 December 2008, stated that: "The Ministers' Committee authorized the Prime Minister, the Minister of Foreign Affairs and Acting Prime Minister, and the Minister of Defense to determine the timing and nature of the action.

In accordance with the decision, which was passed unanimously, the three of them agreed on an Air Force operation that began this morning."<sup>97</sup> This Air Force operation included the illegal targeting and wilful killing - a grave breach of the Geneva Conventions - of civilian police officers; in total 250 non-combatant police officers were killed on the first day of the offensive. In light of the fact that a significant number of the violations of international law were committed pursuant to official policy, and that there is sufficient prima facie evidence to indicate the commission of these crimes, Israel's investigations to date are wholly inadequate. Any genuine investigation must investigate both the official policy, and those who masterminded and implemented it.

The UN Fact Finding Mission concluded that: "there are serious doubts about the willingness of Israel to carry out genuine investigations in an impartial, independent, prompt and effective way as required by international law.

The Mission is also of the view that the Israeli system presents inherently discriminatory features that have proven to make the pursuit of justice for Palestinian victims very difficult."<sup>98</sup> As noted previously, the Fact Finding Mission also concluded that "the extent to which Palestinian right to access a court of law and an effective remedy are limited or denied by Israeli laws"<sup>99</sup>

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97 Israel Ministry of Foreign Affairs, Decision of Ministers' Committee on National Security, 24 December 2008. Available at: [http://www.mfa.gov.il/MFA/Government/Communiques/2008/Decision\\_Ministers\\_Committee\\_National\\_Security\\_24-Dec-2008](http://www.mfa.gov.il/MFA/Government/Communiques/2008/Decision_Ministers_Committee_National_Security_24-Dec-2008)

98 Report of UN Fact Finding Mission on the Gaza Conflict, §1629.

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

may amount to the crime against humanity of persecution.<sup>100</sup>

Additionally, since the beginning of the second intifada the Judge Advocate General has stopped automatically opening investigations into cases of death and injury of Palestinians not involved in hostilities, except in exceptional circumstances; B'tselem report that between 2000 and 2008 only 287 such exceptional investigations were opened; only 33 of these cases resulted in actual indictments.<sup>101</sup> As noted above, the majority of these isolated cases were opened months after the actual incidents, with evident problems with respect to interviewing witnesses and collecting evidence. In 2006, following a case taken by 9 Palestinian and Israeli organisations, including PCHR, the Israeli Supreme Court upheld a Knesset law enacted in July 2005 which provides that Israel does not have to pay compensation for damages caused in military operations when these relate to residents of the oPt, "a citizen of an Enemy State" or "an activist or member of a Terrorist Organization". In addition to violating numerous principles of international law, this law sends out the dangerous message that the lives and rights of those in the oPt effectively have no value, as no court will come to their aid.<sup>102</sup> These two decisions had a serious impact as regards upholding victims' rights and the pursuit of accountability.

Simply put, the State of Israel has proved itself unwilling, both in practice and in law, to genuinely investigate and prosecute those accused of serious violations of international law. As noted by the UN Fact Finding Mission, 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."<sup>103</sup> Today, over one year after offensive, Israel has still failed to open independent and impartial investigations. The State of Israel is internationally accountable for its failure to take appropriate investigative action. It is essential that the international community holds Israel to account, Israel cannot be allowed to continue to exist as a State above the law. The consequences of such impunity, both for Palestinian civilians, and the international rule of law, need no elucidation.

There are no domestic mechanisms capable of upholding Palestinian victims' right to an effective judicial remedy, or ensuring that those responsible for the perpetration of international crimes are held to account. If victims' legitimate rights are to be upheld, and the integrity of the international

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

101 See, [http://www.btselem.org/English/Accountability/Investigatin\\_of\\_Complaints.asp](http://www.btselem.org/English/Accountability/Investigatin_of_Complaints.asp).

102 See further, PCHR Press Release, PCHR Closely Follows up Through Cases the Israeli Supreme Court's Ruling on the Civil Wrongs Law, 14 December 2006, [http://www.pchrgaza.org/portal/en/index.php?option=com\\_content&view=article&id=604:pchr-closely-follows-up-through-cases-the-israeli-supreme-courts-ruling-on-the-civil-wrongs-law&catid=133:press-releases-from-other-years-05-08&Itemid=194](http://www.pchrgaza.org/portal/en/index.php?option=com_content&view=article&id=604:pchr-closely-follows-up-through-cases-the-israeli-supreme-courts-ruling-on-the-civil-wrongs-law&catid=133:press-releases-from-other-years-05-08&Itemid=194).

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

legal order maintained, it is essential that recourse be had to mechanisms of international justice. Such mechanism 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 addition, PCHR note that each and every 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."<sup>104</sup>

Universal jurisdiction is currently one of the only legal mechanisms capable of providing judicial redress to Palestinian victims of Israeli-perpetrated international crimes. National courts exercising universal jurisdiction offer the only forum whereby victims' rights to an effective judicial remedy can be upheld, and where impunity can be combated.

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: civilians will continue to suffer the horrific consequences. 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.

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104 Article 146, Fourth Geneva Convention 1949.