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Joint written statement* submitted by the Palestinian Centre for Human Rights, the Arab Organization for Human Rights and the International Association of Democratic Lawyers, non-governmental organization in special consultative status

The Secretary-General has received the following written statement, which is circulated in accordance with Economic and Social Council resolution 1996/31.

[10 May 2013]

* This written statement is issued, unedited, in the language(s) received from the submitting non-governmental organization(s).

No justice or remedy for Palestinian victims in the Israeli legal system*

Since the beginning of its occupation of the occupied Palestinian territory, Israel has committed widespread and systematic violations of international law, including grave breaches of the Geneva Conventions and crimes against humanity.

We, as Palestinian human rights organizations, want to defend victims, and we believe in the rule of law, which is why we resort to the Israeli legal system.

However, seeking to pursue justice for victims within the Israeli legal system over the past few decades, we have observed how the possibility of achieving accountability for Israeli international law violations has decreased dramatically. Various legislative amendments and judicial decisions have imposed legal and procedural obstacles, which preclude the possibility of effective investigations, and lead to the denial of individual victims' legitimate right to an effective remedy, as well as the loss of considerable investments of time and money.

Israel's criminal investigative and judicial mechanisms: inherently flawed

The following features of the structure illustrate that the mechanisms are being used to provide an illusion of justice, while systematically denying victims access to justice.

Since the beginning of the Second Intifada in 2000, the Military Advocate General (MAG) has pursued a policy of not automatically opening criminal investigations into the killing and injury of Palestinian civilians. Moreover, the State, through the Attorney General, has argued that criminal responsibility will only apply to "intentional" acts.

Also 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 in the oPt. These debriefings are procedure intended to analyze an incident from an internal military perspective, so that lessons may be learned and conclusions drawn for the purpose of enhancing the performance of the Israeli military. They fail to meet the international legal requirements associated with effective investigations, do not address any command level policy-based decisions which preceded the attacks, and can unreasonable delay the decision of whether to initiate an investigation.

Conflicting with the independence and impartiality of the military justice system and the principle of the separation of powers, the Military Justice Law confers significant powers on District Chiefs of the Israeli forces, 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, to consent to a military court's final judgment as a confirming authority and, significantly, to order the quashing of a charge sheet.

The Military Attorney General (MAG) serves a twofold function: acting as legal advisor to the military; and enforcing penal laws intended to 'represent the rule of law and the public interest'. His office is involved in preparing the rules of engagement and providing the legal framework regulating attacks by Israeli forces. However, at all stages, the decision to open or close a criminal investigation into possible violations of international law rests with the

* The Union of Palestinian Non-Governmental Organizations, an NGO without consultative status, also shares the views expressed in this statement.

Military Attorney General (MAG), which severely undermines the impartiality and independence of the entire investigative procedure, and illustrates that the MAG cannot be considered independent or impartial, as it is itself involved in the planning of attacks. In effect, this system operates as a loop, with the MAG responsible for each strategic decision. The Israeli Attorney General, and ultimately the Supreme Court, may review the decisions of the MAG. However, the Attorney General rarely intervenes in the MAG's decisions, and the Supreme Court justices have time and again demonstrated their hesitance to interfere with the MAG's discretion.

Only in exceptional cases do operational debriefings result in a decision to open a subsequent investigation by the Military Police Criminal Investigation Division (MPCID). Similar to operational debriefings, MPCID investigations focus solely on specific attacks, failing to address any command level policy-based decisions which preceded the attacks. Futhermore, 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.

Almost no responses are being received to criminal complaints filed with the Israeli Military Prosecutor. A small number of replies was received, confirming the receipt of the complaint, noting that it will be reviewed, and that the submitting party will be informed of the outcome. A similar small number of responses was received, noting that the complaint is under review. Cases have been closed following the Military Prosecutor's conclusion that no violations of international law had been committed, where all evidence indicates the opposite. Additionally, criminal complaints have been dismissed because the witness would not travel to the Beit Hanoun ('Erez') crossing for an interview with the MPCID. The few indictments and convictions that did result from the criminal complaints filed are in stark contrast with the gravity of the crimes committed.

Israel's civil court system: insurmountable obstacles

The procedural requirements and obstacles outlined below illustrate that the Israeli civil system effectively denies the right to remedy of Palestinian victims, who find themselves being financially penalised for having pursued their legitimate right to access to justice by filing civil cases before the courts.

Under Israeli law, requests for compensation have to be filed with the Ministry of Defence's Compensation Officer within 60 days of the incident, and civil cases must be filed with the court within 2 years. In general applications requesting compensation are not replied to by the Ministry. Therefore, the cases are subsequently filed to the court within two years, according to the applicable statute of limitations.

Each individual claimant is required to pay a 'court guarantee' of, on average, $8,000 before the case will be reviewed by the court. If the case is lost, the guarantees will be retained to offset the State's 'defence costs'.

Due to the closure of the Gaza Strip, PCHR's lawyers cannot represent clients in the Israeli judicial system. Therefore, Israeli lawyers file the cases, but they, in turn, cannot meet with the clients as they are denied access to the Gaza Strip and the clients are not allowed to travel into Israel.

Recently, additional obstacles have been put in place which makes it virtually impossible for Palestinian victims to pursue their case through the Israeli civil system:

Following a December 2012 Israeli Court order[1], a power of attorney can only be considered valid if it bears the signature and stamp of an Israeli diplomat. The closure and travel restrictions make it impossible to comply with this requirement.

Amendment No. 8 to the Israeli Civil Tort Law (Liability of the State)[2], which applies retroactively from the year 2000 onwards and, with respect to the Gaza Strip, from 2005 onwards, exempts the State of Israel of any liability arising from damages caused to a resident of an enemy territory during a "combat action"[3]. Furthermore, this amendment widens the scope of a combat action to any operations carried out by Israeli forces, which by their nature, were in response to terrorism, hostilities, or insurrections. Qualification of a military operation as a combat action is dependent upon the overall circumstances, including the goal of the action, the geographic location, and the inherent threat to members of the Israeli forces who are involved in carrying out the action. The Amendment disregards the customary international obligation to provide reparation for violations which occur in the context of combat operations, and leaves aside the vital question of the legality of attacks, and ignores the damages caused to the victims, which can potentially constitute IHL violations.

Apart from a few cases in victims received compensation (often through an out-of-court settlement), the majority of the cases are dismissed because of the high cost of court guarantees. Other cases are withdrawn by the complainant in order to avoid having to pay prohibitively high defence costs. The remaining cases are unsuccessful as a result of the application of Amendment No. 8, the lack of access to courts, the Statute of Limitation, and the new power of attorney requirements.

Impunity fosters violations

Israel disregards its State duty, under international law, to investigate and prosecute alleged violations of international law, and to make reparations for breaching or violating international legal principles. Palestinian victims are systematically denied the right to an effective judicial remedy. This has led to the development of a culture of impunity, in which Israel is permitted to consistently violate the rule of law without repercussion. While victims of past crimes wait for justice, the lack of accountability continues to give way to future violations.

[1] Order of the Be'er Sheva Central Court on 31 December 2012, in Case No. 7865/01/11.

[2] On 16 July 2012, the Israeli Knesset accepted the Law and Explanatory Matters Bill, which was published in the Government Act Bill – 387 in May 2008, page 598. (Hereinafter: 'Amendment No. 8'). (Annexure: Amendment No. 8).

[3] Since 2005, the Gaza Strip has been classified as a 'hostile entity'. Israeli Ministry of Foreign Affairs, "Israel's Security Cabinet declares Gaza hostile territory," 19 September 2009.