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Shielded From Accountability

Israel's Unwillingness to Investigate and Prosecute International Crimes

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Introduction

Israel is assigned the primary responsibility to investigate and prosecute war crimes allegations committed by the Israeli Military in the Occupied Palestinian Territory. Under international law, these investigations must be independent, effective, prompt and impartial.¹ According to the principle of complementarity, set forth in Article 17 of the Rome Statute, the International Criminal Court (ICC) may only exercise jurisdiction in those instances where national legal systems fail to do so e.g., if a State is unwilling or unable to genuinely undertake investigations and prosecutions.² In the wake of the “Goldstone Report” of 15 September 2009, which raised serious allegations of international crimes committed by Israel in Gaza in December 2008 - January 2009, Israeli domestic investigations came under the scrutiny of both the domestic and international legal communities. Two special bodies were established for this purpose: the UN Committee of Experts and the Israeli Turkel Commission³. Should Israeli investigations not comply with international standards, and not hold the responsible individuals accountable, the ICC’s enforcement mechanism could be triggered⁴. The aim of this study is to examine whether the Israeli legal system is willing to investigate and prosecute war crimes allegations committed by its military, including the military and political echelon for the purpose of the admissibility requirement of Article 17 of the Rome Statute.⁵

Although the admissibility assessment does not intend to “judge” a national legal system as a whole, but to assess the handling of a specific case, it is necessary to consider the broader legal context of the State concerned in order to make that assessment. Where a system is shown to be unwilling to pursue certain groups of offenders or offences, a lack of genuineness in the particular case may be inferred.⁶ As Prof. Cassese and other international law experts have noted:

“To demonstrate “unwillingness” may be technically difficult (likely involving inferences and circumstantial evidence) and politically sensitive (amounting to an accusation against the authorities). It is possible that a regime may employ sophisticated schemes to cover up involvement and to whitewash crimes, so information and analytic tools are needed to penetrate such tactics.”⁷

This observation is especially true in constitutional democracies where the separation of powers assumes institutional independence and effectiveness for the Judiciary. Therefore, to explore Israel’s *willingness* to genuinely investigate and prosecute, this study provides an overview of the different components of the Israeli legal system in both Israel and the Occupied Palestinian Territory (OPT). It demonstrates, through specific case studies, the general pattern of institutional and functional deficiencies of Israel’s judicial systems to investigate, prosecute and judge war crimes allegations. It shows how the Israeli legal system has not only failed to prevent, bring to an end or hold perpetrators and planners accountable for the commission of international crimes, but has itself facilitated the commission of international crimes and has shielded those responsible for such acts from criminal accountability.

¹ Michael N. Schmitt, “Investigating Violations of International Law in Armed Conflict”, , *Harvard National Security Journal*, 2 (1) pp. 35-48. (2011)

² Jann Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions*, p. 270 et seq., Oxford University Press, (2008)

³ The Turkel Commission is formally known as “The Public Commission to Examine the Maritime Incident of 31 May 2010”. For more details on these two bodies see Annex 2.

⁴ After Operation Cast Lead the Palestinian Authority (PA) declared that it recognised the ICC *ad hoc* jurisdiction according to Art. 12(3) of the Rome Statute. If the ICC prosecutor recognises the competence of the PA to recognise the *ad hoc* jurisdiction, this declaration may establish the ICC jurisdiction over international crimes committed in the OPT. Otherwise, the ICC may have jurisdiction if the case were to be referred to the ICC by the Security Council. Another possibility to gain competence is the ratifying of the Rome Statute by either an Israel or a Palestinian State. In this case the jurisdiction of the ICC will prospective from the date the State joined the statute.

⁵ In the Israeli context, the inability factor of the admissibility test is not relevant.

⁶ Antonio Cassese, et al., “Informal Expert Paper: The Principle of Complementarity in Practice” para. 35. (2003).

⁷ “The Principle of Complementarity in Practice”, ICC Office of the Prosecutor, para. 44 (2003) (<http://www.iccklamberg.com/Caselaw/OTP/Informal%20Expert%20paper%20The%20principle%20of%20complementarity%20in%20practice.pdf>).

1. The Israeli system of investigation and prosecution of war crimes allegations

Article 17 (2) of the Rome Statute lists three factors to assess the unwillingness of a State to genuinely carry out investigations: 1) intent to shield the person from criminal responsibility; 2) unjustified delay, or 3) lack of independence and impartiality inconsistent with an intent to bring the person to justice. The assessment of each of these factors is based on procedural and institutional indicators.⁸

This section evaluates the Israeli war crimes investigations system under the lens of Article 17 (2) of the Rome Statute. Part 1 discusses the non-independent nature of the Israeli High Court of Justice (HCJ), which has been placed under the responsibility of the army, the very same body that is supposed to be investigated. Part 2 examines functional deficiencies related to promptness and, Part 3 discusses the policies utilized to shield military and political officials responsible for such acts. Finally, the follow-up to war crimes allegations raised in the aftermath of Israel's 'Operation Cast Lead' in December 2008 and January 2009 is used to illustrate Israel's inherent unwillingness to genuinely carry out investigations and prosecutions.

1.1 Structural deficiencies: The non-independent nature of the mechanism

According to Article 17 (2)(c) of the Rome Statute, the unwillingness of a State to genuinely conduct investigations and prosecutions can be concluded on the basis of the lack of independence or impartiality of its structures or practice. For this assessment the ICC Prosecutor office provides:⁹

*“Independence in the proceedings at hand may be assessed in light of such indicators as, inter alia, the alleged involvement of the apparatus of the State, including those responsible for law and order, in the commission of the alleged crimes; Impartiality in the proceedings at hand may be assessed in light of such indicators as, inter alia, linkages between the suspected perpetrators and competent authorities responsible for investigation, prosecution and/or adjudication of the crimes”.*¹⁰

The structural deficiencies in Israel's investigation system attesting to its lack of independence and impartiality are mainly based on three factors.

i. Authority centralized in the hands of the Military Advocate General (MAG)

The Military Advocate General (MAG) is the legal advisor to the army, and is in charge of enforcing the law. The MAG is, simultaneously, the head of the military prosecution, and is responsible for investigating and prosecuting violations of the law of armed conflict. The subordination of the investigative body of war crimes allegations to the authority of the MAG, the very authority that issues military orders and provides advice on their implementation, inherently undermines its independence and impartiality. Professor Eyal Benvenisti went beyond the portrayal of the MAG as wearing a “dual hat”, and described it more precisely as centralizing three powers – legislative (defining the army's rules of conduct), executive (providing ‘real time’ legal counseling during military operations), and quasi-judicial (deciding which investigations and

⁸ Antonio Cassese, et al. “The Principle of Complementarity in Practice”, para. 46 (2003). See also Annex 4 (<http://www.icc-cpi.int/iccdocs/doc/doc654724.pdf>); and “Draft Policy Paper on Preliminary Examinations”, ICC Office of the Prosecutor (2010) paras. 52-66

(<http://www.icccpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/Policies+and+Strategies/Draft+Policy+Paper+on+Preliminary+Examinations.htm>).

⁹ Rome Statute, Art. 17(2), ICC.

¹⁰ “Draft Policy Paper on Preliminary Examinations”, paras. 62, 64-5, ICC Office of the Prosecutor (2010), paras. 62, 64-5.

prosecutions to pursue) – in the hands of one authority.¹¹ The structure of this system makes it impossible to conduct a review of the legality of the orders or guarantee accountability at the policy decision-making level, as it entails a clear conflict of interest. This structural deficiency was noted by the United Nations (UN) Committee of Experts¹² who noted:

“[t]he Committee concludes that the dual role of the Military Advocate General to provide legal advice to IDF with respect to the planning and execution of “Operation Cast Lead” and to conduct all prosecutions of alleged misconduct by IDF soldiers during the operations in Gaza raises a conflict of interest, given the Fact-Finding Mission’s allegation that those who designed, planned, ordered and oversaw the operation were complicit in IHL and IHRL violations. This bears on whether the military advocate general can be truly impartial – and, equally important, be seen to be truly impartial – in investigating these serious allegations”.

Additionally, the MAG himself, conceded that this is not a viable mechanism for the scrutiny and investigation of high-level policy decisions in stating “The mechanism is calibrated for the inspection of individual incidents, complaints of war crimes as individual incidents (...). This is not a mechanism for policy. ...” -.¹³

ii. Institutional lack of independence and impartiality

When military investigations are carried out by soldiers who are constrained by military discipline, and who have prospects for promotion, rigorous analysis must be undertaken to ensure that investigations will adhere to the level of independence and impartiality required by the ICC. The fact that the last two MAGs were promoted by the army’s General Chief of Staff in the midst of their mandate is a striking example of this intrinsic lack of impartiality and independence. Former MAG Menachem Finkelstein was promoted to the rank of Major General only a year after his appointment, and the current MAG, Avichai Mandelblit, was promoted to the rank of Major General in September 2009, five years after taking office as MAG.

iii. Lack of civilian supervision

In any democratic system of governance, the army must be subject to the civil branch of the state in order to guarantee the close supervision of its actions. In Israel, however, civilian authorities have delegated almost all of their responsibilities with regards to Israel’s obligations under international humanitarian law (IHL) to the military system, thereby creating a “quasi-constitutional vacuum” in which the MAG is operating.¹⁴ The military is exclusively entrusted by Israel to define the rules of conduct of hostilities, the guidelines for investigations, and even the criteria for initiating prosecutions. An Israeli expert report prepared by an international lawyer succinctly concludes that the “Israeli military legal system concentrates too much power in the hands of a single body that is only minimally supervised by civilians”.¹⁵

¹¹ “The Duty of the State of Israel to Investigate Violations of the Law of Armed Conflict”, Expert opinion of Eyal Benvenisti, submitted on 13 April 2011 to the Turkel Commission (hereinafter: Benvenisti’s report to the Turkel Commission), p. 24. See Annex 2 for information regarding the Turkel Commission.

¹² UN Report of the Committee of Experts on Follow-up to Recommendations in the Goldstone Report, A/HRC/15/50, 23, Para. 91 (hereinafter: First Report of the Committee of Experts in follow-up to Goldstone) (September 2010) ; See also the Second Report of the Committee of Experts on Follow-up to Recommendations in the Goldstone Report, A/HRC/16/24, (hereinafter Second Report of the Committee of Experts in follow-up to Goldstone), para. 41, (5 May 2010).

¹³ Testimony of the Military Advocate General to the Turkel Commission, Session Number Four, 26 August 2010, cited in Second Report of the Committee of Experts in follow-up to Goldstone, para. 41.

¹⁴ Benvenisti’s report to the Turkel Commission, p. 25.

¹⁵ “Response to the Military Advocate General’s Position Paper on the Investigation of Allegations of Violations of International Humanitarian Law”, Prof. Yuval Shany et al, para. 64 (hereinafter: IDI, Shany, Cohen, Experts response to the Chief Military Prosecutor’s testimony to the Turkel Commission), (February 2011)

Israel systematically implies that the ability of the HCJ to review the decisions of the MAG constitutes genuine civilian supervision. In practice however, the HCJ, whose competence and rules of procedure are designed to be invoked only in exceptional cases, is an entity that neither can, nor should, conduct thorough and routine supervision of the work of the military investigations system. Professor Benvenisti views the HCJ's role in this regard as "too little, too late, and depending on the knowledge available to the public."¹⁶

The deficiency of the HCJ's judicial review in investigation matters is related to several factors. First, the scope of review of the HCJ over the MAG and State's Attorney General decisions is very limited and results in a significant deference to the executive power. The decision to open an investigation or to indict is made under the broad discretion of the MAG and State's Attorney General, especially when the decisions are based on an examination of the evidence. The State's decision, as noted by Deputy Chief Justice Rivlin states:

*"... normally falls within the 'margin of appreciation' that is afforded to the authorities and restricts, almost completely, 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."*¹⁷

The HCJ limited its scope of review to the question of whether or not the decision was reasonable. For the HCJ to intervene in the authorities' decision, the decision needs to have been based on flawed motives and/or made in bad faith (both remarkably high evidential standards and difficult to argue on behalf of victims given that the basis for the MAG's decision- the operational debriefing- remains confidential. A 2006 court decision states "... HCJ intervention 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."¹⁸ The HCJ has accepted that certain considerations may limit its ability to intervene even where this standard is fulfilled, namely: "the unique characteristics of active operations sometimes constitute considerations negating the presence of a public interest in the instigation of criminal proceedings, even if criminal liability is present".¹⁹ Considering the limitations on conducting an effective factual examination of the case by the Court (which relies solely on affidavits submitted to the Court), the protracted nature of the proceedings (which has an irreversible impact on the ability of establishing the facts required for a criminal procedure), and their financial burden, the HCJ is clearly not the institution that can be in charge of supervising the military's investigations in cases of war crimes allegations²⁰. In the January 2011 ruling on the Thabit case, the HCJ itself upheld the view that it is unable to handle allegations regarding violations of IHL, since it "is not the suitable forum with the necessary means to examine the circumstances of the case in which the deceased was killed."²¹

http://www.idi.org.il/sites/english/ResearchAndPrograms/NationalSecurityandDemocracy/Terrorism_and_Democracy/Newsletters/Documents/IDI_Response_for_Turkel_Commission_English.pdf.

¹⁶ Benvenisti's report to the Turkel Commission, p. 24.

¹⁷ HCJ 5699/07, Jane Doe (A) v. The Attorney General, 26 February 2008, Deputy Chief Justice Rivlin's ruling. For a similar decision with regards to the powers of the MAG see, HCJ 425/89, Suffan v. The Military Advocate General, PD 43(4) 718, 727 (1989)..

¹⁸ HCJ 10665/05, Shtanger v. The Attorney General, 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). To this day, the HCJ has not ruled that the AG or the MAG acted on the basis of flawed motives or with a lack of good faith in deciding on such matters. Adv. Hassan Jabareen, Expert Opinion in the Al-Daraj case, pp. 8-9. B'Tselem, "Israel's report to the UN Misstates the Truth (4 February 2010) <http://www.btselem.org/English/Gaza_Strip/20100204_Israels_Report_to_UN.asp>.

¹⁹ HCJ 4550/94, Anonymous v Attorney-General et al., PD 49(5) 859, cited by the State Attorney's Office in HCJ 8794/03, Yoav Hess et al. v Judge Advocate General et. al; Response on Behalf of the State Attorney's Office, quoted in "Promoting Impunity", *Human Rights Watch* (July 21 2005).

²⁰ IDI, Shany, Cohen, report to Turkel Commission pp. 91- 102

²¹ HCJ 474/02 Thabit v. Attorney General, (30 January 2011), decision of President Beinisch. See also, "Experts Response to the Chief Military Prosecutor's Testimony to the Turkel Commission", paras. 95 et seq., IDI, Shany, Cohen

1.2 Functional deficiencies: lack of promptness

The second factor listed in the Rome Statute is if the unwillingness of a State to genuinely carry out investigations or prosecutions is evidence of an “unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice.” According to the ICC prosecutor, this factor “may be assessed in light of, *inter alia*, whether the delay in the proceedings can be objectively justified in the circumstances; and whether there is evidence in the circumstances of a lack of intent to bring the person(s) concerned to justice.”²²

The failure to ensure promptness in the initiation and conduct of investigations is a principal reason for the lack of effectiveness of the investigative process. Many investigations are opened several months, and sometimes even years, from the date of the incident as a result of long unjustified delays in the MAG’s decision-making process.²³ It should be emphasized that in the regular Israeli criminal judiciary, systematic undue delays in opening criminal investigations do not exist. The procedures that are before the HCJ to review decisions related to investigations or prosecutions are excessively long. Most petitions submitted to the HCJ that demand the opening of an investigation often remain pending before the Court for a considerable number of years. For example, Israeli human rights organisations submitted a petition to the Israeli Supreme Court in 2003 asking the court to order the MAG to open a criminal investigation within a reasonable time into the circumstances of the deaths of eight Palestinians from the West Bank and the Gaza Strip. A decision was only recently rendered.²⁴ Another HCJ petition, submitted on 5 April 2007 by Palestinian human rights organizations demanding a criminal investigation into the killings of Palestinians and the extensive demolition of homes by the Israeli military in Rafah, Gaza Strip in 2004, remains pending before the Court.²⁵

In numerous cases in which the authorities finally decided to open an investigation, crucial evidence (documenting the scene of the incident, including the collection of forensic and ballistic findings) and witnesses were no longer accessible. The HCJ itself has stated that opening investigations into events that occurred in the last decade is pointless because of the time that will have passed and the inability to collect evidence after such a gap in time.²⁶

One example, among numerous others, is the killing of Firas Qasqas in 2007. Mr. Qasqas was allegedly shot in the back from long range without warning. He was unarmed and posed no danger to the soldiers. The investigation was opened one year later, due to the persistence of B’Tselem’s demands in this respect.²⁷ In February 2011, four years and a half after the incident, B’Tselem submitted a petition demanding that a decision be made with regards to the prosecution of those involved in the killing.²⁸ In a more recent example, a complaint submitted on 18 January 2009 following the shooting of a 15-year-old boy in Hebron, which occurred on 12 December 2008, was not answered, let alone investigated, as of 23 March 2011.²⁹

In many cases the MAG’s decision to open an investigation has occurred only after the submission of a petition to the HCJ, or a after a threat thereof was communicated to the authorities. For instance, in the case of Bassem Abu Rahmeh, who was killed in April 2009 in a non-violent protest in the Palestinian village of Bilin, the MAG opened an investigation a year after the killing, only after being subject to numerous letters submitted by Yesh Din threatening to file a petition to the HCJ.

²² ICC Office of the Prosecutor, Draft Policy Paper on Preliminary Examinations, paras. 62-63. (2010)

²³ ACRI, “Does the mechanism for the investigation of violations of the laws of war comply with Israel’s obligations”, Submission to the Turkel Commission, 28 March 2011, Annex (b) detailing requests for the opening of investigations ACRI and Btselem filed to the MAG in 2005. *See also*, B’Tselem, ‘No Responsibility’ September 2010, pp. 17-19.

²⁴ HCJ 9594/03, B’Tselem, et al. v. The Military Judge Advocate General (2011).

²⁵ HCJ 3292/07, Adalah, et al. v. Attorney General (case pending). *See also* the cases listed in Annex 3

²⁶ HCJ 9594/03, B’Tselem v. The Military Advocate General, judgement of 21 August 2011, para. 12.

²⁷ Correspondence between B’Tselem and the author of the report, August – September 2011 (on file with author).

²⁸ HCJ 941/11 B’Tselem, Qasqas Inheritors v Chief Military Prosecutor et al, petition submitted on 2 February 2011, para. 1. *See also*, “IDF’s law enforcement is a joke of a justice system”, Gideon Levy, *Haaretz*, (25 August 2011) <<http://www.haaretz.com/print-edition/opinion/idf-s-law-enforcement-is-a-joke-of-a-justice-system-1.380545>>; “Batallion Commander That Shot a Palestinian in the Back Against the Rules of Engagement Will be Tried”, Haim Levinson, *Haaretz* (24 August 2011) <<http://www.haaretz.co.il/hasite/spages/1239368.html>>.

²⁹ Yesh Din’s submission to the Turkel Commission, paras. 121 and 126.

1.3 Policy and legislative deficiencies intent to shield high-level officials

Another factor under the Rome Statute for assessing the unwillingness of a State is that “the national decision was made for the purpose of shielding the person concerned from criminal responsibility.”³⁰ According to the ICC Prosecutor’s office “this may be assessed in light of such indicators as, *inter alia*, the scope of the investigation and in particular whether the focus is on the most responsible of the most serious crimes or marginal perpetrators or minor offenses; manifestly insufficient steps in the investigation or prosecution.”³¹ The ICC’s jurisprudence on admissibility confirms that the requirement is that there be an investigation of and prosecutions of “those most responsible for the most serious crimes.”³² The absence of the high political and military echelons from the list of pending investigations is “‘compelling evidence’ of...unwillingness to genuinely investigate and prosecute.”³³

i. Shielding the political echelon

An expert opinion by Israeli international law professors addressed the Israeli system’s inability to conduct criminal investigations that examine the responsibility of the political echelon. It states:

*“Israel lacks domestic legislation appropriate to the prosecution of perpetrators of international crimes...It seems that in the current legal situation in Israel and the practices that exist here, there is no proper solution for verifying suspicions of violations of IHL on the part of the political echelon in Israel.... there is no independent, effective verification procedure that can determine whether an international legal norm has been violated or not.”*³⁴

It is not only unfeasible, but also unreasonable, for the MAG to be responsible for the investigations of high-level political members as this would offend the very governmental structures that subject the military to the political echelon. In fact, the lack of Israeli domestic legislation on the prosecution of perpetrators of international crimes, coupled with the structure and practice of the Israeli investigation system, do not allow for the handling of such investigations. In addition, in Israel, where most military policy decisions are made by the political echelon, the close relationship between the military and political echelons is evidenced by the fact that a criminal investigation into war crimes allegations has never been conducted against a political member. An example of this is when the HCJ declined to review the decision to not open a criminal investigation against high political and military officials in the case of Salah Shehadeh. Mr. Shehadeh was a Hamas leader in the Gaza Strip whose house was hit by a one-ton bomb dropped by the Israeli Air Force on 22 July 2002 Shehadeh and 14 civilians were killed and at least 100 were injured. The bomb also caused massive destruction to residential buildings. The HCJ deferred the decision as to whether to open an investigation to a State-established committee composed mainly of former military and security officials who lacked the elementary powers needed to conduct a criminal investigation. That legal saga proceeded for more than eight years, and ended with the committee’s decision to not open an investigation. The evidential basis for its decision remains unknown.³⁵

³⁰Article 17(2)(a) of the Rome Statute of the ICC.

³¹“Draft Policy Paper on Preliminary Examinations”, ICC Office of the Prosecutor, paras. 60, 61. (2010)

³² ICC-02/04-01/05, Situation in Uganda in the case of the Prosecutor v. Joseph Ikonu, Vincent Otti, Okot Odhiambo, Dominic Ongwen, 10 March 2009, para.17. *See also*, ICC Office of the Prosecutor, Draft Policy Paper on Preliminary Examinations (2010), 11-14.

³³ICC-01/09-01/11, Situation in the Republic of Kenya in the case of Prosecutor v. William Samoeiruto, Henry Kiprono Kosgeun and Joshua Arap Sang, 30 May 2011, para. 27.

³⁴ IDI, Shany, Cohen, Experts’ response to the Chief Military Prosecutor’s testimony to the Turkel Commission pp. 38-9.

³⁵See the *Hess* case in Annex 3.

i.i. Shielding the military echelon

The Israeli military justice system has established four different investigative mechanisms that are meant to hold military personnel accountable for their actions: disciplinary proceedings, operational debriefings (or command investigations), special investigations at the request of the General Chief of Staff, and criminal investigations carried out by the Military Police Investigations Unit.³⁶ Generally, most of the investigations undertaken by the army fail to lead to a criminal prosecution. These occur in only exceptional cases, and most involve low-rank soldiers who violated military orders on their own initiative. Officers are more often submitted to disciplinary proceedings instead of criminal ones.³⁷ The Israeli NGO Yesh Din (Volunteers for Human Rights) reports that from the beginning of the second Intifada in 2000 until the end of 2009 only 6% of criminal investigations resulted in indictments against soldiers, and of those only 13 pertained to killings of Palestinian civilians. Soldiers were convicted in only four cases.³⁸ Out of an average of 200 complaints of war crimes committed against the civilian population per year, i.e., 800 complaints during 2005-2009, only 49 investigations lead to an indictment.³⁹

The low number of criminal investigations and prosecutions (effectively shielding military personnel from convictions) is largely due to the army's policy of utilizing operational debriefings.⁴⁰ An operational debriefing is a classified inquiry within a specific army unit, the purpose of which is to draw operational conclusions. However, according to international law, operational debriefings are neither suitable nor relevant to the criminal investigation, let alone prosecution, of war crimes allegations.⁴¹ Israeli legal experts have confirmed that "the operational inquiry is not an effective tool for managing criminal investigations. On the contrary, it is a tool whose usage may harm these investigations or even disrupt them completely."⁴²

The Military Justice Law (1955) defines a command investigation 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 a military operation or with connection to them." They have the following characteristics: (1) All testimonies heard and their conclusions remain confidential and are inadmissible before a court; (2) If the Military Advocate General finds that there is a basis to open a criminal investigation, he can do so only after consulting a Major General. As the materials of the inquiry remain confidential, if the Military Advocate General decides to open a criminal investigation, it will start from the beginning. The reliance on classified operational debriefings,⁴³ which in most cases results in the closure of a case without any means to review the process of the procedure, testifies to the system's lack of transparency. As the conclusions of the debriefings are confidential, access to the investigations materials in order to effectively challenge the process or conclusions of the army's internal checks is unachievable.⁴⁴

³⁶Israel's military judiciary is regulated by the Military Justice Law 5715-1955. For more details see Israel State report, "Gaza Operation Investigations: An Update", paras. 41-70 (January 2010).

³⁷See examples below in the section on human shields.

³⁸"Data Sheet: IDF Investigations of IDF Offenses against Palestinians: Figures for 2000-2009", Yesh Din (February 2010); "Exceptions and Prosecution of IDF Soldiers During and After the Second Intifada, 2000-2007" Yesh Din (2008).

³⁹"The IDF Investigates Itself - Investigation of War Crimes Allegations", p. 25, IDI, Shany and Cohen (July 2011) (Hebrew).

⁴⁰"B'Tselem to Turkel Commission: Independent Investigation Apparatus Must be Appointed to Investigate Suspected Breaches of Laws of War", Press release (11 April 2011).

⁴¹"The IDF Investigates Itself - Investigation of War Crimes Allegations", pp. 38-41, IDI, Shany and Cohen (July 2011) (Hebrew) Recently, the HCJ itself raised the problematic nature of the use of the operational debriefing to collect information at the preliminary stage of the investigation, yet it continues to defer the matter to the State. HCJ 9594/03, Btselem and ACRI v Military Advocate General para.12. (21 August 2011).

⁴²"Experts Response to the Chief Military Prosecutor's Testimony to the Turkel Commission", paras. 42, 46-47, IDI, Shany, Cohen,

⁴³Article 539a(b)(2), Military Justice Law holds that «the material of the debriefing will be classified to every man, and will be provided, wholly or partly, only to those members of the army that require it to fulfil their duty». Not only is the material classified, but also the conclusions of the debriefing are classified.

⁴⁴See Yesh Din's submission to the Turkel Commission, paras. 113-115; and ACRI submission to the Turkel Commission, paras. 96-99.

1.4 The follow-up to the Goldstone Report: a case study of the system's deficiencies

The deficient pattern described above is well illustrated by the investigations undertaken in the aftermath of Operation Cast Lead. The UN Fact-Finding Mission on the Gaza Conflict (Goldstone Report) raised serious allegations of war crimes and crimes against humanity committed by Israel in Gaza in December 2008 and January 2009. In order to ensure accountability for these acts, criminal investigations should be conducted and should lead to prosecutions when appropriate. According to the March 2011 UN Committee of Experts' report, Israel opened 400 command and 52 criminal investigations.⁴⁵ Yet, all these investigations were conducted within the military judiciary, by military personnel, whose top echelon was itself involved in issuing and enforcing the orders in situations of 'real time' combat. Of these numerous investigations, only three prosecutions were initiated, and only almost three years after Israel's 'Operation Cast Lead'. All cases were against low-ranked soldiers who violated the army's orders.⁴⁶ Not a single investigation examined either the legality of the policies or the responsibility of the policy-makers. Instead, Israel has persistently claimed that the army's orders and decisions were issued in accordance with international law,⁴⁷ while regrettably, some mistakes had occurred.⁴⁸

The Palestinian Center for Human Rights (PCHR) reported that of 490 criminal complaints submitted by the organisation to the Israeli Military Prosecutor requesting the opening of a criminal investigation, only 21 received interlocutory responses⁴⁹. Updates on the proceeding of the investigation have not been provided despite repeated requests⁵⁰. The status of the ongoing investigations is in most cases unknown and the evidence that led to the discontinuation of certain inquiries is inaccessible.

In the follow-up on the Goldstone Report, Israel has produced five long reports,⁵¹ in which Israel's lawyers have rigorously engaged in refuting claims about its responsibility for violations of international law. However, one must not allow themselves to be misled by these efforts and rhetoric. The reasons for the lack of accountability are not related solely to the lack of political will, but also, to a high degree, to the structural deficiencies of the system itself. The system effectively guarantees the shielding of political and military officials from prosecution, *inter alia*, by centralizing all investigation and prosecution powers in the hands of the MAG – a body which is neither independent nor impartial. This issue has been clearly exposed by the Goldstone Report and its follow-up processes, and explicitly established in the two UN expert reports that monitored the follow-up to the Goldstone Report.⁵²

⁴⁵ Second UN Report of the Committee of Experts in follow-up to Goldstone, March 2011, p. 6.

⁴⁶ See Annex 1.

⁴⁷ See, for example Israel's response to the allegations raised on the legality of the rules of engagement and use of weapons, Israel State report, "Conclusion of Investigations into Central Claims and Issues in Operation Cast Lead" (April 2009) and "The Operation in Gaza: Factual and Legal Aspects", paras. 222 and 405 (July 2009)

⁴⁸ Israel State report, para. 387 *ibid*, (July 2009); Israel State report, "Gaza Operation Investigations: An Update", paras.4, 99-100. (January 2010)

⁴⁹ Two of these were concrete responses, one to conclude the prosecution (theft of credit card) and one to close the investigation (also looting offence)

⁵⁰ "Memorandum on the Status Domestic Investigations Conducted into Alleged Violations of International Law committed in the Context of Operation 'Cast Lead' Submitted by the Palestinian Centre for Human Rights", paras. 7-13 PCHR, (February 2011)

⁵¹ Israel's five reports are: (1) "Conclusion of investigations into Central Claims and Issues in Operation Cast Lead", April 2009 (2) "The Operation in Gaza: Factual and Legal Aspects", July 2009 (3) "Initial Response to the Fact-Finding Mission on Gaza pursuant to Resolution S-9/1 of the Human Rights Council", September 2009 (4) "Gaza Operation Investigations: An Update", January 2010. (5) State of Israel, "Gaza Operation Investigations: Second Update", July 2010 (herein after: July 2010 State report)

⁵² (See Annex 2).

2. The Israeli High Court of Justice

*...it will almost inevitably be necessary to consider the broader context, laws, procedures, practices and standards of the State concerned... where a system shown to be...unwilling to pursue certain groups of offenders or offenses, this may contribute to an inference of a lack of genuineness in the particular case.*⁵³

The HCJ has exercised its jurisdiction very broadly and was willing to adjudicate cases even during actual combat⁵⁴. As it has issued a number of landmark decisions in which it imposed (or appeared to impose) limits on the State the Court and the Israeli legal system as a whole, it has enjoyed a strong worldwide reputation. However, since the beginning of the occupation, grave and systematic violations of IHL continue to be committed, and remain unabated by the HCJ.⁵⁵ While discussing different landmark cases and their follow up implementation, this section describes HCJ's role in the judicial review of the State's acts and policies. The analysis demonstrates not only the HCJ's failure to prevent criminal practices, but more alarmingly, how it has been actively involved in facilitating and legitimizing alleged war crimes, as well as assisting in the shielding of the political and military echelons from criminal responsibility.

2.1 The HCJ's failure to stop illegal practices: non-compliance of the State with the 'Human Shields' decision

The use of human shields is a war crime under article 8 (2) (b) (xxiii) of the Rome Statute.

On 10 October 2005 the HCJ ruled that the army's use of human shields was illegal, including the 'Early Warning' or 'Neighbor Procedure', in which Palestinian civilians 'voluntarily assist' the army in arrest operations.⁵⁶ A month after the ruling was delivered, Israel asked the HCJ to grant a second hearing to reconsider its decision, claiming, *inter alia*, that this new precedent would have a harmful impact on the army's functioning. Israel's motion was rejected.⁵⁷ Following the HCJ's decision, the army proceeded to modify its orders.⁵⁸ Yet, despite these official proclamations and the HCJ's decisions, Israeli and international experts and organisations, have affirmed that the use of 'human shields' continues unabated:

"The Israeli military is consistently violating these prohibitions by continuing its use of Palestinian citizens as human shields. In fact, these practices have become systematic: routinely, the soldiers force protected civilians to perform military tasks for them. Despite Adalah's numerous letters to the Military Advocate General, which contain detailed information on the victims who were used as such, there has not been any independent

⁵³"The Principle of Complementarity in Practice", para. 35, Antonio Cassese et al, (2003)

⁵⁴"Judicial Review During Armed Conflict", pp. 425-435, David Kretzmer, *German Journal of International Law* (2005)

⁵⁵The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories", pp. 1-3, Kretzmer, David, (State University of NY Press, 2002).

⁵⁶HCJ 3799/02, *Adalah, et. al. v. Yitzhak Eitan, Commander of the Israeli Army in the West Bank, et. al.* (6 October 2005).

http://elyon1.court.gov.il/files_eng/02/990/037/a32/02037990.a32.HTM; "Neighbours as Human Shields? The Israel Defence Forces "Early Warning Procedure" and International Humanitarian Law", Ronald Otto, *International Review of the Red Cross*, Vol 86, No 856 (December 2004) "The "Early Warning Procedure"1, colloquially referred to as "Neighbour Procedure", is a means employed by the Israel Defense Forces (IDF) to arrest wanted persons in the West Bank and to avoid civilian and military casualties. If the Israeli armed forces have knowledge of a wanted person's presence in a house, according to the "Early Warning Procedure" the forces surround the house but do not enter it themselves. They then obtain the assistance of local Palestinians, i.e. a neighbour who is persuaded to enter the house. That person warns the occupants of the house, asks them to leave it and requests the wanted person to surrender to the Israeli forces"

⁵⁷HCJ 10739/05, *Minister of Defense, et. al. v. Adalah, et. Al* (2006). See also, "News Update: Supreme Court Rejects State's Motion to Rehear Human Shields Case", *Adalah*, 8 March 2006 <<http://www.adalah.org/eng/humanshields.php>>.

⁵⁸July 2009 State report, paras. 227-228.

investigation or prosecution against those responsible for committing such crimes.”⁵⁹ Although several allegations of use of Palestinians as human shields were raised by the Goldstone Report, only one case was actually brought before an Israeli court.⁶⁰ It was affirmed by the Israeli authorities that sufficient evidence was found in another case that involved a senior army commander⁶¹. Although Israel recognises that the use of ‘human shields’ amounts to a war crime⁶² and insists that “disciplinary proceedings are reserved for less serious offenses”⁶³, the senior army commander in this case was, for some reason, subjected to disciplinary proceedings rather than criminal proceedings.⁶⁴ Similarly, in October 2007, the MAG decided to not prosecute Brigadier General Yair Golan, the military commander of the West Bank, who ordered the use of the ‘Early Warning’ procedure in five cases. Instead, he was subjected to a soft disciplinary sanction.⁶⁵

2.2 The HCJ’s role in upholding torture and shielding its perpetrators

Torture is a war crime under articles 8(2)(a)(ii) and 8(2)(b)(xxi) of the Rome Statute

In 1999, the HCJ outlawed certain methods of interrogation that were being used on Palestinian detainees.⁶⁶ Nevertheless, allegations of torture continue to be recorded. Unlike in the Human Shields case, where the state disregarded the Court’s judgement, here the State was in fact implementing the HCJ’s ruling. In its judgement, the HCJ declared certain interrogation techniques to be illegal, as they did not have a basis in national law. Although the HCJ held that the “necessity defense” cannot serve as the basis for such authority, it added that “if the state wishes to enable General Security Service investigators to utilize physical means in interrogations, it must enact legislation for this purpose.”⁶⁷ With its ruling, the HCJ effectively enabled the State to continue implementing its torture policies by allowing codification of the use of torture instead of preventing it, in clear defiance of the absolute prohibition of torture in international law. The HCJ further ruled that “[t]he Attorney-General can establish guidelines regarding circumstances in which investigators shall not stand trial, if they claim to have acted from ‘necessity’.”⁶⁸ Thus, on the one hand, the HCJ affirmed that the “necessity defense” cannot serve as legal authorization to use torture methods, whilst on the other, it allowed the State Attorney General, which stands at the head of the prosecution office and serves as the State’s legal advisor, to define the circumstances in which interrogators shall not be prosecuted, when they claim to have used a prohibited method of torture due to “necessity”. By granting the State Attorney General that discretion, the HCJ upheld a legal construction that in fact allows the use of torture and ill-treatment, despite having been declared illegal. What the Court explicitly ruled to be illegal was subsequently legitimized by the very same ruling.⁶⁹

⁵⁹ “Update Report: On the Israeli Military’s Continued Use of Palestinian Civilians Including Minors as Human Shields”, Adalah, (July 2009) <http://www.adalah.org/newsletter/eng/jul09/Rana_Human_Shields_update_report_English_july_2009.pdf>. In 2007, B’Tselem documented twelve such cases. <http://www.btselem.org/english/human_shields/timeline_of_events.asp>.

⁶⁰ For the one case prosecuted and its light punishment, see Annex 1. For the allegations raised see, the Goldstone report, Chapter 14, pp. 218-230; “Exposed: The Treatment of Palestinian Detainees During Operation Cast Lead”, pp. 10-13, PCATI and Adalah, (June 2010)

⁶¹ State report, July 2010, para. 37.

⁶² <<http://www.mag.idf.il/592-1521-en/Patzar.aspx?SearchText=human%20shield>>.

⁶³ State report, July 2010, p. 6, footnote 13.

⁶⁴ “IDF Military Advocate General Takes Disciplinary Action, 6 Jul. 2010 Indicts Soldiers Following Investigations into Incidents during Operation Cast Lead”, *The Official Blog of the Israeli Army* (6 July 2010) <<http://idfspokesperson.com/2010/07/06/idf-military-advocate-general-takes-disciplinary-action-6-jul-2010-indicts-soldiers-following-investigations-into-incidents-during-operation-cast-lead/>>.

⁶⁵ See for further information, <http://www.btselem.org/english/human_shields/timeline_of_events.asp>.

⁶⁶ HCJ 5100/94, *Public Committee Against Torture in Israel. v. Government of Israel* (1999). See also Bana Shoughri-Badarneh, “A Decade after the High Court of Justice “Torture” Ruling, What’s Changed?”, in Baker and Matar (eds), *Threat: Palestinian Political Prisoners in Israel*, Pluto Press, London, 2011.

⁶⁷ Ibid, para. 37.

⁶⁸ Ibid, para. 38.

⁶⁹ Consequently, Israel is using the Court’s decision to justify its of torture in interrogations. See for example Israel Fourth periodic report to CAT (2006), paras. 146-147 <<http://www2.ohchr.org/english/bodies/cat/docs/CAT.C.ISR.4.doc>>.

- Institutionalizing immunity

The “necessity defense” has continued to be a way to obtain *a priori* authorization for using illegal interrogation methods.⁷⁰ Thus, the HCJ landmark decision resulted in the institutionalization of immunity for interrogators from prosecution. “Israel does not maintain a genuine mechanism for investigating complaints of torture. This fact, which has its roots in part in an HCJ decision that created an opening for exempting torturers from punishment, has resulted in absolute immunity for interrogators who commit grave criminal offenses”. For instance, in the case of Medhat Tareq Muhammad the HCJ held that: “... the Attorney General and State Attorney decided that the forms of interrogation which were applied fall under the ‘defence of necessity’, and therefore the interrogators bear no criminal liability in this case for the forms of interrogation applied by them.”⁷¹

Over the years, the authorities have rejected hundreds of requests to open criminal investigations for allegations of torture and cruel, inhuman and degrading treatment during interrogations of Palestinians. According to the Public Committee Against Torture in Israel (PCATI) not a single case among the 621 complaints submitted from 2001 until September 2009 has been criminally investigated.⁷² In its 2009 report, PCATI demonstrates that the law enforcement system in practice supports the shielding of torturers. Complaints submitted to the authorities are reviewed by a General Security Service (GSS) agent whose recommendation to not open a criminal investigation is always accepted by the high-ranking attorney in charge of the cases at the Ministry of Justice and by the State Attorney General.⁷³

As for the HCJ’s judicial review of those decisions where criminal investigations were not opened despite the submission of thoroughly evidenced allegations of torture and other forms of ill-treatment, in June 2005, the HCJ deferred review of decisions to the investigation authorities, such as GSS, and granted them a very wide discretion on whether or not to open criminal investigation.⁷⁴ As a result of HCJ’s decision to defer requested reviews to the State investigative authorities, organisations and victims have refrained from submitting other cases as they saw no possibility of having a remedy. However, in 2009 three major human rights organisations (PCATI, ACRI and Hamoked) on behalf of seven Israeli human rights organisations filed a contempt of court motion to the HCJ against the Israeli government and the GSS for their responsibility for the policy that grants *a priori* permits to use torture in interrogations, in violation of the 1999 judgement. claimed that the pattern of shielding alleged torturers – as demonstrated by the systematic and unsupported rejections of hundred of complaints – demands the intervention of the HCJ. However, the HCJ rejected this petition on the grounds that it does not address general policies in contempt procedures and recommended that motions be submitted for individual cases.⁷⁵ Since then, three individual cases were submitted; one was rejected on procedural grounds, and the other two remain pending. One petition demanded the opening of investigations for alleged torture and ill-treatment in the cases of 13 former detainees. It was rejected on the grounds that the procedure for complaints had changed during the proceeding, and that the authority to investigate such cases had been transferred to the Ministry of Justice, without clear instructions about the changes or the current form of the complaints procedure.⁷⁶ Earlier this year, PCATI submitted a petition on behalf of 6 human rights organisations and 10

⁷⁰ “Accountability Denied: The Absence of Investigation and Punishment of Torture in Israel”, p. 93, PCATI, (December 2009) *See also*, “Celebrating’ a Decade of Legalised Torture in Israel”., Yuval Ginbar, available at <projects.essex.ac.uk/ehrr/V6N1/Ginbar.pdf>.

⁷¹ Crim App 4705/02 Anon v. State of Israel, para 1 (30 December 2002)

⁷² Briefing to the Human Rights Committee Jerusalem, para. 25, PCATI, Israel (June 2010). *See also* “ World Organisation Against Torture Israel – Briefing to the UN Committee Against Torture Jerusalem & Geneva”, PCATI, OMCT (April 2009) <http://www2.ohchr.org/english/bodies/cat/docs/ngos/PCATI_OMCT_Israel42.pdf>.

⁷³ “Accountability Denied: The Absence of Investigation and Punishment of Torture in Israel”, PCATI, December 2009.

⁷⁴ HCJ 11447/04, HCJ 1081/05, HaMoked et al. v Attorney General et al., judgement of 14 June 2005.

⁷⁵“HCJ Rejected the contempt of court Petition filed by PCATI and Other Organizations”, PCATI (6 July 2009) <http://www.stoptorture.org.il/en/node/1460>

⁷⁶ HCJ 6138/10, HaMoked v. Attorney General, 12 January 2011. The authors wish to thank PCATI for providing this information.

Palestinians who were subjected to torture or other forms of ill-treatment, and demanded a criminal investigation. This case is scheduled to be heard in January 2012.⁷⁷

- Legitimizing incommunicado detention

The HCJ has also facilitated the implementation of torture by allowing for the extensive use of incommunicado detention orders that deny access to counsel for detainees under interrogation.⁷⁸ Between 2002 and 2005, PCATI submitted 376 petitions to the HCJ requesting that orders denying detainees access to counsel be lifted, all of which were rejected, including those in which torture was explicitly acknowledged.⁷⁹ The HCJ's practice has had a considerable effect on the readiness of individuals and organisations to file complaints or petitions in these cases. Victims have realised that they have little to gain from complaining, and are often fearful of the GSS reprisals should they do so.

2.3 The HCJ's role in facilitating Israel's settlement policy

The transfer, directly or indirectly, by the Occupying Power, of parts of its own civilian population into the territory it occupies is a war crimes under Articles 8 (2) (b) (viii) of the Rome Statute

- Avoiding ruling on the legality of the settlement policy

The HCJ has refrained from adjudicating the legality of Israel's settlement policy in the OPT under Art. 49(6) of the Fourth Geneva Convention, and has declared the matter to be non-justiciable.⁸⁰ In the 1970s, the HCJ rendered a number of decisions concerning the settlements, in which it reviewed only the legality of the expropriation orders, thereby forming a policy of defending the property rights of the petitioners, whilst avoiding the review of the general policy.⁸¹ In the aftermath of the only case in which the HCJ found a requisition order to be illegal in the early 1980s, the Government of Israel changed its policy and declared that it would only build settlements on land that was declared by the Israeli Civil Administration as 'state land'.⁸² In 1993, the Bargil case, which challenged the legality of the settlements policy, was rejected on the grounds of lack of standing and as being a 'political question' making the case non-justiciable.

"In my opinion, this petition should be denied, for it is defective in that it relates to questions of policy within the jurisdiction of other branches of a democratic Government, and it raises an issue whose political elements are dominant and clearly overshadow all its legal fragments. The overriding nature of the issue

⁷⁷ HCJ 1265/11, PCATI et al. v. Attorney General, pending. The authors wish to thank PCATI for providing this information.

⁷⁸ PCATI brief to UN CAT, April 2009, paras. 5-7. See also, "When the Exception Becomes the Rule", PCATI, *Periodic Report* (November 2010)

⁷⁹ See, for instance the case of Qawasmeh, PACTI brief to UN CAT, paras. 5-6, 10-11.

⁸⁰ HCJ 4481/91 Bargil v. the Government of Israel (1993) available at: http://elyon1.court.gov.il/files_eng/91/810/044/z01/91044810.z01.pdf. See also Kretzmer, "The Occupation of Justice", p. 78

⁸¹ HCJ 390/79 Dawikat v. State of Israel (1979); HCJ 606/78 Ayub v. Minister of Defense (1979). See Justice Vitkon at p. 124, and Justice Landau at p. 128 "It is evident that on issues dealing with of foreign affairs...the decision is in the hand of the political authorities and not the judiciary. Yet, while there is a case involving private property..."; and Justice Landau at p. 128: "this court must refrain from considering this problem of civilian settlement in an area occupied from the viewpoint of international law...although I agree that the petitioners' complaint is generally justiciable, since it involves property rights of the individual...".

⁸² Thus preventing petitioners from questioning the legality of the settlements, see David Kretzmer, "The Occupation of Justice", p. 89.

*raised in the petition is blatantly political. The unsuitability of the questions raised in the petition for a judicial determination by the High Court of Justice derives in the present case from a combination of three aspects that make the issue unjusticiable: intervention in questions of policy that are in the jurisdiction of another branch of Government, the absence of a concrete dispute and the predominantly political nature of the issue”.*⁸³

Recently, the legality of Israel’s settlements in the OPT was reviewed by HCJ in petitions that pertained to the legality of the Wall. This followed the International Court of Justice Advisory Opinion on the Wall (2004), which ruled that Israeli settlements in the OPT have been established in violation of international law.⁸⁴ However, while the legality of the settlements was a fundamental factor for determining the legality of the Wall by the International Court of Justice, the HCJ persistently avoided addressing this issue, ruling that this question is *irrelevant*, and further that “[T]he military commander is authorized to construct a separation fence in the area for the purpose of defending the lives and safety of the Israeli settlers in the area”.⁸⁵

- Facilitating the Settlement policy: the creation of an Israeli legal environment in the OPT

In addition to the HCJ’s use of different techniques to avoid ruling on the legality of settlements, it has actively facilitated the State’s criminal policy of transferring its own population into occupied territory by providing the State with the legal tools to administer the settlers’ presence in the occupied territory. The HCJ has enabled the creation of an Israeli legal regime in the OPT, which affords settlers the Israeli legal constitutional, economic and social rights, which was a precondition for effecting the settlement policy.⁸⁶

An example of this is the HCJ’s extension of the legislative authority of the military commander to regulate the needs of the settlers by military orders. The HCJ held that Article 43 of the Hague Regulations recognises two legitimate interests that could justify a change in the status quo of the occupied territory and the introduction of new legislation: (1) the interests of the local population; and (2) the security needs of the Occupying Power. In 1972, the HCJ interpreted the term “local population” to include settlers,⁸⁷ which allowed the military commander the ability to issue military orders (laws) that regulated the settlers’ daily life, without being required to apply Israeli law extraterritoriality. The military commander could simply import Israeli law through military orders, and allow Israel to legislate the laws that facilitated their presence and development in the OPT. Moreover, the HCJ’s interpretation of Article 43 as including two distinct “local populations,” the occupied and the occupiers, opened the door to the installation of two separate sets of laws over two separate populations. As these orders have not been regularly published in any official gazette, and since the legislation was effectuated under the guise of IHL measures, their real character has been obscured. Israel has effectively created two separate legal regimes without needing to officially annex territory, and without formalizing legislation that would reflect the character of an apartheid system.

⁸³ HCJ 4481/91 Bargil v. the Government of Israel (1993). See Justice Shamgar at para. 3.

⁸⁴ “Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory”, I.C.J. Rep. 136, para 120, The International Court of Justice Advisory Opinion, (2004)

⁸⁵ HCJ 7957/04 Mara'abe et al v. Israel Prime Minister et al.), para. 19 (2005)

⁸⁶ HCJ 1661/05, The Gaza Coast Regional Council v. The Knesset para. 80 (2005). See also, Marabe case, para. 21, and “The International Law of Occupation”, pp. 129-133, Benvenisti, (Princeton, Princeton University Press, 2004).

⁸⁷ HCJ 256/72, Electricity Company for Jerusalem District v. Minister of Defense, (1972)

3. The Israeli military courts system in the OPT

“..there is also a possibility of selective “willingness”: authorities may be eager to investigate crimes by rebel groups but be reticent with respect to government forces”⁸⁸.

The assessment of a State’s unwillingness to genuinely carry out investigations and prosecution of allegations of international crimes, include the consideration of ‘contextual’ indications, such as the existence of “jurisdictional territorial divisions” or “special jurisdictional regimes”, like military tribunals.⁸⁹

In the case of Israel, it was the law of military occupation that provided the authority to establish the military courts system in 1967, and gave it jurisdiction over civilians in the OPT.⁹⁰ Since then, the military courts system has judged hundreds of thousands of Palestinian civilians in proceedings that denied their right to a fair trial. Between 1993 and 2000, more than 124,000 people were prosecuted in military courts. It is estimated that during the almost 45 years of occupation, approximately 700,000 Palestinian were detained under Israeli military orders.⁹¹ Thus, IHL, which was designed to serve as an *ad hoc* law with a short duration of applicability, has enabled the Israel to establish a special jurisdictional regime, in which military orders are the criminal code, the military’s rules of due process apply, and in which soldiers (who until 2004 were young officers without legal background) are appointed as judges.⁹²

3.1 Jurisdictional territorial divisions: Violations of the principle of equality before the law

The territorial jurisdiction of the military courts in the West Bank (and previously also in the Gaza Strip) is expanded or restricted according to the nationality of the perpetrator. The Courts exercise jurisdiction over the civilian Palestinian population, and refrain from exercising jurisdiction over Israeli settlers. As a result, Palestinians and settlers who commit the same crime in the same place, are subjected to two distinct legal systems: one military and the other civilian. These two legal systems differ considerably in many respects, including in substantive and procedural criminal provisions, due process, prosecution policies, level of punishment, and sentencing.

This situation was described by a military court judge as follows:

"For many years now, only people of Arab origin have been tried by Israel's military courts, despite the fact that the military court is entitled to try any person who commits an offense under its jurisdiction.... Such conduct on the part of the investigating authorities smacks of racism, the origin of which I do not understand. I believe it is time to reexamine the criteria for bringing people before the military courts, so that all those who commit offenses are subject to equal treatment.”⁹³

⁸⁸ *Ibid*, para. 45

⁸⁹ Antonio. Cassese et al, Informal Expert Paper: The Principle of Complementarity in Practice (2003), para. 28.

⁹⁰ Articles 64 and 66 of the Fourth Geneva Convention.

⁹¹ Goldstone Report, para 1444.; Netanel Benisho, “Criminal law in the West Bank and Gaza”, IDF Law Review, Vol. 18 (2005), p. 300 (in Hebrew). Despite the large number of cases that has been submitted to the courts since the second intifada, only two courts of first instance and one court of appeals function today.

⁹² See Benisho, *ibid* at p. 312-313.

⁹³ Ofer Military court judge M. Liberman in, 4333/08 Military Prosecutor v. Anbau Issa, 21 September 2008.

The “jurisdictional territorial division” on criminal matters was put in place through legislation and prosecution policies approved by the HCJ. Although military courts are meant to have territorial jurisdiction over all persons in the OPT, regardless of their nationality⁹⁴, the Emergency Regulations law (West Bank and Gaza – Criminal Jurisdiction and Legal Assistance) of 1967, enacted by the Israeli parliament, extends the jurisdiction of Israeli courts to settlers “if those acts would have constituted an offence had they occurred in the territory under the jurisdiction of Israeli courts” . At the same time, to prevent the extension of Israeli criminal law to Palestinians, section 2(c) of the Law was enacted stating that “this Regulation does not apply on residents of the Region or the PA, who are not Israelis” .⁹⁵ As clarified by the HCJ, “[t]he aim of these Regulations was to apply the same law to Israelis, wherever they committed the offense, in Israel or in the Region, according to the personal principle – as if Israeli citizens carry Israeli law with them when entering the Region.” The Emergency Regulations thus violate the principle of territoriality, which provides that all persons residing in a given area are subject to the same system of law.⁹⁶ As a result, a situation of concurrent jurisdiction was created. Israelis residing in the OPT are subject to both civil and military courts, and there is no provision on the priority in adjudicating between the systems. This allows a selective policy to be implemented. In early cases, military courts recognised that the parallel jurisdiction of the Israeli courts did not deprive the military courts of their authority to adjudicate settler cases.⁹⁷ However, since 1979, the HCJ has affirmed the practice of applying only Israeli criminal law, and not military law, to settlers.⁹⁸ According to the former President of the military court of appeals, Colonel Shaul Gordon, this policy was introduced for substantive and practical reasons. When tried in Israel, Israelis are guaranteed significantly more favorable procedural rights under Israeli law during the investigation, detention and trial. For practical reasons, it was deemed dangerous to detain Israeli and Palestinian detainees in the same detention units.⁹⁹

The practice of shielding Israelis from military law and courts system is not extended to those Palestinian who are Israeli nationals. They are subject to military law despite their Israeli nationality. Whenever Israeli Palestinians have argued before military courts that they should be tried in an Israeli civil court, their claims were rejected on the ground that the Emergency Regulations Law does not cancel the jurisdiction of the military courts.¹⁰⁰ The lack of a rule to regulate the concurrence of jurisdictions of the two legal systems facilitates the practice of a discriminatory policy, and enables the separation of jurisdiction without explicitly legislating discriminatory laws.

⁹⁴ Art. 7 of Security Provisions Order (No. 378) of 1970. Today, article 10 of the Order regarding Security Provisions [Consolidated Version] (Judea and Samaria) (No. 1651), 5770-2009

⁹⁵ Art. 2(a) and 2(c) of the Emergency Regulations (legal assistance. Until the final version was reached, this section was amended a few times, initially excluding all residents of the Region, then including the settlers, and finally to amend it according to the Interim Agreement.

⁹⁶ HCJ 831/80, Tsoba v. State of Israel , p.174 (1980)

⁹⁷ 1238/69 Military Prosecutor v. Abu Ranem (1969), 1 Selected Judgement of Military Courts (SJMC), published by the Military Advocate-General unit of the Israel Defence Forces (IDF), p. 130., HCJ Levy v. General in Chief (1967); HCJ 507/72 Arnon v. Attorney General; English summary in 9 IYHR (1979) p. 334.

⁹⁸ HCJ 163/82 David v. State of Israel.

⁹⁹ Interview with Col. Gordon Shaoul, President of the military court of Appeals, Ofer military camp in 4.12.2005.

¹⁰⁰ For example, HCJ 6743/97, Zrari v. Israeli Police (unpublished, 1997); The Israeli Police v. Nabulsi (1990), 7 SJMC, p. 198.

3.2 The denial of fair trial as a war crime

Willfully depriving protected person of the rights of fair and regular trial is a war crime under article 8 (2) (a) (vi) of the Rome Statute.

In addition to the lack of independence and impartiality required by international human rights law,¹⁰¹ the military courts' rules of procedure allow the practice of systematic denial of access to the right to a fair trial. A number of aspects of this practice deserve emphasis.

Firstly, there are significant differences compared to the Israeli criminal system. In the military law system detainees may be held for up to eight days before being brought before a military judge, compared to 24 hours (72 hours for security offenses) in Israel. Detainees in the OPT may be held for 90 days without access to a lawyer, but only 48 hours (21 days for security offenses) in Israel, and can go 188 days before being charged (compared with 75 days in Israel).¹⁰² Furthermore, there is no limitation on the period of detention before an indictment is filed. The only limitation is that the trial must be conducted two years from the time the indictment is filed. At the end of 2006, up to 1,800 detainees were custody for one year or less until the end of proceedings, and close to 200 were in custody for over one year.¹⁰³ Defendants are notified of the charges against them whilst in detention, or during the prosecution's motion requesting custody until the end of proceedings. The charges are provided in Hebrew and defendants are most often asked to respond to them at once. Defence attorneys who do not read Hebrew are forced to rely on a rushed translation in court.¹⁰⁴ In regards to the proceedings themselves, 95% of cases do not involve a presentation of evidence and witnesses but rather the negotiation of a plea-bargain between the parties and those who refuse to accept a bargain are often 'punished' for not having the good sense to do so.¹⁰⁵

Another major difference between the two judiciary systems is that the military court system treats Palestinians as adults from the age of 16, whilst in Israel, adults are those above the age of 18. As there is no law regarding, and therefore little application of, the presumption of innocence, defendants were found guilty in more than two-thirds of the 9,123 cases heard in 2006.¹⁰⁶ The de facto restrictions on the presence of the public at hearings, coupled with the lack of effective access to the courts' decisions, amount to systematic violations of the right to a public and transparent trial, whilst 95% of cases do not involve a presentation of evidence and witnesses but rather the negotiation of a plea-bargain between the parties.¹⁰⁷ Concurrently, severe restrictions are imposed on lawyers, which diminishes their ability to provide effective representation to their clients. In addition to the frequent issuance of orders denying detainees meetings with a lawyer, lawyers are harassed and experience conditions that are meant to discourage them from visiting their clients, and are denied access to all relevant materials.¹⁰⁸

¹⁰¹ See JM Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules*, Cambridge University Press (2005), p. 356; Federico Andreu-Guzmán, *Military Jurisdiction*, International Commission of Jurists (2001), p. 10; UN Human Rights Committee, General Comment No. 13 on Art. 14 of the ICCPR, (12 April 1984), UN document HRI/GEN/1/Rev.1: UN document E/CN.4/1998/39/Add.1, para. 78. As to the impartiality of Israeli judges in military courts see L. Hajjar, "Courting Conflict - The Military Court System in the West Bank and Gaza, (2005)", p. 112. Thus the authority granted by the Fourth Geneva Convention to try civilians in military courts is in fact an exception to human rights law – an exception that was designed to apply in *ad hoc* situation of occupation.

¹⁰² Consultation with Advocates Limor Goldstein and Nery Ramati, Gaby Lasky and Partners Law Offices (on-file with authors).

¹⁰³ Federico Andreu-Guzmán, *Military Jurisdiction*, International Commission of Jurists (2001), p. 8-9.

¹⁰⁴ *Ibid*, 6.

¹⁰⁵ Chief military prosecution date, cited in *Ibid*, 9.

¹⁰⁶ Official data obtained from the Military Court Unit, cited in, "Backyard Proceedings: The Implementation of Due Process Rights in the Military Courts in the Occupied Territories", Summary of Findings and Recommendations", pp. 4-5, Yesh Din (December 2007) <www.yesh-din.org/site/images/BackyardProceedingsEng.pdf>.

¹⁰⁷ *Ibid*.

¹⁰⁸ *Ibid*, 7.

The systematic violations of international humanitarian and human rights law by the military judiciary may amount to a war crime as Palestinian defendants are effectively victims of the system and are denied their right to a fair trial which result in a systematic denial of justice.¹⁰⁹

¹⁰⁹ Article 8(2)(a)(vi) of the Rome Statute of the ICC, as well as Art. 147 of GC IV. See for further information, Louise Doswald-Beck, "Fair Trial, Right to International Protection", *Max Planck Encyclopaedia of Public International Law* (2009).

Conclusion

This study presents evidence demonstrating the Israeli legal system's unwillingness to investigate and prosecute allegations of international crimes, as required for the ICC admissibility requirement set forth in Article 17 of the Rome Statute. The report examined different components of the Israeli legal system: the system of investigations and prosecutions of war crimes allegations committed by Israeli armed forces; the HCJ's judicial review of international crimes; and the function of military courts in the OPT, which exercise jurisdiction over the Palestinian civilian population.

The Israeli war crimes investigation system is almost entirely under the responsibility of the military legal system, and therefore fails to fulfill the international law standard of impartiality and independence. This is primarily due to the concentration of power in the hands of the MAG. Furthermore, the HCJ's narrow scope of review over decisions related to investigations and prosecutions operates under a policy of deference to the executive power, and is characterized by unjustified delays that result in the shielding of the political and military echelons. Israel's military investigations focus only on specific incidents of misconduct of individual soldiers, namely for deviations from orders, rules of engagement or policies, in contradiction with international requirements. To date, Israel has refused to investigate the policies, strategies, regulations and objectives of a military operation. This refusal to investigate the wider context of human rights violations effectively shields senior military and political policy-makers from prosecution. These structural and functional deficiencies clearly demonstrate Israel's unwillingness to genuinely undertake investigations and prosecutions.

Israel's follow up to the allegations made in the aftermath of Operation Cast Lead in the exposed overwhelming indicators of Israel's unwillingness to investigate and prosecute war crimes committed by its army and the higher chain of command, including that of the political echelon.

Israel, with the support of the HCJ, has been unwilling to pursue certain offenses and certain offenders. Whilst the HCJ is often perceived as being an independent body that effectively reviews state Acts, its institutional limits and its role in legitimizing and facilitating illegal policies and acts becomes evident in cases where it is asked to put restraints on executive power. The HCJ's has fulfilled an active role in shielding the military and political echelons and in facilitating war.

The authority given to Israeli's military courts provide further evidence Israel's unwillingness to operate with a genuine intention to bring perpetrators to justice. The territorial divisions created by the Courts' special jurisdictional divisions effectively exclude settlers from its jurisdiction – a jurisdiction exercised only on the Palestinian civilian population in hundreds of thousands of cases since their establishment in 1967. As shown in reports by local and international non-governmental organizations and experts, there are striking differences from the Israeli criminal system and the military courts. The military courts' practices and policies systematically violate the fundamentals of fair and regular trial guarantees, which may constitute a war crime.

Through the different case studies the report unequivocally demonstrates that the Israeli judiciary is ineffective in ensuring Israel's compliance with its international obligations. The Israeli occupation of the Gaza Strip has lasted for more than 40 years, and is characterized by a long-standing policy of settlement construction and military control over millions of civilians. However, allegations of severe war crimes are not, and cannot, be genuinely prosecuted and adjudicated by Israel's domestic and military judiciary systems. As such, intervention of an international court is required for accountability of international crimes to be achieved.

ANNEX 1: Cases prosecuted by Israel in the aftermath of Operation Cast Lead¹¹⁰

Case no. 1 (August 2009): Theft of credit card. Indictment: looting. Sentence: seven and a half months' imprisonment.

In January 2010, a year after Operation Cast Lead, Israel published the only concrete result it had produced by that time in its efforts to counter the war crimes and crime against humanity allegations that had been raised in the UN Fact-Finding Mission on the Gaza Conflict: one soldier had been prosecuted and convicted for stealing a credit card.¹¹¹ During the sentencing, the Court Martial noted: "The crime of looting is harmful to the moral duty of every IDF soldier to keep human dignity ... The accused harmed the 'combat moral code,' the spirit of the IDF, in using his power and his arms not for the execution of his military mission"

Case no. 2 (November 2010): Use of a Palestinian child as a human shield. Indictment: 'excess of authority' and 'conduct unbecoming'. Sentence: three months on probation and demotion of rank.

Two soldiers were convicted of 'excess of authority' and 'conduct unbecoming' for having forced a nine-year old Palestinian boy to open bags suspected of being booby-trapped.¹¹² Despite the gravity of the use of children as human shields, both soldiers, who were convicted of these charges, were sentenced to a three-month probation period and a demotion of rank. This sentence is particularly astonishing compared to the prison sentence imposed in the looting case, in which the convict may indeed have "harmed the 'combat moral code' of the IDF", yet he did not endanger life of a nine-year-old child. In an attempt to justify this lenient ruling the Deputy Military Advocate for Operational Affairs said that the court gave weight to "the personal circumstances of the defendants and their contribution to Israel's national security" and that by using a child as a human shield "the defendants did not seek to humiliate or degrade the boy."¹¹³

Case no. 3: Shooting of unarmed civilians holding white flags – pending. Charged with manslaughter.

On 16 June 2010, the Israeli daily newspaper Haaretz reported¹¹⁴ that the army would charge a soldier for shooting and killing two Palestinian women. More than a year and a half after the killings, the nature of the charges have not been determined. The soldier was eventually indicted before a military court on charges of manslaughter related to the deliberate targeting of an individual waving a white flag without orders or authorization to do so. The March 2011 UN report notes that "the trial was opened on 1 August 2010 but the reading of the indictment was immediately postponed at the request of the defense, who demanded that the trial be suspended while the Military Police pursue allegations that an IDF officer had attempted to block the investigation by not submitting the results of a probe into the incident to his superior officers and to the military advocate general. The trial is currently in recess while the authorities investigate further".

¹¹⁰ By June 2011 only three cases, described below, were followed by a prosecution. Other investigations are still ongoing and may lead to future indictments. However, these will probably have the same characteristics – they will not address the responsibility at command level, but only responsibility of individual soldiers, who violated the army's orders on their own initiative.

¹¹¹ Military Prosecutor v. Sergeant A.K., S/153/09 12 (11 August 2009) cited in footnote 112, State January Report 2010.

¹¹² Army Blog, Military Advocate for Operational Affairs, "Indictment filed in Connection with 'Cast Lead'", 11 March 2011 <<http://www.militaryadvocategeneral.idf.il/164-3952-en/Patzar.aspx?SearchText=human%20shields%20gaza23rd%20Newsletter/3/3.aspx>>.

¹¹³ "Investigating the Gaza Operation", Interview with Deputy Military Advocate for Operational Affairs, The Official Weblog of the Israeli Army, 9 March 2011 <<http://www.militaryadvocategeneral.idf.il/163-4544-en/patzar.aspx>>.

¹¹⁴ Amos Harel, "IDF to Charge Soldier with Killing Two Palestinian Women During Gaza War", Haaretz, 16 June 2010 <<http://www.haaretz.com/news/diplomacy-defense/idf-to-charge-soldier-with-killing-two-palestinian-women-during-gaza-war-1.296500>>.

ANNEX 2: Monitoring domestic investigations

The UN Committee of Experts

The UN committee of experts is an independent expert panel established by the UN Human Rights Committee in March 2010, and was created to monitor the domestic investigations and proceedings undertaken by Israel following the Goldstone Report and assess their conformity with international standards¹¹⁵. The UN Committee of Experts has published two reports in which it expressed the view that the Israeli military judiciary lacked the necessary structural independence to thoroughly investigate allegations.¹¹⁶ It found that the investigations carried out were neither sufficiently transparent nor prompt, which impaired the judiciaries' effectiveness and compromised the goal of accountability and justice.¹¹⁷ Finally, it criticized Israel for not investigating the individuals (usually in the political or military echelons) who had designed, planned, ordered, and oversaw military operations during the 'Operation Cast Lead' offensive in the Gaza Strip in December 2008 – January 2009, which was cited as one of the main flaws in the investigation process.¹¹⁸

The Israeli inquiry commission - the Turkel Commission

The Turkel Commission, (officially 'The Public Commission to Examine the Maritime Incident of 31 May 2010') is an independent public commission set up by the Israeli government in June 2011 in the aftermath of the Flotilla raid, during which nine activists were killed and many others wounded. The committee was mandated to examine, *inter alia*, "whether the investigation and inquiry mechanism that is practiced in Israel in general... is consistent with the duties of the State of Israel pursuant to the rules of international law"¹¹⁹. The commission consists of four Israeli members (none of them are experts in international law) and two international observers. Unlike the UN Committee of Experts, which was denied entry into Israel, the West Bank and Gaza, the Turkel Commission enjoyed the full collaboration of the State of Israel. During April 2011 the Israeli panel heard the testimonies of the top echelons of the Israeli military and civil authorities - including the MAG, the State Advocate General, the head of the General Security Services, and the head of the Military Police - as well as representatives of leading Israeli NGOs and distinguished Israeli law professors. Their reports and testimonies provide information of major importance for the assessment of the Israeli domestic system of investigation. Of special interest are the reports of the Israeli professors of international law, which provide the latest analysis of the matter. The Commission is due to submit its report before the end of 2011.

¹¹⁵ See, "Follow-up to the Report of the United Nations Independent International Fact-Finding Mission on the Gaza Conflict", 25 March 2010, A/HRC/RES/13/9.

¹¹⁶ First UN experts report, para. 91; Second UN experts report, A/HRC/16/24, 5 May 2011, para. 41.

¹¹⁷ UN Goldstone Report, paras. 92-93; UN Report of the Committee of Experts in follow-up to Goldstone, pp. 12-3.

¹¹⁸ UN Goldstone Report, para. 95, UN Report of the Committee of Experts in follow-up to Goldstone, p. 14.

¹¹⁹ The testimonies given by the Israeli authorities, NGOs and academics are online (in Hebrew) <<http://www.turkel-committee.com/connt-153-b.html>>.

ANNEX 3: Survey of HCJ petitions demanding review of the MAG's decisions relating to the conduct of criminal investigations – A sample of landmark cases and their implementation

(i) B'Tselem et al. case (2003)

One of the first petitions that challenged the MAG policy of not opening criminal investigations was submitted to the HCJ in 2003. It remained pending before the Court for over seven years¹²⁰. The army's official policy since 2000 was to not open a criminal investigation in those cases in which Palestinian civilians were killed by soldiers.¹²¹ In the course of the procedures before the HCJ challenging this policy, Israel announced on 4 April 2011 that it had changed the investigation policy for cases in which Palestinian civilians are killed in the West Bank. "The new policy requires every case in which uninvolved Palestinians are killed by IDF fire to be investigated immediately by the Criminal Investigation Division. This policy applies unless the incident occurred during an activity clearly stated as combat."¹²² However, this policy is restricted to the West Bank, and is not applicable to the Gaza Strip. On 21 August 2011, the HCJ finally rendered its judgement. It rejected the petition on the basis that the MAG's recent change in policy resolves its main demand.

(ii) Hess case (2003)

In 2008, the HJC refrained from overturning the decisions of the State Attorney General and the MAG to not open a criminal investigation against civil and military high officials in the case of Salah Shehadeh. Salah Shehadeh was a Hamas leader in the Gaza Strip whose house was hit by a one-ton bomb dropped by the Israeli Air Force on 22 July 2002. Shehadeh and 14 civilians, including nine children, were killed and at least 100 were injured. The bomb also caused massive destruction to residential buildings.¹²³ In its ruling the HCJ deferred the decision whether to open a criminal investigation to a State committee, which was mandated to function in accordance to the law that applies to the conduct of a military debriefing, meaning that all the testimonies and evidence are classified.¹²⁴ That committee, which consisted mainly of former security and military personnel, decided in 2011, more than eight years after the event, to not open a criminal investigation.¹²⁵

(iii) Atrash case (2005)

A petition filed on 9 March 2005 by a relative of Mr. Al-Nebari, a Palestinian who was killed by the Israeli army was rejected almost three years later by the HCJ. The HCJ also refused to order the military to provide information it possessed about the circumstances of Mr. Al-Nebari's death. A subsequent HCJ petition demanding that the MAG indict the soldiers responsible for

¹²⁰ HCJ 9594/03, B'Tselem v. The Military Advocate General. See court documents in the case on ACRI's website <<http://www.acri.org.il/he/?p=1721>>.

¹²¹ For a detailed research on the policy and its outcomes see the B'Tselem report entitled, "Void of Responsibility: Israel Military Policy not to investigate Killings of Palestinians by Soldiers" (September 2010). On 27 October 2003, the Association for Civil Rights in Israel and B'Tselem filed a petition before the Israeli High Court of Justice challenging this policy. HCJ 9594/03, B'Tselem et al. v. The Military Judge Advocate General et al. (21 August 2011).

¹²² "New Investigation Policy Regarding Palestinian Casualties from IDF Fire", Official Weblog of the Israeli army, 6 April 2011, <<http://dover.idf.il/IDF/English/News/today/2011/04/0604.htm>>.

¹²³ HCJ 8794/03, Hess v. The Military Advocate General (23 December 2008). For more details see, Adalah, "Israeli Military Probes and Investigations Fail to Meet International Standards or Ensure Accountability for Victims of the War on Gaza", Briefing Paper, January 2010; Weill, Sharon. 'The Targeted Killing of Salah Shehadeh: from Gaza to Madrid', *Journal of International Criminal Justice*, Vol. 7, No. 3, 2009, pp. 617–631.

¹²⁴ Announcement from the State Attorney's Office to the HCJ, February 4, 2008, para. 8.

¹²⁵ The Commission's report was published in February 2011, <<http://www.pmo.gov.il/PMOEng/Communication/Spokesman/2011/02/spokeshchade270211.htm>>.

the killing was rejected by the Court, concluding that the circumstances did not justify its intervention in the MAG's decision.¹²⁶

(iv) Hamoked et al. case (2005)

Thoroughly documented and evidenced allegations of torture and other forms of ill-treatment of Palestinians under interrogation were submitted to the HCJ in June 2005, and the petitioners demanded that investigations be opened and the perpetrators prosecuted as appropriate. The HCJ deferred the decision on whether or not to open criminal investigations to the state investigation authorities, and granted them a very wide margin of discretion.¹²⁷ The State decided to not open criminal investigations into the cases, claiming that the authorities are capable of deciding upon the scope and extent of the inquiries on the basis of the circumstances of each case and with regard to the credibility of the victims' claims.

(v) Alhams case (2006)

In the case of 13 year-old Iman Alhams, who was willfully killed by Israeli soldiers whilst unknowingly entering a 'special security zone' near a settlement in the southern Gaza Strip, the HCJ firmly refused to investigate the soldiers on suspicion that they carried out illegal orders, and merely recommended the general practice of the opening-fire regulations in order to ensure that they comply with the official orders be reviewed.¹²⁸

(vi) Adalah et al. case (2007)

This petition, filed in April 2007, sought criminal investigations into the killing of civilians and extensive home demolitions during two Israeli military attacks launched on Gaza in 2004. The case remains pending.¹²⁹ The sole investigatory mechanism has been an inherently flawed 'committee of examination', which could not conduct an effective criminal investigation because of its status, powers and composition. Although the Court's instructions were to appoint a committee that fulfilled the basic requirements of independence, thoroughness and objectivity, the committee was not impartial. Despite the fact that in a subsequent case the Court itself had acknowledged the illegality of the attack,¹³⁰ and despite significant legal efforts made on behalf of the victims, no effective criminal investigation has been conducted in the almost eight years since the attack.¹³¹

(vii) Abu Rahmeh case (2008)

In the shooting case of a blindfolded and handcuffed Palestinian, the MAG decided to indict the officer and soldier on charges of 'conduct unbecoming', which do not appear on a criminal record. A petition was submitted to the HCJ demanding the charges be aggravated to reflect the gravity of their actions. The MAG's response to the HCJ stated in part:

"After I considered the matter again and again, and contemplated the issue seriously and whole-heartedly, I decided not to change my original decision regarding the charges against the soldiers and the battalion

¹²⁶The decision confirmed the State's response that the soldiers were acting in accordance with the relevant military protocols when confronted with a life-threatening situation, and accepted the reasonableness of the MAG's decision on this basis. HCJ 10682/06, Ayman Atrash v. The Chief Military Prosecutor (18 July 2007).

¹²⁷HCJ 11447/04, HCJ 1081/05, HaMoked et al. v Attorney General et al (14 June 2005).

¹²⁸Justice Levy used the phrase "if my opinion is to be followed" to express his recommendation to the MAG. HCJ 741/05, Alhams et al. v IDF Chief Military Prosecutor et al., para. 37 (14 December 2006)

¹²⁹ HCJ 3292/07, Adalah, Al Haq and PCHR et al. v. Attorney General (case pending). The state responded that the case should be dismissed as its arguments were general and it was brought too long after the end of military operations.

¹³⁰ HCJ 769/02, The Public Committee Against Torture in Israel v. The Government of Israel, para. 46 (11 December 2005)

¹³¹ See also, Expert opinion of Adalah submitted in the Al Daraj case, p 7.

commander, and I retain my position ... [that charges of 'conduct unbecoming'] is the most appropriate legal response to the circumstances of the incident."¹³²

However, in July 2009, as videos of the shooting were distributed and viewed by hundreds of thousands of people around the world, the HCJ issued a landmark decision ordering the indictments to be changed.¹³³ The indictments were amended: the officer was charged with threats and the soldier was charged with unlawful use of weapons. While both were convicted, the punishments imposed on them were very light- the soldier was demoted, and the officer was suspended from a commanding position for a year. The Court Martial noted that they had already suffered enough by having the shooting listed on their criminal records.¹³⁴

(viii) Avery case (2005)

Brian Avery was an American volunteer who was shot in the face by the Israeli Army on 5 April 2003. The shooting, which was unprovoked and did not occur in the context of any apparent hostilities, caused Mr. Avery permanent disfigurement. The HCJ demanded the MAG review his decision to not open an investigation; however, the HCJ did not explicitly order that a criminal investigation be opened.¹³⁵ As a result, no criminal indictment was ever filed. In November 2008, Avery accepted a settlement for NIS 600,000 (USD \$150,000) from Israel in exchange for dropping the lawsuit. According to his lawyer, Mr. Avery was willing to settle the case because, in addition to skepticism that the 15-month-long investigation would ever reach a satisfactory conclusion, he needed to defray some of the costs of necessary reconstructive operations. Mr. Avery's lawyer also noted that one of the very few times the State had awarded damages to anyone injured by the IDF during the Second Intifada¹³⁶

¹³² Affidavit submitted by the MAG and Chief Military Prosecutor to the Court, in H CJ 7195/08 following instructions of the Court during the hearing of the case on 28 September 2008, para. 2.

¹³³ H CJ 7195/08, Abu Rahma v Military Advocate General et al (1 July 2009).

¹³⁴ Hanan Greenberg, 'Naalin Shooting: Battalion Commander Won't be Demoted', *Ynet*, 27 January 2011 <<http://www.ynetnews.com/articles/0,7340,L-4019996,00.html>>.

¹³⁵ H CJ 11343/04, Brian Avery v. The Military Advocate General (1 March 2005). For more information, see Jerusalem Post, "Wounded Activist Testifies Against IDF", 20 September 2007 <<http://www.jpost.com/Home/Article.aspx?id=75945>>.

¹³⁶ See also, <<http://www.jpost.com/Home/Article.aspx?id=121136>>.

ANNEX 4: Compensation

The denial of justice to Palestinians in the Israeli system is also manifested in Israel's failure to provide Palestinian victims of international crimes with just compensations. Israeli legislation and administrative practices effectively bars Palestinians from having access to the civil remedies available under the Israeli system. This is achieved through procedural and substantive obstacles, both in the preliminary stages of the case and during the course of the proceedings.

The first prerequisite to submit a petition to the Israeli civil courts is that a complaint must have been filed with the compensation officer at the Israeli Ministry of Defense (MoD) within 60 days of the incident.¹³⁷ If the complaint is not filed within 60 days, the right to seek compensation is forfeit. In the majority of cases, as illustrated by experiences post Operation Cast Lead In December 2008 – January 2009, no response to those complaints is given.¹³⁸ In the vast majority of cases, no more than an interlocutory response is provided, and usually denotes the end of the case. Following Operation Cast Lead, PCHR submitted 1,046 compensation claims. To-date, only 23 interlocutory responses have been received. The MoD has only called witnesses to testify in exceptional cases.¹³⁹

A second procedural obstacle is that the full case, including all the relevant evidence, witness statements and affidavits, must be filed within two years of the incident.¹⁴⁰ As petitioners are barred access to such information and documentation,¹⁴¹ incomplete files are rejected at the outset and do not even proceed to the second stage of the assessment, which is where the Court decides whether the claimants have a right to compensation, and, if so for what amount.¹⁴²

There are also a number of substantive obstacles that stand in the way of victims seeking remedies. A law passed in 2004, held that compensation would not be awarded for 'combat operations', a term broadly defined in the case law. Despite a subsequent HCJ ruling prohibiting the imposition of a blanket bar to compensation, little has changed in practice. The majority of individual cases continue to be defined as falling under the definition of 'combat operations', for which no compensation can be awarded'. In 2005, Amendment 7 to the Law further restricted the state's liability by exempting the state from liability for damages caused to particular categories of persons, encompassing a broad group of persons. These persons are defined as: (1) a citizen of an 'Enemy State', unless he or she is legally in Israel; (2) an activist or member of a terrorist organization; and (3) anyone who incurred damage while acting as an agent for or on behalf of a citizen of an enemy state, or an activist or member of a terrorist organization;¹⁴³

Other barriers faced by petitioners at the preliminary stage of the proceedings are (i) excessive court fees and guaranties required from claimants, and (ii) the prevention of witnesses from traveling to court. Additionally, lawyers from Gaza cannot travel to Israel to represent their clients, and lawyers hired from within Israel cannot travel to Gaza to meet their clients, making legal representation very difficult.

In addition to the payment of court fees, the courts require the payment of a court insurance/guarantee (set at a minimum of 10,000 NIS, but this is often much higher, reaching to over a 100,000 NIS in some cases), before the case can be pursued. Article 519 of the Israeli Civil Code, grants the Court the right (not obligation) to request payment of a guarantee,

¹³⁷ Sec. 5A(2)(b) of the Civil Wrongs (Liability of the State) Law 1952. See also the military legislation which mirrors many of the provisions in the Israeli Law, Military Order 271 concerning Civil Claims (12 August 1968), and the amendments thereto; and Military Order 1441 concerning Powers and Areas of Civil Responsibilities (7 April 1996).

¹³⁸ "Genuinely Unwilling : An Update", PCHR.

¹³⁹ "Genuinely Unwilling" PCHR (August 2010).

¹⁴⁰ Formerly the time period was seven years. For claims of less than 2.5 million NIS cases are heard before the courts of first instance, claims for 2.5 million NIS and above are heard in one of the five Central Courts. The outcome of these cases may be appealed to either the Central Court (less than 2.5 million NIS claims) and the Supreme Court (greater than 2.5 million NIS claims).

¹⁴¹ HCJ 2366/05, *Atwa al-Nebari and Adalah v IDF Chief of Staff, et al.*

¹⁴² The Court approves the withholding of information from the claimant, effectively preventing the claimant from presenting his or her case in accordance with the right to a fair trial and international due process guarantees. Section 5A(4) of the Civil Wrongs Law 1952.

¹⁴³ Amendment no. 7, Section 5B of the Civil Wrongs Law.

before the case begins, in order to cover the other party's expenses (the MoD in this case) in the event that the case is lost.¹⁴⁴ However, this requirement is applied in a discriminatory manner, i.e. only against Palestinians.

As few victims can afford such expenses, these requirements effectively bar access to justice for the vast majority of claimants who are forced to drop their cases. Secondly, witnesses who are required to appear in court have, since 2007, been systematically refused permits by the Israeli authorities at Erez Crossing (between the Gaza Strip and Israel). As a result, the case is either closed and lost, or adjourned indefinitely until it was deleted by the courts due to a long period of inactivity in the case.¹⁴⁵ In practice, if a compensation case were seen to have a significant chance of success, a 'Settlement Committee', including representatives of the Ministry of Defense and the Civil Prosecutor, would initiate negotiations with the claimant for a settlement outside of court. The recent 'success' in the Abu Hajjaj case was also based on a settlement with the Israeli military prosecution, and was the first time that PCHR was able to procure compensation for victims of "Operation Cast Lead" in the Gaza Strip.¹⁴⁶

A recent HCJ petition, submitted by the PCHR on 21 December 2010, requested an extension of the two-year statute of limitations regulating civil claims in light of Israel's absolute closure of the Gaza Strip. The petition was submitted after the authorities failed to address substantive issues presented in the original request submitted prior to the initiation of legal proceedings.¹⁴⁷ As of 17 February 2011, no single offer to settle has been proposed by the Israeli authorities. In a 11 August 2011 judgment, the HCJ precluded residents of the OPT from relying on Israel's obligation to provide redress as a civil cause of action, and stated that such grounds are only applicable in administrative proceedings before the claims committees established by the Israeli military legislation in the OPT or in a petition to the HCJ.¹⁴⁸ Instead of providing alternative mechanisms, the current situation effectively bars victims' access to remedies, which provides further evidence of the overall unwillingness of the Israeli judicial system to either hold perpetrators accountable or provide victims with effective remedies.

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¹⁴⁴For a recent example of these high costs see, PCHR, "Israeli Courts Issue Two Decisions Denying Palestinians Access to Justice; Place Prohibitive Price on Judicial Remedy", press release 19 September 2011.

¹⁴⁵Between June 2010 and January 2011 PCHR filed 100 cases before Israeli courts, representing the interests of approximately 600 victims. Due to the Israeli-imposed absolute closure, it is not possible for PCHR's lawyers to represent clients within the Israeli judicial system. As a result these cases are filed on behalf of PCHR by a lawyer based in Israel. It is noted that numerous requests by this lawyer to access Gaza in order to meet with clients have been denied, with far reaching implications with respect to effective representation.

¹⁴⁶"PCHR Succeeds in Ensuring Reparation for the Family of Two Victims of the Israeli Offensive on Gaza", Press Release, 01 August 2011.

¹⁴⁷"Memorandum on the Status Domestic Investigations Conducted into Alleged Violations of International Law Committed in the Context of Operation Cast Lead", PCHR

¹⁴⁸LCA 3675/09 State of Israel v Mohammed Mohamad Salah Daod, Israeli Supreme Court, para. 15 (11 August 2011).



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investigative and trial observation missions

Through activities ranging from sending trial observers to organising international investigative missions, FIDH has developed, rigorous and impartial procedures to establish facts and responsibility. Experts sent to the field give their time to FIDH on a voluntary basis.

FIDH has conducted more than 1 500 missions in over 100 countries in the past 25 years. These activities reinforce FIDH's alert and advocacy campaigns.

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permanent lobbying before intergovernmental bodies

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