fidh

Shielded From Accountability

Israel's Unwillingness to Investigate and Prosecute International Crimes

September 2011

N° 572a

FIDH member organizations in Israel and Palestine

Adalah- The Legal Center for Arab Minority Rights in Israel
94 Yaffa Street
PO Box 8921
Haifa 31090
Israel
Tel: (972)-4-950-1610 / Fax: (972)-4-950-3140
Email: adalah@adalah.org
http://www.adalah.org

ACRI- Association for Civil Rights in Israel
Nahalat Binyamin 75
Tel Aviv 65154
ISRAEL

Phone: +972-3-5608185
Fax: +972-3-5608165
E-Mail: mail@acri.org.il

http://www.acri.org.il

B'Tselem- The Israeli Information Center for Human Rights in the Occupied Territories
P.O. Box 53132
Jerusalem 91531
Tel: 972-2-6735599
Fax: 972-2-6749111
Email: mail@btselem.org
www.btselem.org

PCATI- The Public Committee Against Torture in Israel
P.O.B. 4634
Jerusalem 91046
Tel: 972-2-6429825
Fax: 972-2-6432847
E-mail: pcati@stoptorture.org.il
Website: www.stoptorture.org.il

Al Haq-
P.O.Box: 1413
Ramallah - West Bank
Tel:+ 970 (0)2 2954646
Fax:+ 970 (0)2 2954903
www.alhaq.org

PCHR- The Palestinian Center for Human Rights
29 Omar El Mukhtar Street
Gaza City
PO Box 1328
Tel: 970 8 2824-776
Fax: +970 82825-893
Email: pchr@pchrgaza.org
www.pchrgaza.org

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 complimentary, set in Art. 17 of the Rome Statute, the International Criminal Court (ICC) may only exercise its jurisdiction where national legal systems fail to do so, if a State is unwilling or unable to genuinely undertake investigations and prosecutions.[2] In the wake of the Goldstone Report, 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 the domestic and international legal community. Two special bodies were established for this purpose: the UN Experts Committee and the Israeli Turkel Commission[3]. Should Israeli investigations not comply with international standards, and not provide accountability, in case the ICC established jurisdiction, its enforcement mechanism could be triggered[4]. 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 armed forces and the responsibility of the higher chain of command, including the political echelon for the purpose of the admissibility requirement of Art. 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 will also be necessary to consider the broader legal context of the State concerned in order to make that assessment.[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 constitutionaldemocracies where the separation of powers assumes institutional independence and effectiveness for the Judiciary. Therefore, to explore Israel's *willingness*, this study provides an overview of the different components of the Israeli legal system in Israel and the Occupied Palestinian Territory (OPT). [It demonstrates through specific case studies, the general pattern of institutional and functional deficiencies of Israel's 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 war crimes and shielded those responsible for such acts from criminal accountability.

---

1 See Michael N. Schmitt, (2011) "Investigating violations of international law in armed conflict", Harvard national security journal, 2 (1) pp. 35-48.

2 See Jann Kleffner, Complementarity in the Rome Statute and national criminal jurisdictions (Oxford University Press, 2008), p. 270 et seq.

3 For more details on these bodies see Annex 2

4 After Cast Lead the Palestinian Authority (PA) declared that it recognized 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 *ad hoc* the jurisdiction, this declaration may establish the ICC jurisdiction over international crimes committed in the OPT since 2002. Otherwise, the ICC may have jurisdiction if (quite hypothetically) 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 Israel or a Palestinian State. In this case the jurisdiction of the ICC will prospective from the date the State joint the statute.

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

6 Prof. Cassese et al, Informal Expert Paper: The Principle of Complementarity in Practice (2003), para. 35. Thus where a system is showed to be unwilling "to pursue certain groups of offenders or offences, this may contribute to an inference of a lack of genuineness in the particular case".

7 The Principle of Complementarity in Practice (2003), para. 44.

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

Art. 17 (2) of the Rome Statute lists three factors to assess the unwillingness of a State to genuinely carry out investigations: a purpose of shielding the person from criminal responsibility, an unjustified delay or a 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 Art 17 (2). It discusses the non-independent nature of the mechanism, which has been essentially conferred to the responsibility of the army, the very same body that is supposed to be investigated (part 1), the functional deficiencies related to promptness (part 2) and the policy employed to shield military and political officials responsible for such acts (part 3). Finally, the follow-up to war crimes allegations raised in the aftermath of Israel's 'Operation Cast Lead' is used to illustrate Israel's inherent unwillingness to carry out investigations and prosecutions genuinely.

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

According to Art. 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 MAG is the legal advisor to the army in charge of enforcing the law and, simultaneously, the head of the military prosecution, responsible for investigating and prosecuting violations of the law of armed conflict. The subordination of the investigation body of war crimes allegations to the authority of the MAG, the very authority that issues orders and provides advise on their implementation, inherently undermines its independence and impartiality. Professor Benvenisti went beyond

---

[8] Prof. Cassese et al, Informal Expert Paper: The Principle of Complementarity in Practice (2003), p 14, para 46; and Annex 4 to the paper listing indicia of unwillingness to genuinely carry out proceedings pp 28-31. Available at http://www.icc-cpi.int/iccdocs/doc/doc654724.pdf . See also, ICC Office of the Prosecutor, Draft Policy Paper on Preliminary Examinations (2010), paras 52-66. Available at 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] Art. 17(2) of the Rome Statute of the ICC.

[10] ICC Office of the Prosecutor , Draft Policy Paper on Preliminary Examinations (2010), paras. 62, 64-5 (emphasis added).

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 on investigations and prosecutions) – 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 interests in light of the different powers of the MAG. This structural deficiency was also recalled by the United Nations (UN) Experts Committee[12], as well as by the MAG himself, who conceded that this is not a viable mechanism for the scrutiny and investigation of high-level policy decisions.[13]

ii. Institutional lack of independence and impartiality

When military investigations are carried out by soldiers, constrained by military discipline, and with promotion prospects, rigorous analysis must be undertaken to ensure that investigations will adhere to the required level of independence and impartiality. In this context, 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 in September 2009, five years after taking office.

iii. Lack of civilian supervision

In any democratic system of governance the army must be subordinated to the civil branch of the state in order to guarantee the close supervision of the former's actions. In Israel, however, the 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 the State 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 international law Professors equally confirms 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]

Israel systematically refers to the competence of the High Court of Justice (HCJ) to review the decisions of the military advocate general as constituting genuine civilian supervision. In practice however, the HCJ, whose competence and rules

---

[11] Expert opinion of Prof. Eyal Benvenisti, "The duty of the State of Israel to investigate violations of the law of armed conflict", submitted on 13 April 2011 to the Turkel Commission (hereinafter: Benvenisti's report to the Turkel Commission), p. 24. On the Turkel Commission see Annex 2.

[12] "[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". UN Report of the Committee of Experts on Follow-up to Recommendations in the Goldstone Report, A/HRC/15/50, 23 September 2010 (hereinafter: First Report of the Committee of Experts in follow-up to Goldstone), paragraph 91; See also the Second Report of the Committee of Experts on Follow-up to Recommendations in the Goldstone Report, A/HRC/16/24, 5 May 2011, (hereinafter Second Report of the Committee of Experts in follow-up to Goldstone), paragraph 41.

[13] "The mechanism is calibrated for the inspection of individual incidents, complaints of war crimes as individual incidents (…). This is not a mechanism for policy. True, it is not suitable for this." - 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] Prof. Yuval Shany et al, "Response to the Military Advocate General's Position Paper on the Investigation of Allegations of Violations of International Humanitarian Law", February 2011 (hereinafter: IDI, Shany, Cohen, Experts response to the Chief Military Prosecutor's testimony to the Turkel Commission), para. 64. http://www.idi.org.il/sites/english/ResearchAndPrograms/NationalSecurityandDemocracy/Terrorism_and_Democracy/Newsletters/Documents/IDI_Response_for_Turkel_Commission_English.pdf>

of procedure are designed to be invoked only in exceptional cases, is an organ 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 States Attorney General decisions is very limited and results in an important deference to the executive power. The decision to open an investigation or to indict is made under the broad discretion of the authorities especially when the decisions are based on an examination of the evidence.[17] The State's decision, as noted by Deputy Chief Justice Rivlin,

> *"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."*[18]

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).[19] Moreover, the HCJ has accepted that certain considerations may limit its ability to intervene even where this standard is fulfilled.[20] In addition, 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, resulting in a delay that 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 allegations[21]. In 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."[22]

1.2 Functional deficiencies: lack of promptness

The second factor listed in the Rome Statute to determine 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,

---

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

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

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

20 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". 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 Human Rights Watch, Promoting Impunity, July 21 2005.

21 See also , IDI, Shany, Cohen, report to Turkel Commission paras. 91- 102

22 HCJ 474/02 Thabit v. Attorney General, judgement of 30 January 2011, decision of President Beinisch. See also, IDI, Shany, Cohen, Experts response to the Chief Military Prosecutor's testimony to the Turkel Commission, paras. 95 et seq.

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."[23]

The failure to ensure promptness in the initiation and conduct of investigations in Israel is a principal reason for the lack of effectiveness of the investigation. Many investigations are opened several months and sometimes years from the time of the incident due to long unjustified delays in the opening of investigations due to the MAG's decision-making process.[24] It should be emphasis that in the regular Israeli criminal system these kind of systematic undue delay in opening criminal investigation does not exist. Similarly, the procedures before the HCJ aiming at reviewing the authorities' decisions related to investigations or prosecutions are excessively long.[25] Due to this delay, 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. Remarkably, the HCJ itself stated opening investigations on events that occurred in the last decade is pointless because of the time that have passed and its negative impact on the possibility of collecting evidence for criminal trials[26].

One example, among numerous others, is the killing of Firas Qasqas in 2007. He was allegedly shot in the back from long range whilst unarmed and posing no danger to the soldiers, without any warning having been issued. The investigation was opened one year later due to the persistence of Btselem's demands in this respect[27]. Four years and a half after the incident, Btselem submitted a petition demanding that a decision be made with regards to the prosecution of those involved in the killing.[28]

In many cases the MAG's decision to open an investigation required the submission of a petition to the HCJ, or a threat thereof being 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.

---

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

24 See annex (b) to the report submitted by ACRI to the Turkel Commission detailing requests for the opening of investigations ACRI and Btselem filed to the MAG during 2005. See also, Btselem, 'No Responsibility' September 2010, pp. 17-19 (for updated information). See also the examples provided in Yesh Din's submission to the Turkel Commission, paras. 121 and 126. In one of the examples, a complaint was 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.

25 Most petitions submitted to the HCJ demanding the opening of an investigation of the killings of Palestinians in the West Bank and Gaza Strip often remain pending before the Court for a considerable number of years. For example, Israeli human rights organizations 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 Gaza Strip. See HCJ 9594/03, B'Tselem, et al. v. The Military Judge Advocate General (2011). Only very recently a decision was rendered. 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, to-date, over four years later, remains pending before the Court. HCJ 3292/07, Adalah, et al. v. Attorney General (case pending). See also the cases listed in Annex 3

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

27 On 24 January 2008 the MAG's office informed Btselem that the military police was instructed to take testimonies from the witnesses in the case, which indicates the opening of an investigation. On 28 February 2008 a military police officer requested Btselem's assistance in contacting the Palestinian witnesses. Such measures are usually the only indicators for the opening of an investigation, since no formal response is usually sent to inform that an investigation has been opened. Correpondence between Btselem and the author of the report, August – September 2011 (on file with author).

28 HCJ 941/11 Btselem, Qasqas inheriters v Chief Military Prosecutor et al, petition submitted on 2 February 2011, para. 1. See, Gideon Levy, 'IDF's law enforcement is a joke of a justice system', Haaretz, 25 August 2011 http://www.haaretz.com/print-edition/opinion/idf-s-law-enforcement-is-a-joke-of-a-justice-system-1.380545. Haim Levinson, 'Batallion commander that shot a Palestinian in the back against the rules of engagement will be tried', Haaretz, 24 August 2011 http://www.haaretz.co.il/hasite/spages/1239368.html.

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

A further factor for assessing the unwillingness of a State provided by the Rome Statute is that "the national decision was made for the purpose of shielding the person concerned from criminal responsibility."[29] 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."[30] The ICC's jurisprudence on admissibility confirms that the requirement is that there be an investigation and prosecutions of "those most responsible for the most serious crimes."[31] 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."[32]

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, stating the following:

> "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."[33]

It is indeed not only unfeasible but also unreasonable that the MAG be responsible for the investigations of high-level political members as this would contravene the very governmental structures that subordinate 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 conduct of such investigations. In addition, the close relationship between the military and political echelons in Israel, where most military policy decisions are made by the political echelon, is compatible with the fact that a criminal investigation into war crimes allegations has never been conducted against a member of the political echelon. An example of this is found in the Hess case, in which the HCJ did not accept to review the decision not to open a criminal investigation against high political and military officials in the case of Salah Shehadeh, 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, killing Shehadeh and 14 civilians, injuring at least 100, and caused massive destruction to residential buildings. Instead, the decision whether to open an investigation was deferred by the HCJ to a State-established committee composed mainly of former military and security officials, that lacks the elementary powers needed to conduct a criminal investigation. That legal saga proceeded for more than eight years, ending with the committee's decision not to open an investigation, while the evidential basis for their decision remains unknown.[34]

---

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

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

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

32 ICC-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, decision of 30 May 2011, para. 27.

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

34 For more details, see the Hess case in annex 3.

ii. Shielding the military echelon

The Israeli military justice system establishes four different investigative mechanisms that are meant to hold military personnel to account 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.[35] Generally, most of the investigations undertaken by the army according to one of these options fail to lead to a criminal prosecution, which are initiated in exceptional cases, and which involve most generally low rank soldiers who violated military orders on their own account. As different cases have shown, officers are often submitted to disciplinary proceedings instead of criminal ones.[36] The Israeli NGO Yesh Din reports that from the beginning of the second Intifada in 2000 until the end of 2009 only 6% of criminal investigations yielded indictments against soldiers, of which only 13 investigations pertained to killings of Palestinian civilians. In only four killing cases of Palestinian civilians were any soldiers convicted.[37] 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 indictments[38].

The low number of criminal investigations and prosecutions, i.e., the shielding of military personnel in practice, is largely due to the army's policy of recourse to operational debriefings[39] – a classified inquiry within a specific army unit, the purpose of which is to draw operational conclusions.[40] However, according to international law operational debriefings are neither suitable nor relevant to criminal investigations, let alone prosecutions, 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 reliance on classified operational debriefings,[43] which in most cases results in the closure of the case without any means to review the process of the check, also testifies to the system's lack of transparency. This effectively bars any person from having access to the investigations materials in order to effectively challenge the process or conclusions of the army's internal checks.[44]

---

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

36 See examples below in the section on human shields.

37 See, Yesh Din, "Data Sheet- IDF Investigations of IDF offenses against Palestinians: Figures for 2000-2009" (February 2010); Yesh Din, "Exceptions - Prosecution of IDF soldiers during and after the Second Intifada, 2000-2007" (2008).

38 Shany and Cohen, "The IDF investigates itself - Investigation of war crimes allegations", July 2011, (Hebrew), p. 25

39 Press release, "B'Tselem to Turkel Commission: Independent investigation apparatus must be appointed to investigate suspected breaches of laws of war", 11 April 2011.

40 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.

41 Shany and Cohen, "The IDF investigates itself - Investigation of war crimes allegations", July 2011 (Hebrew), p. 38-41. 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 (judgement of 21 August 2011) paras.12.

42 IDI, Shany, Cohen, Experts response to the Chief Military Prosecutor's testimony to the Turkel Commission, para. 42, 46-47.

43 Article 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.

44 See 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 (hereinafter: Goldstone report) raised serious allegations of war crimes and crimes against humanity committed by Israel in Gaza in December 2008-January 2009. In order to ensure accountability for these acts, criminal investigations should be conducted leading to prosecutions, where appropriate. According to the March 2011 UN Experts Committee report Israel opened 400 command and 52 criminal investigations.[45] Yet, all these investigations have been conducted within the military system, by military personnel, whose top echelon was itself involved in issuing and legitimizing the orders in situations of 'real time' combat. Of these numerous investigations only three prosecutions were initiated, almost three years after Israel's 'Operation Cast Lead' – all these cases were against low-ranked soldiers who violated the army's orders (See Annex 1). Not a single investigation by Israel examined 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,[46] while regrettably, some mistakes had occurred.[47]

The Palestinian Center for Human Rights (PCHR) reported that of 490 criminal complaints that the organization submitted to the Israeli Military Prosecutor requesting the opening of a criminal investigation, only 21 received a (laconic) response, whilst updates on the proceeding of the investigation have not been provided.[48] Meanwhile, the status of the ongoing investigations or the evidence that led to the discontinuation of certain inquiries remains, in most cases, unknown and inaccessible.

In the follow-up on the Goldstone report, Israel has produced five long reports,[49] where Israel's international lawyers have rigorously engaged in refuting claims about its responsibility for violations of international law, one must not be mislead by these efforts and rhetoric. The reasons for the lack of accountability are not related solely to the lack of political will expressed in practice, but also, most eminently, to the structural deficiencies of the system itself, which 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 the two UN expert reports that monitored the follow-up to the Goldstone report (See Annex 2).

---

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

46 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 (2) "The Operation in Gaza: Factual and Legal Aspects", July 2009, paras. 222 and 405.

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

48 PCHR, "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", February 2011, paras. 7-13.

49 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)

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*.[50]

The HCJ has exercised its jurisdiction very broadly and was willing to adjudicate cases even during actual combat[51]. Moreover, as it has issued a number of landmark decisions in which it imposed (or appeared to impose) limits on the State, a strong worldwide reputation for the Court and the Israeli legal system as a whole has been established over the years. At the same time, since the beginning of the occupation, grave and systematic violations of IHL continue to be committed, unabated by the Court.[52] While discussing different landmark cases and their follow up implementation, this section describes the role of the HCJ in its exercise of judicial review of the State's acts and policies that may amount to international crimes. 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, and assisting in the shielding of the political and military echelons from criminal responsibility.

2.1 The HCJ's failure to stop illegal practices: The 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.[53] A month after the ruling was delivered, the State 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. The State's motion was rejected.[54] Following the HCJ's decision, the army proceeded to modify its orders.[55] Yet, despite these official proclamations and the HCJ's decisions, Israeli and international experts and organizations, 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 investigation or prosecution against those responsible for committing such crimes."[56]

---

50 Prof. Cassese et al, Informal Expert Paper: The Principle of Complementarity in Practice (2003), para. 35

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

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

53 HCJ 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. Ronald Otto, 'Neighbours as human shields? The Israel Defense Forces' "Early Warning Procedure" and international humanitarian law', International Review of the Red Cross, Vol 86, No 856 (December 2004).

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

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

56 Adalah, "Update Report: On the Israeli military's continued use of Palestinian civilians, including minors, as human shields", July 2009.

Though several allegations of use of Palestinians as 'human shields' were raised by the Goldstone report, only one case was brought before an Israeli court.[57] It was affirmed by the authorities that sufficient evidence was found in another case that involved a senior army commander[58]. Yet, whilst Israel recognizes that the use of 'human shields' amounts to a war crime[59], and insists that "disciplinary proceedings are reserved for less serious offenses"[60], the senior army commander in this case was indeed subject to disciplinary proceedings, instead of conducting a criminal trial, for reasons that remain unknown.[61] Similarly, in October 2007, the MAG decided not to prosecute the military commander of the West Bank, Brigadier General Yair Golan, who ordered the use of the 'Early Warning' procedure in five cases. Instead, he was subjected to a soft disciplinary sanction.[62]

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.[63] Nevertheless, allegations of torture have continued to be recorded. Unlike in the Human Shields case, where the state disregarded the Court's judgement, here it was in fact implementing the HCJ's ruling that had afforded it a broad margin of appreciation, effectively enabling it to continue implementing its policy. In its judgement, the HCJ declared certain interrogation techniques as illegal, as these did not have a basis in national law. It held that the "necessity defense" cannot serve as the basis for such authority and that "if the state wishes to enable General Security Service investigators to utilize physical means in interrogations, it must enact legislation for this purpose."[64] With its ruling, the Court allowed the possibility of codification of the use of torture instead of preventing it, in defiance of the absolute prohibition in international law. It 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'."[65] 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 Court upheld a legal construction that in fact results in the same practice: it allowed the use of torture and ill-treatment, although being declared illegal. What the Court explicitly ruled to be illegal was subsequently legitimized by the very same ruling.[66]

<http://www.adalah.org/newsletter/eng/jul09/Rana Human Shields update report Englsih july 2009.pdf>. In 2007 Btselem documented twelve such cases. <http://www.btselem.org/english/human_shields/timeline_of_events.asp>.

57 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; PCATI and Adalah, "Exposed: The Treatment of Palestinian Detainees During Operation Cast Lead", June 2010, pp. 10-13.

58 State report, July 2010, para. 37.

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

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

61 "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/>.

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

63 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.

64 Ibid, para. 37.

65 Ibid, para. 38.

66 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.[67] Thus, the HCJ landmark decision resulted in the institutionalization of interrogators' immunity from prosecution.[68] 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.[69] In their 2009 report they demonstrate 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 recommendations not to open a criminal investigation are always accepted by the high-ranking attorney in charge of the cases at the Ministry of Justice and by the State Attorney General.[70]

As for the HCJ's judicial review of decisions not to open criminal investigations, despite the submission of thoroughly evidenced allegations of torture and other forms of ill-treatment, in June 2005, the HCJ deferred the decision to the investigation authorities, granting them a very wide margin of appreciation on whether or not to open criminal investigation.[71] Following this decision, the organizations and victims refrain from submitting other cases as they saw no possibility of having a remedy. Instead, in 2009 three major human rights organizations 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. It was claimed that the pattern of shielding alleged torturers – as demonstrated by the systematic rejections of hundred of complaints – demands the intervention of the HCJ. However, this petition was rejected on the grounds that the Court does not address general policies in contempt procedures and recommended to submit individual cases.[72] Since, three individual cases were submitted, one was rejected on procedural grounds and the other two remain pending.[73]

---

67 "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". PCATI, "Accountability Denied: The Absence of Investigation and Punishment of Torture in Israel", December 2009, p. 93. For more discussion see also, Yuval Ginbar 'Celebrating' a Decade of Legalised Torture in Israel' available at <projects.essex.ac.uk/ehrr/V6N1/Ginbar.pdf>.

68 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." Crim App 4705/02 Anon v. State of Israel, decision of 30 December 2002, para 1.

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

70 PCATI, "Accountability Denied: The Absence of Investigation and Punishment of Torture in Israel", December 2009.

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

72 "HCJ rejected the contempt of court Petition filed by PCATI and other organizations", 6 July 2009, http://www.stoptorture.org.il/en/node/1460

73 A recent HCJ petition demanding the opening of investigations for alleged torture and ill-treatment in the cases of 13 former detainees was rejected on the grounds that the procedure for complaints had changed during the proceeding and the authority to investigate such cases was transferred, following the submission of the petition, to the Ministry of Justice, from the AG's office, without clear instructions about the changes or the current form of the complaints procedure - HCJ 6138/10, HaMoked v. Attorney General, judgement of 12 January 2011. Another recent HCJ petition submitted this year by PCATI on behalf of 6 human rights organisations and 10 Palestinians who were subjected to torture or other forms of ill-treatment, demanding criminal investigations in these cases, remains pending before the Court, HCJ 1265/11, PCATI et al. v. Attorney General, pending (hearing set for January 2012). The authors wish to thank PCATI for providing this information.

- Legitimizing incommunicado detention

The HCJ has also facilitated the occurrence of torture by allowing for the extensive use of incommunicado detention orders that deny access to counsel for detainees under interrogation.[74] 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 by the Court, including those in which torture was explicitly acknowledged.[75] The Court's practice has had a considerable effect on the readiness of individuals and organizations to file complaints or petitions in these cases. Victims have also realized that they have little to gain from complaining, whilst often being fearful of the GSS reprisals in such cases.

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 declared the matter to be non-justiciable.[76] In the 1970's the HCJ rendered a number of decisions concerning the settlements, in which the Court reviewed only the legality of the expropriation orders, forming a policy of defending the property rights of the petitioners, whilst avoiding the review of the general policy.[77] In the aftermath of the only case in which the HCJ found a requisition order to be illegal in the early 1980's, 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'.[78] In 1993, the Bargil case, which challenged the legality of the settlements policy, was rejected on the grounds of lack of standing and it being a 'political question' making the case non-justiciable.[79] Recently, the legality of Israel's settlements in the OPT

---

74 PCATI brief to UN CAT, April 2009, paras. 5-7. See also, PCATI, "When the Exception becomes the rule", Periodic Report, November 2010.

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

76 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

77 HCJ 390/79 Dawikat v. State of Israel (1979); HCJ 606/78 Ayub v. Minister of Defense (1979). See there Justice Vitkon at p. 124 : "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…".

78 Preventing thus from petitioners standing to question the legality of the settlements, see David Kretzmer, The Occupation of Justice, p. 89

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

was reviewed by Court in petitions concerning the legality of the Wall, following 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.[80] 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*.[81]

•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, leaving the matter to be decided by the executive power, 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 enabled through different methods the creation of an Israeli legal regime in the OPT, affording settlers the Israeli legal constitutional, economic and social rights, which was a precondition for effecting the settlement policy.[82]

An example of this is the HCJ's extension of the legislative authority of the military commander to include the regulation of the needs of the settlers by military orders. The HCJ held that Article 43 of the Hague Regulations recognizes 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. Already in 1972, the HCJ interpreted the term "local population" to include settlers,[83] allowing the military commander to issue the laws necessary to regulate the settlers' daily life, in form of military orders, without being required to apply Israeli law extraterritoriality. The military commander could simply import Israeli law through military orders, allowing the State to legislate the laws that were necessary to facilitate 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 install two sets of laws over two separated populations, as the needs of the settler population required a different legislation than that enacted for Palestinians. Yet, as these orders are not regularly published in any official gazette, that massive legislation project has been obscured, and since this legislative project was effectuated under the guise of IHL measures, their real character remain disguised: It enabled the State to install two separate legal regimes without needing to officially annex territory, and without formalizing that legislation that reflect the character of an apartheid system.

---

80 The International Court of Justice, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, [2004] I.C.J. Rep. 136, para 120.

81 "The 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. It is not relevant whatsoever to this conclusion to examine whether this settlement activity conforms to international law or defies it, as determined in the Advisory Opinion of the International Court of Justice at the Hague...". HCJ 7957/04 Mara'abe et al v. Israel Prime Minister et al. (2005), paragraph 19.

82 For example, the HCJ extended the personal jurisdiction of Israeli constitutional law to all Israelis in the OPT. "This jurisdiction [of the Israeli Constitutional Laws] is personal... It is the fruit of a view by which the state's Basic Laws regarding human rights apply to Israelis found outside the state, who are in an area under its control by way of belligerent occupation", HCJ 1661/05, The Gaza Coast Regional Council v. The Knesset (2005), paragraph 80; See also, Marabe case, para. 21. See also, Benvenisti, Eyal, The International Law of Occupation (Princeton, Princeton University Press, 2004) pp. 129-133.

83 HCJ 256/72, Electricity Company for Jerusalem District v. Minister of Defense (1972). Since, the local population have been constantly referred as including the settlers.

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"*[84].

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.[85]

In the case of Israel, it was the law of military occupation that provided the authority to establish the military courts system in 1967 having jurisdiction over civilians in the OPT.[86] Since, the military courts system has judged hundreds of thousands of Palestinian civilians in proceedings that denied their right to a fair trial. It is estimated that during the years of occupation, approximately 700,000 Palestinian have been detained under Israeli military orders.[87] Thus, IHL, which was designed to serve as an *ad hoc* law with a short duration of applicability, has enabled the State of Israel to establish a special jurisdictional regime to try a vast number Palestinians for almost 45 years. This judicial regime consists of military orders as the criminal code and its own rules of due process, whilst soldiers (who until 2004 were young officers without legal background) are appointed as judges.[88]

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) has been expanded or restricted according to the nationality of the perpetrator. They exercise jurisdiction over the civilian Palestinian population, and refrain from exercising their competence over the Israelis. As result, Palestinians and settlers, who commit the same crime in the same place, are subjected to the jurisdiction of two distinct legal systems, one military, and the other civilian. These two legal systems differ considerably in many respects, including substantive and procedural criminal provisions, due process guarantees, 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

---

84 Ibid, para. 45

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

86 Articles 64 and 66 of the Fourth Geneva Convention.

87 Goldstone Report, para 1444. Between 1993 and 2000 alone, more than 124,000 people were prosecuted in military courts 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.

88 See Benisho, ibid at p. 312-313.

time to reexamine the criteria for bringing people before the military courts, so that all those who commit offenses are subject to equal treatment.'[89]

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 nationality[90], 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.[91] 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."[92] As a result, a situation of concurrent jurisdiction was created. Both Israeli civil and military courts have jurisdiction over offenses committed in the OPT by Israelis, and there is no provision on the priority in adjudicating between the systems, allowing for a selective policy to be implemented through the practice. In early cases, military courts recognized that the parallel jurisdiction of the Israeli courts did not deprive the military courts of their authority to adjudicate settler cases.[93] However, since 1979 the HCJ has affirmed the practice of applying only Israeli criminal law and not military law to settlers.[94] According to the former President of the military court of appeals, Colonel Shaul Gordon, this policy was introduced for substantive and practical reasons. Being tried in Israel, during their investigation, detention and trial, Israelis enjoy significantly more favorable procedural rights as guaranteed under Israeli law. Moreover, for practical reasons, it was also seen as dangerous to detain Israeli and Palestinian detainees in the same detention units.[95]

Yet, the policy of shielding Israelis from military law and courts system has been practiced through a distinction between Jewish and Palestinian Israeli nationals, the latter being subjected 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.[96] The lack of a rule to regulate the concurrence of jurisdictions of the two legal systems facilitates the practice of a discriminatory policy, enabling separation of jurisdiction without explicitly legislating discriminatory laws.

---

89 Ofer Military court judge M. Liberman in, 4333/08 Military Prosecutor v. Anbaui Issa, decision of 21 September 2008 (on-file with authors).

90 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

91 Art. 2(a) of the Emergency Regulations (legal assistance) states that "Israeli courts have jurisdiction to try according to Israeli law any person who is present in Israel and who committed an act in the Region, and any Israeli who committed an act in the PA, 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) was enacted stating that 'this Regulation does not apply on residents of the Region or the PA, who are not Israelis'. Until this final version was reached, this section was amended a few times – first it excluded all residents of the Region, then it had to include the settlers, and finally to amend it according to the Interim Agreement.

92 HCJ 831/80, Tsoba v. State of Israel (1980) at p.174. The Emergency Regulations (legal assistance) thus constitute a violation of the principle of territoriality, according to which all persons residing in a giving area are subject to the same system of law. The term 'region' in the judgement refers to the West Bank.

93 See the case of 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), page 130. HCJ Levy v. General in Chief (1967); HCJ 507/72 Arnon v. Attorney General; English summary in 9 IYHR (1979) p. 334.

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

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

96 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.

Besides the structural deficiencies concerning the lack of independence and impartiality inherent to military courts[97], their rules of procedure also demonstrate a 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 sticking differences compared to the Israeli criminal system. In the military law system Palestinian detainees may be detained for up to: eight days before being brought before a military judge (compared to 24 hours / 72 hours for security offenses in Israel); 90 days without access to a lawyer (compared to 48 hours / 21 days for security offenses in Israel); 188 days before being charged (compared with 75 days in Israel).[98] Moreover, the Israeli military court system treats Palestinians as adults from the age of 16, while in Israel adults are those above the age of 18. Additionally, there is no law and very little practice of adherence to the presumption of innocence, resulting in the fact that only in 0.29% (out of 9,123) of the cases in 2006, the defendant was found entirely 'not guilty'.[99] The de facto restrictions on the presence of the public at court hearings, and with the lack of effective access to the courts' decisions, amount to systematic violations of the right to a public and transparent trial of defendants. Furthermore, defendants are notified of the charges against them whilst in detention or during the prosecution's motion requesting arrest until the end of proceedings – these are provided in Hebrew and defendants are most often asked to respond to them at once.[100] There is also no limitation on the period of detention before an indictment is filed,[101] whilst 95% of cases do not involve a presentation of evidence and witnesses but rather the negotiation of a plea-bargain between the parties.[102] Concurrently, severe restrictions are imposed on lawyers' ability to provide effective representation to their clients, including primarily the significant barriers to access their clients and the materials to argue their case.[103]

These procedures create a reality in which Palestinian defendants become victims of the military judiciary through its systematic violations of international humanitarian and human rights law, which result in their scope and extent in a denial of the rights of fair and regular trial and the denial of justice, which may amount to a war crime[104].

---

97 The rules of international human rights law, which state that in general military courts should not try civilians, because they do not comply with the obligation of independency and impartiality. 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 Doc.HRI/GEN/1/Rev.1: UN document E/CN.4/1998/39/Add.1, paragraph 78. Regarding 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 trial 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.

98 Adv Limor Goldstein and Nery Ramati from Gaby Lasky and Partners, Law Offices.

99 Official data obtained from the Military Court Unit, cited in Yesh Din, Backyard Proceedings: The implementation of due process rights in the military courts in the occupied territories', Summary of findings and recommendations, December 2007, 4-5 <www.yesh-din.org/site/images/BackyardProceedingsEng.pdf>.

100 Defense attorneys who do not read Hebrew are forced to rely on a rushed translation in court. Ibid, 6.

101 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 held in arrest until the end of proceedings for a period of up to one year, and close to 200 for a period of over one year. Ibid, 8-9.

102 Those who refuse to accept a bargain are often 'punished' for not having the good sense to do so, thereby elevating from the work of the court and the prosecution. Chief military prosecution date, cited in Ibid, 9.

103 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 during their visits, prevented from having access to all the materials. Ibid, 7.

104 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 to demonstrate Israeli legal system's 'unwillingness' to investigate and prosecute allegations of international crimes, as required for the ICC admissibility requirement set in Art. 17 of the Rome Statute. The report examined different components of the Israeli legal system : the criminal 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 their jurisdiction over the Palestinian civilian population.

Almost entirely under the responsibility of the military legal system, the Israeli war crimes investigation system fails to fulfill international law standards of impartiality and independence. Due primarily to the structural deficiencies of Israel's judicial system with the concentration of power in the hands of the MAG. Moreover, the HCJ's narrow scope of review over decisions related to investigations and prosecutions is characterized by unjustified delays that result in the shielding of the political and military echelons, operating under a policy of deference to the executive power. Israel's military investigations focus only on specific incidents of misconduct of individual soldiers and on deviations from orders, rules of engagement or policies. To date, Israel has refused to investigate the wider context of the policies, strategies, regulations and objectives of a military operation, leaving the decisions of senior military and political policy-makers outside of the scope of the scrutiny of the Israeli military investigations. 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 Gaza Strip is an insightful example of the deficiencies of the Israeli system, which present overwhelming indicators of Israel's unwillingness to investigate and prosecute war crimes committed by its army and the higher chain of command, including the political echelon.

The State, with the support of the HCJ, has been unwilling to pursue certain offenses and 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 become 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 through deference to the executive power (e.g. the Torture case) and in facilitating war crimes (e.g. the settlement project).

Israel's military courts in the OPT present further evidence for the deficiencies of the Israeli legal system, which result in its 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 their jurisdiction – a jurisdiction exercised only on the Palestinian civilian population in hundreds of thousands of cases since their establishment in 1967. With striking differences from the Israeli criminal system, as shown in reports by local and international non-governmental organizations and experts, the military courts practice and policies systematically violate the fundamentals of fair and regular trial guarantees – practices that may amount to 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. Over forty years of occupation characterized by a long-standing policy of settlement construction and military control over millions of civilians, involving routine allegations of severe war crimes, are not (and cannot) be genuinely prosecuted and adjudicated by Israel's domestic system. As such, the case of Israel's unwillingness amounts squarely to a situation in which the 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 Cast lead[105]

Case no. 1 (August 2009): Theft of credit card. Indictment: looting. Sentence: seven and a half months' imprisonment.
In January 2010, a year after 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 FFM report: one soldier had been prosecuted and convicted for stealing a credit card.[106] While sentencing him for seven and a half months' imprisonment, 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.[107] 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."[108]

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

On 16 June 2010, the Israeli daily newspaper Haaretz reported[109] that the army would charge a soldier for shooting and killing two Palestinian women, a case that was mentioned in the Goldstone report; yet, 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 in relation 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, which 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".

---

105 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 account.

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

107 Army Blog, Military Advocate for Operational Affairs, "Indictment filed in connection with 'Cast Lead'", 11 March 2011 <http://www.military advocate general.idf.il/164-3952-en/Patzar.aspx?SearchText=human%20shields%20gaza http://www.idi.org.il/sites/english/ResearchAndPrograms/NationalSecurityandDemocracy/Terrorism_and_Democracy/Newsletters/Pages/23rd%20Newsletter/3/3.aspx>.

108 "Investigating the Gaza operation", interview with Deputy Military Advocate for Operational Affairs, The Official Weblog of the Israeli army, 9 March 2011 <http://www.military advocate general.idf.il/163-4544-en/patzar.aspx>.

109 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 Experts Committee

The UN expert committee is an independent expert panel established by the UN Human Rights in March 2010 designed to monitor the domestic investigations and proceedings undertaken by Israel following the Goldstone report and assess their conformity with international standards[110]. The UN Experts Committee has published two reports in which it expressed the view that the Israeli military system lacked the necessary structural independence to thoroughly investigate allegations.[111] It found that the investigations carried out were neither sufficiently transparent nor prompt, which impaired their effectiveness and the prospects of achieving accountability and justice.[112] Finally, it criticized Israel for not investigating those who had designed, planned, ordered and overseen the military operations during the 'Operation Cast Lead' offensive on the Gaza Strip, as one of the main flaws in the investigation process.[113]

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 Israeli government in June 2011 in the aftermath of the Flotilla raid. 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" [114]. The commission consists of four Israeli members (none of them are experts in international law) and two international observers. Unlike the UN Experts Committee, 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, 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.

---

110 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.

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

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

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

114 The testimonies on the domestic system of investigation given by the 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) Btselem et al. case (2003)

One of the first petitions challenging the MAG policy not to open criminal investigations, submitted to the HCJ in 2003, had remained pending before the Court over seven years[115]. The army's official policy since 2000 was not to open criminal investigation in cases in which Palestinian civilians were killed by soldiers.[116] In the course of the procedures before the Israeli HCJ challenging this policy, the State 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."[117] Yet, this policy is restricted to the West Bank, being inapplicable to the Gaza Strip. On 21 August 2011, the HCJ finally rendered its judgementjudgement in the case. It rejected the petition on the basis of the claim that the MAG's recent change in policy resolves its main demand.

(ii) Hess case (2003)

In 2008, the Court refrain from overturning the decisions of the State Attorney General and the MAG not to open a criminal investigation against civil and military high officials in the case of Salah Shehadeh, 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, killing Shehadeh and 14 civilians, including nine children, injuring at least 100, and caused massive destruction to residential buildings[118]. In its ruling the Court 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.[119] That committee, which consisted mainly of former security and military personnel, decided in 2011, more than eight years after the event, not to open a criminal investigation.[120]

(iii) Atrash case (2005)

The case was submitted by a relative of Mr Al-Nebari, a Palestinian who was killed by the Israeli army, also did not result in any effective investigation or prosecution. A petition filed on 9 March 2005, was rejected almost three years later by the HCJ, which also refused to order the military to provide information it possessed about the circumstances of the death. A subsequent

---

115 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>.

116 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., judgement of 21 August 2011.

117 "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>.

118 HCJ 8794/03, Hess v. The Military Advocate General (decision delivered on 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

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

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

HCJ petition demanding that the MAG indict the soldiers responsible for the killing was rejected by the Court, concluding that the circumstances did not justify its intervention in the MAG's decision.[121]

(iv) Hamoked et al. case (2005)

In June 2005, a strong sample of thoroughly documented and evidenced allegations of torture and other forms of ill-treatment of Palestinians under interrogation were submitted to the HCJ demanding that investigations be opened followed by prosecutions, where appropriate, in the cases. The Court proceeded to defer the decision on whether or not to open criminal investigations to the state investigation authorities, granting them a very wide margin of appreciation.[122] Its judgement confirmed that the authorities are also capable of deciding upon the scope and extent of the inquiries on the basis of the circumstances of each case (without the Court's interference), having due regard to the credibility of the victims' claims, which was the central claim in the state's reasons for its decision not to open criminal investigations into the cases.

(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 Court firmly denied the investigation of the soldiers on suspicion that they carried out illegal orders, and then merely recommended the investigation of the general practice of the opening-fire regulations in order to ensure that they comply with the official orders.[123]

(vi) Adalah et al. case (2007)

This HCJ 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 until this day.[124] The sole investigatory mechanism has been an inherently flawed 'committee of examination', a procedure that cannot constitute an effective criminal investigation, inter alia, on the basis of its status, powers and composition, despite the Court's own instructions to appoint a committee of examination that fulfills such basic requirements (independence, thoroughness and objectivity). Despite the fact that in a subsequent case the Court itself had acknowledged the illegality of the attack,[125] it remains however, that, over eight years after the attack, despite significant legal efforts made on behalf of the victims, no effective criminal investigation was conducted.[126]

(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 consisted of the following:

> "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 commander, and I re-

---

121 The 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, judgement of 18 July 2007.

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

123 Justice 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. judgement of 14 December 2006, para. 37.

124 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.

125 HCJ 769/02, The Public Committee against Torture in Israel v. The Government of Israel, judgement of 11 December 2005, para. 46.

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

tain my position … [that charges of 'conduct unbecoming'] is the most appropriate legal response to the circumstances of the incident."[127]

In July 2009, with the special circumstances of the shooting being recorded on video and viewed by hundreds of thousands of people around the world, the HCJ issued a landmark decision ordering the indictments to be changed.[128] 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 punishment imposed on them were very light- the soldier was demoted, and the officer was solely suspended from a commanding position for a year. The Court Martial noted that they already suffered enough from a listing on their criminal record.[129]

(viii) Avery case (2005)

The case of an American volunteer who was shot in the face by the Israeli Army on 5 April 2003, the HCJ demanded the MAG review his decision not to open an investigation without however explicitly ordering a criminal investigation to be opened.[130] As a result, no criminal indictment was ever filed in this case. In November 2008, Avery accepted a settlement for NIS 600,000 (USD $150,000) from the state in exchange for dropping the lawsuit. According to his lawyer, Avery was willing to settle the case because of the need to defray some of the costs of reconstruction operations he must still undergo, in addition to skepticism that the 15-month-long investigation would ever reach a satisfactory conclusion[131].

---

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

128 HCJ 7195/08, Abu Rahma v Military Advocate General et al (1 July 2009)

129 Hanan Greenberg, 'Naalin shooting: Batallion commander won't be demoted', Ynet, 27 January 2011 <http://www.ynetnews.com/articles/0,7340,L-4019996,00.html>.

130 HCJ 11343/04, Brian Avery v. The Military Advocate General (1 March 2005). The shooting, which was unprovoked and did not occur in the context of any apparent hostilities, caused Mr. Avery permanent disfigurement. For more information, see Jerusalem Post, "Wounded Activist Testifies against IDF", 20 September 2007 <http://www.jpost.com/Home/Article.aspx?id=75945>.

131 According to Shlomo Lecker, his Israeli lawyer, "The sum does not reflect the injuries Avery suffered... On the other hand, it's one of the very few times the state has awarded damages to anyone hurt by the IDF during the Second Intifada." See also, <http://www.jpost.com/Home/Article.aspx?id=121136>.

ANNEX 4 : Compensation

The denial of justice to Palestinian in the Israeli system is also manifested in its failure to afford Palestinian victims of international crimes compensations. Israeli legislation and administrative practice effectively bars Palestinians from having access to civil remedies in the Israeli system through procedural and substantive obstacles, both in the course of the proceedings as well as in their preliminary stages.

The first prerequisite to the submission of 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 within 60 days of the incident.[132] 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', no response to those complaints is usually received.[133] Even within the complaints that are submitted to the MoD have resulted in the vast majority of cases in no more than an interlocutory response, which usually denotes the end of the correspondence, as only in the exceptional cases has the MoD call witnesses to testify.[134] 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.[135] As a result of an inherent bar to access to such information by petitioners,[136] incomplete files that are evaluated for whether civil responsibility applies with respect to the incident in question, are rejected at the outset due to their inability to fulfill this requirement. These cases do not pass onto the second stage of the assessment where the Court decides whether the claimants have a right to compensation, and for what amount.[137]

There are also a number of substantive obstacles stand in the way of victims seeking remedies. First, a law passed in 2004, held that compensation would not be awarded for 'combat operations', a term that was 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.[138]

Other bars to access to justice at the preliminary stage of the proceedings are (i) the excessive court fees and guaranties required from claimants[139], and (ii) the prevention of witnesses from traveling to court. Also lawyers from Gaza cannot travel

---

132 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.

133 PCHR, Genuinely Unwilling : An Update.

134 Following Operation Cast Lead, PCHR submitted 1,046 compensation claims. To-date, only 23 interlocutory responses have been received. See, PCHR, Genuinely Unwilling, August 2010.

135 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).

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

137 When the state decides to withhold certain information from the claimant for a given reason, usually related to the ongoing conduct of investigations, the court approves this withdrawal of information, whether it is absolute or partial, and effectively prevents the claimant from presenting their case in accordance with the right to a fair trial and international due process guarantees. Section 5A(4) of the Civil Wrongs Law 1952.

138 Amendment no. 7 exempted the state from liability for damages caused to particular categories of persons, including: (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; Section 5B of the Civil Wrongs Law.

139 Addition to the payment of court fees (of approximately 1,600 NIS per case), 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. This requirement is based on Article 519 of the Israeli Civil Code, whereby the Court is granted the right (not obligation) to request payment of a guarantee, before the case begins, in order to cover the other party's expenses (the MoD in this case) in the event that the case is lost. However, this requirement is applied in a discriminatory manner, i.e. only against Palestinians. For a recent example of these high coasts see, PCHR, "Israeli Courts Issue Two Decisions Denying Palestinians Access to Justice; Place Prohibitive Price on Judicial Remedy", press release 19 September 2011.

to Israel to represent their clients, and lawyers hired from within Israel cannot travel to Gaza to meet their clients, which make the legal representation very difficult.

Since 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.[140] 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, being the first time that PCHR was able to ensure compensation for victims of "Operation Cast Lead" in the Gaza Strip.[141]

A recent HCJ petition, submitted by the Palestinian NGO 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.[142] As of 17 February 2011, no single offer to settle has been proposed by the Israeli authorities. In a judgement from 11 August 2011 the HCJ precluded residents of the OPT from relying on Israel's obligation to provide redress as a civil cause of action stating 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.[143] Instead of providing alternative mechanisms, the current situation effectively bars victims' access to remedies providing for further evidence of the overall unwillingness of the Israeli judicial system to either hold perpetrators accountable or provide victims with effective remedies.

This publication has been produced with the assistance of the European Union. The contents of this publication are the sole responsibility of FIDH and can in no way be taken to reflect the views of the European Union.

Imprimerie de la FIDH - Dépôt légal octobre 2011- FIDH ISSN en cours - Fichier informatique conforme à la loi du 6 janvier 1978 (Déclaration N°330 675)

[140] Between June 2010 and January 2011 PCHR filed 100 tort cases before Israeli courts, relating to 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.

[141] 'PCHR Succeeds in Ensuring Reparation for the Family of Two Victims of the Israeli Offensive on Gaza', Press Release, 01 August 2011.

[142] The petition was submitted after the authorities failed to address the substantive issues presented in the original request communicated in correspondence preceding the initiation of legal proceedings. See, PCHR, Memorandum on the Status Domestic Investigations Conducted into Alleged Violations of International Law committed in the Context of Operation 'Cast Lead'

[143] LCA 3675/09 State of Israel v Mohammed Mohamod Salah Daod, judgement of the Israeli Supreme Court of 11 August 2011, para. 15.

International Federation for Human Rights

Establishing the facts

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.

Supporting civil society

training and exchange

FIDH organises numerous activities in partnership with its member organisations, in the countries in which they are based. The core aim is to strengthen the influence and capacity of human rights activists to boost changes at the local level.

Mobilising the international community

permanent lobbying before intergovernmental bodies

FIDH supports its member organisations and local partners in their efforts before intergovernmental organisations.FIDH alerts international bodies to violations of human rights and refers individual cases to them. FIDH also takes part in the development of international legal instruments.

Informing and reporting

mobilising public opinion

FIDH informs and mobilises public opinion. Press releases, press conferences, open letters to authorities, mission reports, urgent appeals, petitions, campaigns, website… FIDH makes full use of all means of communication to raise awareness of human rights violations.

FIDH - International Federation for Human Rights
17, passage de la Main-d'Or - 75011 Paris - France
CCP Paris: 76 76 Z
Tel: (33-1) 43 55 25 18 / Fax: (33-1) 43 55 18 80
www.fidh.org
Director of the publication: Souhayr Belhassen
Editor: Antoine Bernard
Authors: Sharon Weill and Valentina Azarov
Coordinators: Clemence Bectarte and Stephanie David