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**Human rights situation in Palestine
and other occupied Arab territories**

Written statement* submitted by the Palestinian Centre for Human Rights, a non-governmental organization in special consultative status

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

[15 February 2010]

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

Genuinely unwilling: Israel and the Palestinian authorities fail to conduct genuine investigations into widespread violations of international law committed in the context of Israel's offensive on the Gaza Strip, 27 December 2008 – 18 January 2009

The 12th Special Session of the UN Human Rights Council voted overwhelming to endorse the findings and recommendations of the UN Fact Finding Mission on the Gaza Conflict (the Mission). While stressing, “the urgent need to ensure accountability for all violations of international human rights law and international humanitarian law”, the Council called on all concerned parties, including UN bodies, to ensure the implementation of the recommendations contained in the Mission’s Report.

These recommendations centred upon the realization that the “prolonged situation of impunity has created a justice crisis in the OPT that warrants action.”¹ The Mission thus recommended that Israel, “launch appropriate investigations that are independent and in conformity with international standards”² into allegations arising from the offensive on the Gaza Strip; the Palestinian Authorities were subject to a similar demand. The Palestinian Centre for Human Rights (PCHR) emphasize that the obligation to investigate forms a core component of States’ obligations under both Treaty-based and customary international law.³ This obligation extends to all violations of international human rights and humanitarian law; it is not restricted to those incidents detailed in the Mission’s Report.

PCHR have monitored the status of investigations conducted by both Israel, and the Palestinian Authorities; as a representative of the victims, PCHR also participated in the limited investigations conducted by Israeli authorities. These investigations have not been conducted in accordance with the demands of international law, and are characterized by a desire to shield alleged the accused from justice. As confirmed by the Permanent Court of International Justice and numerous human rights bodies,⁴ a State becomes internationally accountable as a result of “insufficient diligence” in conducting criminal prosecutions.⁵

Recommendations

The best interests of the victims and the primacy of international law demand that Israel, including responsible individuals, be held to account for consistent violations of international law – including grave breaches of the Geneva Conventions and crimes against humanity – and for the failure to investigate such violations.

Consequent to all Parties genuine unwillingness or inability to conduct effective investigations, it is imperative that recourse be had to mechanisms of international justice.

¹ Report of the UN Fact Finding Mission on the Gaza Conflict, U.N. Doc A/HRC/12/48, September 2009, §1755.

² Report of the UN Fact Finding Mission on the Gaza Conflict, U.N. Doc A/HRC/12/48, September 2009, §1766.

³ Inter alia, Article 146 Fourth Geneva Convention; Article 2 International Covenant on Civil and Political Rights; Rule 158, ICRC, Study on Customary International Humanitarian Law, 2005.

⁴ Such as the Human Rights Committee, who note in General Comment 31, that “A failure by a State Party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant [ICCPR].”

⁵ Recueil de sentences arbitrales, United Nations, Vol. II, pp. 645 and 646.

The Human Rights Council must demand that the UN Security Council, acting under Chapter VII of the UN Charter, refer the situation in Israel and the occupied Palestinian territory [oPt] to the International Criminal Court. Each individual State of the international community must also concurrently exercise their obligation to carry out investigations and prosecutions before their own national courts, in accordance with the legal principle of universal jurisdiction. The Council must demand that the rule of law is enforced.

The State of Israel

Israel has systematically failed to conduct genuine investigations. Many of the violations of international law perpetrated during the course of the Israeli offensive on the Gaza Strip – such as the targeting of civilian police forces, and the implementation of the Dahiya Doctrine – were the result of policies adopted by the highest echelons of the civilian and military leadership; raising key concerns regarding the willingness of the authorities to investigate and indict themselves. These concerns are reinforced by Prime Minister Netanyahu's public statement on 12 October 2009, vowing that Israeli soldiers and leaders will not stand trial for war crimes committed during the Israeli offensive.⁶ It is presented that, in this respect, Israel is in violation of its legal obligations, and effectively denies Palestinian victims effective legal remedy. This finding was confirmed by the Dutch Court of Appeals in the Al-Shami v. Ayalon case on 26 October 2009.⁷

Israel opened 36 criminal investigations, of which 7 have been closed due to an alleged 'lack of evidence'. Only one case, for the theft of a credit card, has resulted in a successful prosecution. No investigations have been opened into the overwhelming majority of the allegations; PCHR submitted 450 criminal complaints requesting that criminal investigations be opened, positive replies have only been received in relation to 15 cases. A further 1,028 compensations complaints were filed; only 7 responses have been received.⁸

Flaws inherent in the Israeli legal and investigative systems

Two key problems have been identified with respect to the Israeli legal and investigative system: the reliance on operational probes as a first investigative step, and the Israeli

⁶ See Joseph Federman, "Netanyahu: No war crimes trials for Israelis", The Washington Times, 12 October 2009, available at: <http://www.washingtontimes.com/news/2009/oct/12/netanyahu-no-war-crimes-trials-israelis/> (accessed 14 October 2009); see also "Netanyahu vows never to let Israelis be tried for war crimes", Haaretz, 12 October 2009, available at: <http://www.haaretz.com/hasen/spages/1120498.html> (accessed 14 October 2009).

⁷ See further, PCHR, Justice Denied: Dutch Court Denies Appeal Petition in Ayalon Torture Case, 30 October 2009, <http://www.pchrgaza.org/files/PressR/English/2009/111-2009.html> and the ruling of the Spanish Audencia Nacional, unofficial English translation available at: <http://www.pchrgaza.org/files/PressR/English/2008/04-05-2009-2.html>

⁸ PCHR note that, as representatives of the victims, it is necessary to participate in such investigations; this has been a longstanding policy of PCHR. However, as detailed in this, and other reports, PCHR do not believe that these investigations adhere to the requirements of international law. See further, The Palestinian Centre for Human Rights, Genuinely Unwilling: Israel's Investigations into Violations of International Law including Crimes Committed during the Offensive on the Gaza Strip, 27 December 2008 – 18 January 2009, February 2010.

courts' treatment of Palestinian victims. These will necessarily be addressed only briefly herein.⁹

Israeli investigations take two principal forms, constituting either operational probes ('command investigations') or criminal investigations. In the vast majority of cases operational probes constitute the initial investigative phase;¹⁰ the Military Advocate General's (MAG) decision to open a criminal investigation is made on the basis of this probe.

An operational probe is conducted by military personnel who form part of the chain of command under investigation, raising serious problems relating to conflict of interest. During these probes, no external witnesses are interviewed; a fundamental flaw given that this precludes a cross-examination of facts, and presumes that those suspected of crimes will not act in their own self-interest. Additionally, these probes are intended only to uncover 'lessons learned' from a military perspective.

With evident implications for the 'good faith' requirement which forms an essential component of internationally-compliant investigations, operational probes form the basis of the MAG's decision to open a criminal investigation. Further, the Military Justice Law and the General Security Services Law stipulate that all materials related to an operational probe shall not be used as evidence in court, and are confidential;¹¹ The Israeli Supreme Court itself noted "There is, therefore, a substantial difference between an operational probe and a criminal investigation, both at the level of purpose and at the operational level."¹²

In addition to significantly delaying any subsequent investigation – with evident repercussions with respect to, inter alia, the collection of evidence, and degradation of the crime scene – these probes constitute an integral but flawed component of Israel's legal system.

Reliance on such methods of investigation guarantees that investigations cannot be impartial or independent.¹³ As noted by the European Court of Human Rights, "For an investigation into alleged unlawful killing by State agents to be effective, it may generally be regarded as necessary for the persons responsible for and carrying out the investigation to be independent from those implicated in the events".¹⁴

Israeli investigations suffer from the lack of separation of powers between the military and the military legal system (preventing independent non-biased investigation), while the

⁹ For further detail, see, The Palestinian Centre for Human Rights, *Genuinely Unwilling: Israel's Investigations into Violations of International Law including Crimes Committed during the Offensive on the Gaza Strip*, 27 December 2008 – 18 January 2009, February 2010.

¹⁰ See, State of Israel, "Gaza Operation Investigations: An Update", January 2010.

¹¹ Article 539A of the Military Justice Law – 1955 states that, "Anything that is said during the course of a military probe, in a protocol of a probe, or any other materials prepared during a probe, as well as its summaries, findings and conclusions, shall not be accepted as evidence in court, except for in a trial for providing false information or concealing an important piece of information in a probe." Article 17(a) of the General Security Services Law – 2002 states that, "Anything that is said during an internal probe or in a report prepared following an internal probe, including protocols, findings, conclusions or recommendations [...] shall not be accepted as evidence in court, except for in a disciplinary procedure or a criminal trial for providing false information or knowingly concealing an important piece of information in a probe."

¹² HCJ 2366/05, *Al-Nebari v. The Chief of Staff of the Israeli Army* (decision delivered on 29 June 2008), para. 6-10 of Justice Arbel's ruling. Emphasis added.

¹³ Report of the UN Fact Finding Mission on the Gaza Conflict, §1628.

¹⁴ *Isayeva v. Russia*, European Court of Human Rights, App. No. 57950/00, 24 February 2005, §211.

hierarchical structure of the military has evident implication with respect to any claim of impartiality. When combined with ineffective civilian oversight, serious flaws in the civilian judicial system, and significant – in some cases virtually indefinite – delays these factors combine to promote a climate of pervasive impunity.

The Israeli Supreme Court awards an extensive ‘margin of appreciation’ to the decisions of the Attorney General and the MAG:

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.¹⁵

This margin of appreciation extends to the decision, made on the basis of flawed operational probes, to open a criminal investigation; the civilian judicial system is left with an extremely – often non-existent – margin to which to review such decisions, effectively leaving the decision to open a criminal investigation in the hands of those implicated in the commission of the alleged crime.

The Supreme Court has further classified residents of the oPt as “enemy aliens”,¹⁶ who are “presumed to endanger national security and public security.”¹⁷ The claim – presented and accepted at the highest levels of the Israeli political and legal system – has clear and evident repercussions with respect to the pursuit of justice. The straightforward presumption that all Palestinians pose a direct threat to Israel comes into direct conflict with the presumption of innocence,¹⁸ and the willingness to investigate even prima facie cases. In perpetuating this doctrine the Israeli courts cannot be considered impartial. Under such circumstances Palestinian victims cannot expect to receive a fair trial or an effective judicial remedy.

As confirmed by Israel’s investigations to date, the State is unwilling to conduct genuine investigations, particular with respect to senior civil and military figures, those ‘most responsible’. Such investigations are straightforwardly impossible in the current legal and military system.

The Palestinian authorities

Neither the government in the Gaza Strip, nor the government in the West Bank, have conducted any genuine efforts, with respect to investigating violations of international law perpetrated in the context of the offensive on the Gaza Strip.

¹⁵ HCJ 5699/07, Jane Doe (A) v. The Attorney General (decision delivered on 26 February 2008), para. 10 of Deputy Chief Justice Rivlin’s ruling. Emphasis added.

¹⁶ HCJ 7052/03, Adalah v. The Interior Minister (decision delivered in 14 May 2006), para. 12

¹⁷ Ibid., para. 78 (emphasis added).

¹⁸ Article 14(2), ICCPR.