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

**Joint written statement\* submitted by the Palestinian Centre for Human Rights, Al Haq Law in the Service of Man, the Al-Mezan Centre for Human Rights, BADIL Resource Center for Palestinian Residency and Refugee Rights, Defence for Children International (DCI) and the Fédération Internationale des Droits de l'Homme (FIDH), non-governmental organizations 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.

[23 August 2010]

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

## **The failure to conduct genuine criminal investigations and prosecutions at the national level\*\***

In violation of customary International Humanitarian Law obligations,<sup>1</sup> UN Human Rights Council Resolution A/HRC/Res/S-12/1, and UN General Assembly Resolutions A/Res/64/10, the Israeli and Palestinian authorities have failed to conduct effective investigations and prosecutions into alleged crimes committed in the context of Israel's offensive on the Gaza Strip (Operation 'Cast Lead'). It is concluded that both systems are incapable of effectively pursuing accountability, and that immediate recourse must be had to mechanisms of international criminal justice.

### **Genuine investigations**

International jurisprudence has consistently identified four components essential to conducting a genuine investigation.<sup>2</sup> An investigation must be: effective (capable of leading "to the identification and punishment of those responsible"<sup>3</sup>); independent (based on, *inter alia*, "the existence of guarantees against outside pressures",<sup>4</sup> specifically "the persons responsible for the injuries and those conducting the investigations should be independent of anyone implicated in the events"<sup>5</sup>); prompt;<sup>6</sup> and involve an element of public scrutiny.<sup>7</sup> Significantly, the whole operation must also be analysed, and not merely the immediate specifics of any one incident.<sup>8</sup>

### **Palestine**

Both Palestinian authorities (in the Gaza Strip and the West Bank) established committees with international components to 'investigate' alleged crimes committed in the context of Operation Cast Lead, and produced reports to this effect. However, these procedures are not criminal investigations, most significantly they are not capable of leading to the identification and prosecution of all those responsible.

Palestinian procedures have not resulted in any form of accountability, and have failed to ensure victims' legitimate right to an effective judicial remedy, in violation of General

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\*\* Addameer Prisoner Support and Human Rights Association, the Aldameer Association for Human Rights-Gaza, the Arab Association for Human Rights, the Ensan Center for Democracy & Human Rights, the Gaza Community Mental Health Programme, the Jerusalem Legal Aid And Human Rights Center, Physicians for Human Rights – Israel, the Ramallah Center for Human Rights Studies, The Civic Coalition for Defending Palestinians' Rights in Jerusalem, The Public committee against Torture in Israel (PCATI), NGOs without consultative status also share the views expressed in this statement.

<sup>1</sup> Rule 158, ICRC, Study on Customary International Humanitarian Law, 2005.

<sup>2</sup> See further, PCHR, 'Genuinely Unwilling: An Update, The Failure of Israel's Investigative and Judicial System to Comply with the Requirements of International Law, with particular regard to the Crimes Committed during the Offensive on the Gaza Strip (27 December 2008 – 18 January 2009)', ('Genuinely Unwilling: An Update') August 2010, Section 2.4.

<sup>3</sup> *Hugh Jordan v. the United Kingdom*, ECtHR, Application No. 24746/94, 4 August 2001, §107.

<sup>4</sup> *Findlay v. the United Kingdom*, ECtHR, Application No. 22107/93, 25 February 1997, §73.

<sup>5</sup> *Bati v. Turkey*, ECtHR, Application No. 33097/96, 57834/00, 3 September 2004, §135.

<sup>6</sup> *Ibid.* §136.

<sup>7</sup> *Finucane v. the United Kingdom*, ECtHR, Application No. 29178/95, 1 October 2003, §213.

<sup>8</sup> *McCann and Others v. the United Kingdom*, ECtHR, Application No. 18984/91, 27 September 1995.

Assembly Resolution A/Res/64/10. In light of the reality of procedures initiated to date and the practicalities of the situation (including a divided judicial and political system) it must be unequivocally concluded that no effective mechanisms are available on the Palestinian side.

## Israel

This submission will address the main features of the Israeli investigative and judicial system.<sup>9</sup> It is concluded that this system is fundamentally flawed, and utilized to frustrate, and not further, accountability.

The overwhelming majority of alleged violations simply have not been addressed;<sup>10</sup> Israel has opened only 47 military police investigations, and approximately 103 operational debriefings. Most of these (flawed) procedures appear to have been closed without charge. Only 4 individuals have been indicted for Operation Cast Lead-related crimes: 1 individual for looting, 2 in relation to the use of a child as a human shield, and 1 for the shooting of individuals carrying white flags.<sup>11</sup>

### The role of the MAG and the HCJ



As can be seen from this diagram provided by the State of Israel, it is the Military Advocate General (MAG) who is the principal decision-making organ; at all stages the decision to open or close an investigation rests with the MAG himself, despite his potential criminal responsibility consequent to his role as legal advisor to the IDF. This system is open to manipulation, in that the MAG can allow investigations to proceed – to provide an illusion of investigative rigour – only to subsequently close them; it is believed that a number of procedures opened in the context of Operation Cast Lead fulfilled this exact purpose. In many cases, procedures appear to have been undertaken to show Israel’s ‘significant results’. However, these procedures reached standardised conclusions, which had been consistently iterated before any investigative procedure began, namely that: “[t]hroughout the fighting in Gaza, the IDF operated in accordance with international law.” The findings

<sup>9</sup> See further: ‘Genuinely Unwilling: An Update’.

<sup>10</sup> E.g., PCHR submitted 490 criminal complaints to the MAG (on behalf of 1,046 affected individuals). Only 13 ‘interlocutory’ responses have been received.

<sup>11</sup> The gravity of the charges in no way reflect the gravity of the crimes (i.e. manslaughter v. wilful killing, a grave breach of the Geneva Conventions), and that only low-level officers involved in the immediate events have been indicted. See: ‘Genuinely Unwilling: An Update.’

of these procedures appear to have been preordained; the stark contrast with available evidence is discussed further elsewhere.<sup>12</sup>

Further, the MAG remains subordinate – in terms of command – to the Chief of Staff. While the Chief of Staff does not have the authority to instruct the MAG regarding arraignments, as noted by the High Court of Justice (HCJ): the military hierarchy within which the MAG operates cannot be ignored.<sup>13</sup> This reality illustrates that the MAG cannot be considered independent or impartial; conclusions supported by relevant jurisprudence.<sup>14</sup>

The HCJ ostensibly provides civilian supervision of the military justice system. However, this supervision exists in law but not in fact. The HCJ awards an excessive margin of appreciation to the MAG<sup>15</sup> and the Attorney General,<sup>16</sup> particularly with respect to decisions which are based on an examination of the evidence, such as the decision to open or close an investigation. In effect this means that the scope of judicial review is extremely limited, negating the possibility of civilian oversight:

“The decision made by the prosecuting authorities to close an investigation file on the basis of a lack of sufficient evidence [...] normally falls within the ‘margin of appreciation’ that is afforded to the authorities and curtails – almost to nil – the scope of judicial intervention. *I was unable to find even one case in which this court intervened in a decision of the Attorney General not to issue an indictment on the basis of a lack of sufficient evidence.*”<sup>17</sup>

### **The scope of investigations**

The assumption underlying those investigative processes opened by the Israeli military is that “soldiers acted within a legal framework, and that the only thing left to examine is whether they deviated from the orders given them.”<sup>18</sup> This assumption is clearly fatally flawed, and inconsistent with the obligation to investigate the entire operation. Many of the violations committed in the context of the offensive occurred as a result of command level policy-based decisions. Necessarily, the legality of these decisions – *inter alia*, the classification of police as combatants, the decision to shell civilian areas, the rules of engagement, and the decision to use explosive and smoke-screen white phosphorous – must be investigated, and if appropriate, those responsible for the policies and their implementation prosecuted. This excessively limited scope is evidenced in the proceedings undertaken following the offensive.<sup>19</sup>

### **Operational debriefings**

In the majority of instances which Israel actually subjects to analysis, operational debriefings form the only ‘investigative’ step. Although Israel refers to such military debriefings as ‘investigations’, these procedures can by no means be considered genuine investigations; not only do they not meet international legal requirements, under the

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<sup>12</sup> ‘Genuinely Unwilling: An Update’.

<sup>13</sup> HCJ 425/89, Zofan v. the MAG, 43(4) P.D. 718, 725.

<sup>14</sup> *Findlay*, *supra* note 5, §68; Durand and Ugarte Case, Inter-American Court of Human Rights, 16 August 2000, (Ser. C), No. 68 (2000), §126.

<sup>15</sup> HCJ 425/89, Suffan v. The Military Advocate General, PD 43(4) 718, 727 (1989).

<sup>16</sup> HCJ 5699/07, Jane Doe (A) v. The Attorney General (26 February 2008).

<sup>17</sup> *Ibid*, §10. Emphasis added.

<sup>18</sup> B’Tselem, Israel’s report to the UN misstates the truth, 4 February 2010.

<sup>19</sup> ‘Genuinely Unwilling: An Update’.

Military Justice Law they are simply not investigations: an operational debriefing is a procedure intended to analyse an incident from an internal military perspective, so that lessons may be learned, conclusions drawn, and so on, for the purpose of enhancing the performance of the Israeli military.<sup>20</sup> This has been confirmed by the HCJ:

“There is, therefore, a substantial difference between an operational probe and a criminal investigation, both at the level of purpose and at the operational level.”<sup>21</sup>

Precise details on operational debriefings are presented elsewhere, suffice to note that they are not, and cannot be considered, effective investigations. Contrary to Israel’s claims, these operational debriefings do not reflect the US, UK, Canadian, or Australian systems, as confirmed by relevant military experts.<sup>22</sup>

## Military police investigations

In Israel, investigations into alleged crimes committed by the military or military personnel are typically conducted by the Military Police Criminal Investigation Division (MPCID). Notably, MPCID investigations are not automatically opened into cases of civilian deaths but only, and in contrast to the requirements of international criminal law, if soldiers “severely violate the open-fire regulations and cause bodily injury or loss of life.”<sup>23</sup>

The “declaration that only cases of “severe violations” warrant the opening of an investigation is vague and susceptible to various interpretations.”<sup>24</sup> The preferred interpretation would seem to be not to open an investigation, as indicated by the decision not to open a criminal investigation into the shelling of the UNRWA headquarters, despite finding that this violated the rules of engagement.<sup>25</sup> This unwillingness to investigate is the result of State-policy:

“the possible ramifications of a criminal investigation for the chain of command and the willingness of commanders to perform their functions are extremely dramatic. Taking these policy considerations into account, it is clear that the *cases in which a criminal investigation will be instigated with regard to combat operations shall be exceptional and unusual.*”<sup>26</sup>

This unwillingness to investigate is also illustrated by the number of investigations conducted: “in 2006 alone the number of indictments against IDF soldiers on drug offences was *seven times higher than the total number of indictments filed on soldiers' harming Palestinians and their property for nearly seven years since the beginning of the second intifada.*”<sup>27</sup>

<sup>20</sup> Article 539(A)(a), Military Justice Law 1955.

<sup>21</sup> HCJ 2366/05, Al-Nebari v. The Chief of Staff of the Israeli Army (29 June 2008), para. 6-10.

<sup>22</sup> Open Society Justice Initiative, *Comparative Analysis of Preliminary Investigation Systems in Respect of Alleged Violations of International Human Rights And/Or Humanitarian Law*, 2010.

<sup>23</sup> [http://www.btselem.org/English/Accountability/Investigatin\\_of\\_Complaints.asp](http://www.btselem.org/English/Accountability/Investigatin_of_Complaints.asp)

<sup>24</sup> *Ibid.*

<sup>25</sup> State of Israel, *Gaza Operation Investigations: An Update*, January 2010, §108.

<sup>26</sup> HCJ 8794/03, *Yoav Hess et al. v. Judge Advocate General et. al.*; Response on Behalf of the State Attorney's Office.. Emphasis added.

<sup>27</sup> Yesh Din, *Exceptions: Prosecution of IDF Soldiers during and after the Second Intifada, 2000 – 2007*, 2008, p. 5. Emphasis added.

## Summary

It is evident that no effective investigations have been conducted to-date, either by the Israeli or Palestinian authorities, indeed no effective investigations are possible within these systems. In order to pursue accountability, and to uphold victims' rights, it is imperative that urgent recourse be had to mechanisms of international criminal justice.

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