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## Human Rights Council

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Agenda item 7

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

**Joint written statement\* submitted by the Palestinian Centre  
for Human Rights, Fédération Internationale des Droits de  
l'homme (FIDH), BADIL Resource Center for Palestinian  
Residency and Refugee Rights, Al-Haq, Law in the Service of  
Man, 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.

[14 February 2011]

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

## Domestic investigations incapable of meeting international standards: Recourse must be had to mechanisms of international criminal justice\*\*

In violation of, inter alia, 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 genuine investigations and, where appropriate, prosecutions, with respect to alleged crimes committed in the context of Israel's 27 December 2008 – 18 January 2009 offensive on the Gaza Strip (Operation 'Cast Lead').

Over two years after the cessation of hostilities – and following in-depth monitoring and evaluation of domestic procedures by both national and international human rights organizations, and UN mechanisms – it is unequivocally concluded that all parties are incapable of effectively pursuing accountability and ensuring victims' fundamental rights. As such, the requirements of international law, and the interests of the international community, demand that immediate recourse be had to mechanisms of international criminal justice.<sup>2</sup>

### Genuine investigations

International jurisprudence has consistently identified four components essential to conducting a genuine investigation.<sup>3</sup> An investigation must be: effective (capable of leading "to the identification and punishment of those responsible"<sup>4</sup>, and "undertaken in a serious manner and not as a mere formality preordained to be ineffective"<sup>5</sup>); independent (based on, inter alia, "the existence of guarantees against outside pressures",<sup>6</sup> specifically "the persons responsible for the injuries and those conducting the investigations should be independent of anyone implicated in the events"<sup>7</sup>); prompt;<sup>8</sup> and involve an element of public scrutiny.<sup>9</sup> Significantly, the whole operation must also be analysed, and not merely the immediate specifics of any one incident; the overall plan and its implementation must be analysed.<sup>10</sup>

All parties have failed to meet these requirements, in particular the condition that investigations be 'effective' and that they address the overall policy and plan.<sup>11</sup>

\*\* Addameer Prisoner Support and Human Rights Association, Ensan Center for Democracy and Human Rights, Jerusalem Legal Aid and Human Rights Center, 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

<sup>3</sup> See further, PCHR, Genuinely Unwilling: An Update, Section 2.4.

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

<sup>5</sup> *Chumbivilcas v. Peru*, Inter-American Commission on Human Rights, Case 10.559, 1 March 1996.

<sup>6</sup> *Findlay v. the United Kingdom*, ECtHR, Application No. 22107/93, 25 February 1997, §73.

<sup>7</sup> *Bati v. Turkey*, ECtHR, Application No. 33097/96, 57834/00, 3 September 2004, §135.

<sup>8</sup> *Ibid.* §136.

<sup>9</sup> *Finucane v. the United Kingdom*, ECtHR, Application No. 29178/95, 1 October 2003, §213.

<sup>10</sup> *McCann and Others v. the United Kingdom*, ECtHR, Application No. 18984/91, 27 September 1995.

<sup>11</sup> See further, U.N. Doc A/HRC/15/NGO/44.

## Israel

Structural deficiencies inherent in the Israeli investigative system render impossible the genuine investigation of alleged international crimes committed against Palestinians.<sup>12</sup> Briefly, these problems include the illegally limited scope of investigations; the use of operational debriefings (or ‘command investigations’) to ‘investigate’ international crimes; the central role of the Military Advocate General (‘MAG’, who is alleged to be individually responsible for numerous crimes committed during the offensive) with respect to the decision to initiate investigative procedures and to issue indictments; and the ineffective supervision of the High Court of Justice (i.e. the absence of civilian judicial supervision).<sup>13</sup>

These structural deficiencies are evidence by the result of the investigative procedures initiated in the aftermath of the offensive. Approximately 150 such procedures were begun: 47 Military Police investigations and 103 operational debriefings. This figure clearly fails to represent the extent of criminal allegations. For example, 1,167 civilians were killed, 7,878 housing units were rendered uninhabitable, and 8,875 dunums<sup>14</sup> of agricultural land were razed. The Palestinian Centre for Human Rights alone submitted approximately 490 criminal complaints (on behalf of 1,046 individuals); to-date only 13 interlocutory responses – merely noting the receipt of those particular complaints - have been received.

The majority of these investigative procedures have been closed without finding any evidence of wrongdoing on the part of Israeli forces; they have reached the seemingly preordained conclusion that: “[t]hroughout the fighting in Gaza, the IDF operated in accordance with international law.”<sup>15</sup> It must be emphasized that information on the apparent status of investigations has been received from official Israeli publications and the media: no information on the status of investigations has been officially transmitted to the victims or their legal representatives.

In total, in the more than two years that have passed since the end of hostilities, the Israeli MAG has issued indictments with respect to four individuals:

- One individual was convicted of the theft of a credit card and served 7.5 months in prison;
- Two individuals were convicted of using a 9 year old boy as a human shield, and given a three-month suspended sentence;
- One individual has been charged in relation to the shooting of a group of unarmed civilians carrying white flags (resulting in the death of two women), the case is still pending.

Significantly, these indictments failed to reflect the gravity of the actual crimes committed. The soldier indicted in connection with the shooting of an unarmed white-flag bearing civilian was charged with manslaughter as opposed to the grave breach of willful killing;<sup>16</sup> the two soldiers convicted in relation to using a 9 year old boy as a human shield were charged with offenses relating to ‘inappropriate behavior’ and ‘overstepping authority’.

<sup>12</sup> See further, U.N. Doc A/HRC/15/NGO/44.

<sup>13</sup> See further, Palestinian Centre for Human Rights, *Genuinely Unwilling: An Update*, August 2010; and U.N. Doc A/HRC/15/NGO/44.

<sup>14</sup> 1 dunum equates to 1,000m<sup>2</sup>.

<sup>15</sup> IDF, *Conclusions of Investigations into Central Claims and Issues in Operation Cast Lead*, 22 April 2009.

<sup>16</sup> For further significant inconsistencies with respect to this indictment see, Palestinian Centre for Human Rights, *Genuinely Unwilling: An Update*, August 2010, §4.4.1.

Israel has systematically failed to criminally investigate credible allegations relating to the widespread commission of international crimes in the context of Operation Cast Lead. In those exceptionally limited (4 individuals) cases which have resulted in indictments, the charges in no way reflect the gravity of the crime.

It is presented that those investigations conducted so far have been utilized to present the illusion of investigative rigor while comprehensively shielding those suspected of international crimes from genuine justice; a conclusion underlined by the process to-date. It is further presented that effective investigations and prosecutions are impossible within the Israeli judicial system, as a result of the structural deficiencies referred to above and a genuine unwillingness to comply with the requirements of international law.

### **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.

The committee mandated by the authorities in the Gaza Strip comprehensively failed to address alleged violations of international law committed by Palestinian armed groups and to exhibit any genuine investigative rigor. The committee mandated by the authorities in Ramallah confirmed allegations made in the report of the UN Fact Finding Mission, including certain allegations made regarding the actions of Palestinian government and security services, and recommended that criminal prosecutions be initiated.

However, these procedures do not meet the requirements of genuine investigations, as detailed above. In particular, they cannot be considered effective, i.e. capable of leading to the identification and prosecution of those responsible. The procedures failed to address issues of individual criminal responsibility, and lacked the authority to issue indictments.

In the approximately nine months since the issuance of these reports, no criminal procedures have been initiated. In violation of General Assembly Resolution A/Res/64/10, both parties have failed to ensure accountability and respect victims' rights. 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 criminal mechanisms are available on the Palestinian side.

### **Conclusion**

Over two years have now passed since the cessation of hostilities in the Gaza Strip. In this period, all parties to the conflict have comprehensively failed to initiate required criminal proceedings (investigations and prosecutions) in accordance with the requirements of international law.

It is apparent that – in the language of the International Criminal Court Statute – that all parties are genuinely unwilling and/or unable to comply with their obligations under international law.

Responsibility for the investigation and prosecution of these crimes now lies with the international community, in accordance with the requirements of customary international law.

It is imperative that the Human Rights Council confirm the failure of domestic investigations, and recommend that the Security Council, acting under Chapter VII of the UN Charter, refer the situation in Israel and the occupied Palestinian territory to the International Criminal Court.