

Perpetuating impunity

Israel's failure to ensure accountability for violations of international law in the Occupied Palestinian Territory

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1. Introduction

Israel's protracted and continuous failure to ensure accountability for violations of international human rights law (IHRL) and international humanitarian law (IHL), including for crimes under international law committed in the Occupied Palestinian Territory (OPT), has been a long-standing concern. Such accountability deficit creates an environment where impunity thrives, encouraging further abuses. Meanwhile, victims and their families are denied justice and redress.

Israel's failure to ensure accountability, especially for violations of the right to life of Palestinians, is striking, not only in the context of the major escalations of hostilities that took place in the Gaza Strip between 2008 and 2021, but also in relation to law enforcement operations against Palestinians in the West Bank, including East Jerusalem. Addressing such failure, in its March 2022 resolution titled "Human rights situation in the Occupied Palestinian Territory, including East Jerusalem, and the obligation to ensure accountability and justice", the UN Human Rights Council stressed "the imperative of credible, timely and comprehensive accountability for all violations of international law in order to attain justice for the victims and establish a just and sustainable peace."¹

In relation to the escalations of hostilities in the Gaza Strip in 2008/09, 2012, 2014 and 2021, the UN Office of the High Commissioner for Human Rights (OHCHR) has more than once pointed to the absence of any significant steps to ensure accountability for alleged serious violations of IHL, including war crimes committed by the Israeli Defence Forces (IDF).² For instance, with regard to the 2014 Operation "Protective Edge" – during which 2,251 Palestinians were killed, including 1,462 civilians – the most recent update of the Military Advocate General reported in August 2018 that, out of 500 complaints related to 360 incidents that had been referred to him, only 31 had led to the opening of a criminal investigation. Of the investigations that had been opened, only one eventually resulted in the conviction of three soldiers for looting.³ The OHCHR has observed that escalations of hostilities in Gaza are "characterized by longstanding patterns" of violations of IHL and IHRL, which have a "recurrent nature", further denouncing that "the climate of impunity" and the failure "to take sufficient steps to prevent their repetition" call into question "the willingness of Israeli ... authorities to hold those allegedly responsible duly to account."⁴

Throughout the West Bank, impunity for violations of IHRL is equally pervasive outside the context of active hostilities. The February 2022 OHCHR report to the UN Human Rights Council shows that in relation to the period 1 January 2017–31 October 2021 – during which Israeli Security Forces killed 428 Palestinians across the OPT, including 91 children – "82 criminal investigations [were] opened in relation to these deaths, of which at least 13 were closed without further action being

¹ Resolution 49/4, UN Doc. A/HRC/RES/49/4 (24 March 2022), operative para. 2.

² *Report of the United Nations High Commissioner for Human Rights*, UN Doc. A/HRC/49/25 (23 February 2022), paras. 13–16; *Report of the United Nations High Commissioner for Human Rights*, UN Doc. A/HRC/35/19 (12 June 2017), para. 20.

³ *Decisions of the IDF Military Advocate General regarding exceptional incidents that allegedly occurred during Operation 'Protective Edge' – update No. 6* (15 August 2018), pp. 1–2, at <https://www.idf.il/en/minisites/military-advocate-generals-corps/releases-idf-military-advocate-general/mag-corps-press-release-update-5-august-2016/>.

⁴ *Report of the United Nations High Commissioner for Human Rights*, UN Doc. A/HRC/49/25 (23 February 2022), para. 16.

taken and 5 resulted in indictments, 3 of which led to convictions.”⁵ Both the UN⁶ and civil society organizations⁷ have documented the lack of accountability “at all levels, and by all duty bearers.”⁸

Whereas Israel has so comprehensively failed to ensure domestic accountability for crimes under international law committed by the IDF, two international mechanisms have started their respective investigations in 2021, namely, the International Criminal Court (ICC) and a UN Human Rights Council-mandated Commission of Inquiry. On 5 February 2021, the ICC Pre-Trial Chamber I confirmed that the ICC could assert its jurisdiction over serious crimes alleged to have occurred in the State of Palestine since 13 June 2014, and that its territorial jurisdiction extended to the West Bank, including East Jerusalem, and the Gaza Strip.⁹ Following this decision, on 3 March 2021, the ICC Office of the Prosecutor announced the opening of an investigation into the situation of Palestine.¹⁰ Previously, on 20 December 2019, the Office of the Prosecutor had reported the conclusion of its preliminary examination in respect of the Situation in Palestine, affirming that a reasonable basis existed to proceed with an investigation into war crimes under the Rome Statute committed by the IDF and Israeli authorities in the West Bank, including East Jerusalem, and the Gaza Strip, particularly in relation to: the 2014 escalation of hostilities in Gaza; the transfer of Israeli civilians into the West Bank; and alleged crimes committed in the context of the use of lethal force during the “Great March of Return” events in Gaza in 2018–2019.¹¹

On 27 May 2021, the UN Human Rights Council established the Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and in Israel (Palestine/Israel COI).¹² The Palestine/Israel COI was created in response to the widespread protests erupted in April 2021 across Israel and the OPT, as well as the escalation of hostilities between Israel and the *de facto* authorities in the Gaza Strip between 10 and 27 May 2021. Established with an open-ended mandate, the Palestine/Israel COI has been tasked to, among other things: investigate “all alleged violations of international humanitarian law and all alleged violations and abuses of international human rights law leading up to and since 13 April 2021”; “[c]ollect, consolidate and analyse evidence”; and “[i]dentify, where possible, those responsible.”¹³ The Palestine/Israel COI is also mandated to “[m]ake recommendations ... on accountability measures, all with a view to avoiding and ending impunity and ensuring legal accountability, including individual

⁵ *Report of the United Nations High Commissioner for Human Rights*, UN Doc. A/HRC/49/25 (23 February 2022), para. 16. See also *Report of the United Nations High Commissioner for Human Rights*, UN Doc. A/HRC/40/43 (14 March 2019), para. 18.

⁶ *Israeli practices affecting the human rights of the Palestinian people in the Occupied Palestinian Territory, including East Jerusalem*, UN Doc. A/68/502 (4 October 2013), paras. 29–47; *Israeli practices affecting the human rights of the Palestinian people in the Occupied Palestinian Territory, including East Jerusalem*, UN Doc. A/69/347 (25 August 2014), paras. 44–75; *Report of the United Nations High Commissioner for Human Rights on the implementation of Human Rights Council resolutions S-9/1 and S-12/1*, UN Doc. A/HRC/25/40 (13 January 2014), paras. 50–60.

⁷ B’tselem, *The Occupation’s Fig Leaf: Israel’s Military Law Enforcement System as a Whitewash Mechanism* (May 2016), at: https://www.btselem.org/publications/summaries/201605_occupations_fig_leaf; Yesh Din, *Position Paper Submitted to the UN Independent Commission of Inquiry on the 2018 Protests in the OPT* (19 November 2018), pp. 9–21, at: <https://s3-eu-west-1.amazonaws.com/files.yesh-din.org/Gaza+Fire+Regulations+Petition/Yesh+Din+submission+to+UN+Gaza+commission+ENG.pdf>; Palestinian Center for Human Rights and B’Tselem, *Unwilling and Unable: Israel’s Whitewashed Investigations of the Great March of Return Protests* (December 2021), at https://www.btselem.org/sites/default/files/publications/202112_unwilling_and_unable_eng.pdf.

⁸ *Report of the United Nations High Commissioner for Human Rights*, UN Doc. A/HRC/35/19 (12 June 2017), para. 16.

⁹ *Decision on the “Prosecution request pursuant to article 19(3) for a ruling on the Court’s territorial jurisdiction in Palestine”*, Doc. ICC-01/18-143 (5 February 2021). See also *Amicus Curiae Observations by the International Commission of Jurists*, Doc. ICC-01/18-117 (16 March 2020).

¹⁰ *Statement of ICC Prosecutor, Fatou Bensouda, respecting an investigation of the Situation in Palestine* (3 March 2021), at <https://www.icc-cpi.int/news/statement-icc-prosecutor-fatou-bensouda-respecting-investigation-situation-palestine>.

¹¹ *Statement of ICC Prosecutor, Fatou Bensouda, on the conclusion of the preliminary examination of the Situation in Palestine, and seeking a ruling on the scope of the Court’s territorial jurisdiction* (20 December 2019), at <https://www.icc-cpi.int/news/statement-icc-prosecutor-fatou-bensouda-conclusion-preliminary-examination-situation-palestine>;

Prosecution request pursuant to article 19(3) for a ruling on the Court’s territorial jurisdiction in Palestine, Doc. ICC-01/18-12 (22 January 2020), paras. 94–96.

¹² Human Rights Council Resolution S-30/1, UN Doc. A/HRC/RES/S-30/1 (28 May 2021), operative para. 1.

¹³ *Ibid.*, operative paras. 1 and 2(b, d).

criminal and command responsibility, for such violations, and justice for victims.”¹⁴ The Palestine/Israel COI is set to report to the Human Rights Council and the UN General Assembly on an annual basis, starting from June 2022 and September 2022, respectively.

In this legal briefing, focusing on Israel’s failure to ensure accountability for violations of IHRL and IHL committed by members of the IDF in the OPT,¹⁵ the International Commission of Jurists (ICJ) analyzes the accountability failures in law and practice characterizing the Israeli military justice system. First, Israel’s accountability deficit results from the shortcomings dogging the legal framework governing investigations. More precisely, the ICJ’s analysis highlights the need to:

- i. enact war crimes legislation, and recognize and cater for superior responsibility as a mode of individual criminal liability in domestic law;
- ii. guarantee the institutional and practical independence of the investigative authorities; and
- iii. ensure effective civilian oversight over the military justice system.

Second, the Israeli military justice system does not adequately fulfil the State’s duty to investigate in an effective manner credible reports disclosing evidence of crimes, as prescribed by international law. As a result of failing to adhere to international standards, the investigations conducted by Israeli authorities are not effective, and almost never lead to the prosecution of individuals reasonably suspected of having committed violations of IHRL and/or IHL in the OPT, notwithstanding the strength of the evidence. Third, Israeli law fails to accord victims and their families the right to an effective remedy, including reparation, particularly because it places procedural obstacles in their way, impeding their access to Israeli courts.

Underpinning the lack of accountability for serious international law violations committed in the OPT is the absence of any political will, on the part of Israeli authorities, to hold perpetrators to account. Conversely, the Israeli authorities have on numerous occasions sought to undermine any attempts to address the pervasive impunity for such violations, including through attacks against the ICC itself. For instance, in the aftermath of the above-mentioned ICC Pre-Trial Chamber I’s decision, the then Israel’s Prime Minister, Benjamin Netanyahu, accused the ICC of “anti-Semitism.”¹⁶ As this briefing will show, the Israeli authorities have also failed to undertake an effective overhaul of the military justice system, notwithstanding the several and in-depth recommendations made by Israeli government-mandated commissions and UN bodies.

In light of the above, the ICJ considers that the continued lack of structural reforms of Israel’s patently flawed military justice system, coupled with the entrenched practice of shielding IDF members from criminal accountability, are evidence of Israel’s unwillingness and inability to genuinely investigate and prosecute crimes under international law committed by its armed and security forces in the OPT.

2. The Israeli military justice system: accountability failures in the legal framework

The Israeli military justice system fails to comply with international law and standards in various respects. In particular, the following three aspects give rise to serious concern with respect to ensuring accountability for violations of IHRL and IHL: (i) Israeli law does not proscribe war crimes as domestic offences, nor does it acknowledge, let alone cater for, superior responsibility as a mode of criminal liability; (ii) the Military Advocate General (MAG) does not satisfy the requirements of independence and impartiality with respect to the initiation and conduct of investigations into IDF

¹⁴ Ibid., operative para. 2(f).

¹⁵ The scope of this briefing will be limited to the Israeli accountability system, without including an analysis of the Palestinian system.

¹⁶ Al-Monitor, *Netanyahu Accuses ICC of anti-Semitism* (8 February 2021), at <https://www.al-monitor.com/originals/2021/02/israel-international-criminal-court-benjamin-netanyahu-idf.html>.

members' conduct; and (iii) civilian oversight over the military justice system, purportedly ensured by the Attorney-General and the High Court of Justice, remains ineffective.

2.1. Attempts at reform of the Israeli military justice system

In the past two decades, the capacity and willingness of Israel and its military justice system to ensure accountability for violations committed by the country's security forces throughout the OPT has come under renewed international scrutiny,¹⁷ particularly in light of the scale of civilian casualties and destruction that resulted from the major escalations of hostilities in the Gaza Strip – namely, those ensuing from Operation "Cast Lead",¹⁸ Operation "Pillar of Defense",¹⁹ Operation "Protective Edge",²⁰ and Operation "Guardians of the Wall".²¹

The Israeli military justice system has also been scrutinized domestically through the so-called Turkel Commission, established by the Israeli Government in 2010 and tasked, among other things, with "reviewing Israeli military and civilian mechanisms for investigating behavior by the Israeli Security Forces and the compatibility of those accountability structures with Israel's obligations under international law."²² While concluding that Israel's investigatory system generally complied with international standards, the Turkel Commission delivered 18 far-reaching recommendations suggesting a number of improvements aimed at introducing drastic changes to the military justice system.²³ UN bodies have invited Israel to promptly implement such recommendations.²⁴

In January 2014, the Israeli Government appointed the so-called Ciechanover Commission to examine and, in turn, suggest concrete ways to implement the Turkel Commission's

¹⁷ *Report of the United Nations Fact-Finding Mission on the Gaza Conflict*, UN Doc. A/HRC/12/48 (25 September 2009); *Report of the detailed findings of the independent commission of inquiry established pursuant to Human Rights Council resolution S-21/1*, UN Doc. A/HRC/29/CRP.4 (24 June 2015); *Report of the detailed findings of the independent international Commission of inquiry on the protests in the Occupied Palestinian Territory*, UN Doc. A/HRC/40/CRP.2 (18 March 2019).

¹⁸ During operation "Cast Lead" (27 December 2008-18 January 2009), between 1,387 and 1,417 Palestinians lost their life. The number of Israeli soldiers who were killed during the fighting in Gaza amounts to nine; an additional four Israeli citizens (three civilians and one soldier) lost their life in the south of Israel as a result of mortar and rocket attacks launched by Palestinian armed groups. For more information, see *Report of the United Nations Fact-Finding Mission on the Gaza Conflict*, UN Doc. A/HRC/12/48 (25 September 2009).

¹⁹ During operation "Pillar of Defense" (14–21 November 2012), 174 Palestinians were killed; six Israelis, including four civilians, were also reportedly killed. For more information, see *Report of the United Nations High Commissioner for Human Rights on the implementation of Human Rights Council resolutions S-9/1 and S-12/1*, UN Doc. A/HRC/22/35/Add.1 (6 March 2013).

²⁰ During Operation "Protective Edge" (7 July–26 August 2014), 2,251 Palestinians were killed, including 1,462 civilians. On the Israeli side, 69 soldiers were killed during the fighting and six civilians lost their life as a result of mortar and rocket attacks from Palestinian armed groups. For more information, see *Report of the independent commission of inquiry established pursuant to Human Rights Council resolution S-21/1*, UN Doc. A/HRC/29/CRP.4 (24 June 2015).

²¹ During Operation "Guardians of the Wall" (10–27 May 2021), 261 Palestinians were killed, including at least 130 civilians; 10 Israeli citizens and residents were also killed. See *Report of the United Nations High Commissioner for Human Rights*, UN Doc. A/HRC/49/25 (23 February 2022), para. 6.

²² The Public Commission to Examine the Maritime Incident of 31 May 2010, *Second Report: Israel's Mechanisms for Examining and Investigating Complaints and Claims of Violations of the Laws of Armed Conflict According to International Law* (February 2013) (hereinafter Turkel Commission, *Second Report*), at https://www.gov.il/BlobFolder/generalpage/alternatefiles/he/turkel_eng_b1-474_0.pdf.

²³ For analysis of the Turkel Commission's recommendations, see Adalah, *Briefing Paper on The Turkel Report: Part II* (May 2013), p. 1, at <https://www.adalah.org/uploads/oldfiles/Public/files/English/Publications/Articles/2013/Briefing-Paper-Turkel-II-El-Ajou.pdf>; B'tselem, *Promoting Accountability: The Turkel Commission Report on Israel's Addressing Alleged Violations of International Humanitarian Law* (August 2013), p. 13, at https://www.btselem.org/download/position_paper_on_turkel_report_eng.pdf.

²⁴ *Israeli practices affecting the human rights of the Palestinian people in the Occupied Palestinian Territory, including East Jerusalem*, UN Doc. A/68/502 (4 October 2013), para. 29; Human Rights Committee, *Concluding Observations: Israel*, UN Doc. CCPR/C/ISR/CO/4 (21 November 2014), para. 6; *Concluding Observations: Israel*, UN Doc. CCPR/C/ISR/CO/5 (30 March 2022), para. 23.

recommendations.²⁵ The Ciechanover Commission issued its report in August 2015,²⁶ which the Israeli Government adopted only in July 2016, more than three years after the publication of the Turkel Commission's report.²⁷ In fact, the Israeli Government did not adopt the Turkel Commission's recommendations but those of the Ciechanover Commission, which included only some of, but certainly not all, the recommendations of the Turkel Commission. Moreover, as Israeli human rights NGOs have stressed, some of the Ciechanover Commission's recommendations deviated from and diluted the Turkel Commission's recommendations, and failed to provide the necessary practical and functional guidance to ensure their implementation.²⁸

Overall, the outcome of such reviews painfully underscores the need for reform of the Israeli military justice system, which is inadequate to address violations committed by Israel's security forces across the OPT, and, as a result, is incompatible with its obligations under international law.

2.2. Shortcomings in domestic criminal law

2.2.1. Failure to proscribe war crimes as domestic criminal offences

International law requires that persons responsible for violations of treaty or customary rules of IHL amounting to war crimes be held individually criminally liable.²⁹ The Geneva Conventions (GCs)³⁰ and Additional Protocol I (AP I)³¹ impose an obligation to criminalize "grave breaches" of these instruments.³² Many violations also constitute war crimes under customary IHL applicable in both international and non-international armed conflicts, and are criminally proscribed in the statutes of international criminal tribunals, including the ICC Statute.³³ Examples of such offences include murder, torture and other ill-treatment, rape and other forms of sexual violence, enslavement, the taking of hostages, and directing attacks against civilians and civilian objects. Under both treaty and customary international law, States are obligated to criminalize, investigate and, when warranted, prosecute and punish war crimes.³⁴

Israeli domestic criminal law does not criminalize war crimes as such.³⁵ IHL violations are investigated not as war crimes or "grave breaches" of the GCs, but as various "equivalent" domestic

²⁵ On 5 January 2014, the Israeli Government passed Resolution No. 1143 regarding "The appointment of a team to review and implement the Second Report of the Public Commission to Examine the Maritime Incident of May 31st 2010."

²⁶ *Report of the Team for the Review and Implementation of the Second Report of the Public Commission for the Examination of the Maritime Incident of May 31st 2010 Regarding Israel's Mechanisms for Examining and Investigating Complaints and Claims of Violations of the Law of Armed Conflict According to International Law* (hereinafter Ciechanover Report) (August 2015), at <http://www.pmo.gov.il/Documents/ReportEng.pdf>.

²⁷ State Comptroller, *Report on Operation "Protective Edge": IDF Activity from the Perspective of International Law, Particularly with Regard to Mechanisms of Examination and Oversight of Civilian and Military Echelons* (14 March 2018), pp. 87–88, at https://www.mevaker.gov.il/he/Reports/Report_622/3cdfbe36-04fc-4ff2-b2df-33ce258ae838/dabla-eng.pdf.

²⁸ Yesh Din, *The Ciechanover Report: Dodging the criminalization of war crimes and practical steps toward implementation* (1 October 2015), p. 1, at <http://files.yesh-din.org/userfiles/Ciechanover%20Eng.pdf>; B'tselem, *The Occupation's Fig Leaf: Israel's Military Law Enforcement System as a Whitewash Mechanism* (May 2016).

²⁹ International Criminal Tribunal for the former Yugoslavia (ICTY), *Prosecutor v. Tadić*, Case No. IT-94-1, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (2 October 1995), para. 94.

³⁰ Israel ratified the GCs on 6 July 1951.

³¹ Israel is not yet a party to AP I.

³² *Convention relative to the Protection of Civilian Persons in Time of War*, 75 UNTS 287 (12 August 1949) (GC IV), art. 147; *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts*, 1125 UNTS 3 (8 June 1977) (AP I), arts. 11, 85. This category of war crimes concerns international armed conflicts only.

³³ International Committee of the Red Cross (ICRC), *Customary IHL Database*, rule 156, at https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul; *Statute of the International Criminal Tribunal for the Former Yugoslavia*, UN Doc. S/RES/827 (25 May 1993, amended as of September 2009) (ICTY Statute), art. 3; *Rome Statute of the International Criminal Court*, 2187 UNTS 3 (17 July 1998) (ICC Statute), art. 8.

³⁴ GC IV, arts. 146-147; AP I, art. 85; ICRC, *Customary IHL Database*, rule 158.

³⁵ The only text that explicitly refers to "war crimes" as criminal offenses is the Nazis and Nazi Collaborators (Punishment) Law of 1950. The Law's temporal scope is limited to the period of the Nazi regime, and it applies to crimes that have

offences under the Penal Law, the Military Justice Law and relevant command regulations. Furthermore, Israeli law does not envisage any “aggravating circumstances” that would allow to differentiate between crimes under international law and domestic criminal offences.³⁶ As a result, indictments for serious violations of IHL are based on “equivalent” domestic offences.³⁷ However, the Penal Law includes only eight types of criminal conduct that could be said to amount to war crimes under international law.³⁸

In this respect, Israel’s failure to properly proscribe war crimes in domestic criminal law is highly problematic. First, not all war crimes have an “equivalent” in Israeli domestic law (e.g., the prohibition of torture and other ill-treatment).³⁹ Second, domestic “equivalent” offences often do not reflect the gravity of crimes under international law.⁴⁰ With a view to addressing these shortcomings, the Turkel Commission recommended the enactment of domestic legislation criminalizing those crimes under international law that are not covered by “equivalent” offences in Israeli domestic law, as well as the explicit adoption of “the international norms relating to war crimes into Israeli domestic legislation.”⁴¹ As affirmed in the 2018 report of the Israeli State Comptroller (equivalent to an ombudsperson), the Ministry of Justice neither implemented such recommendations, nor submitted bills to incorporate war crimes into domestic law.⁴²

By omitting to make most war crimes punishable offences under its domestic criminal legislation, Israel fails to comply with its obligations under international law, particularly the GCs and customary IHL.

2.2.2. Failure to recognize superior responsibility

Whenever under a duty to do so, military and civilian superiors may be held individually criminally responsible, under the international criminal law doctrine of superior responsibility, for their failure to take the necessary and reasonable measures to prevent or punish crimes committed by their subordinates.⁴³ Under this doctrine, the individual criminal responsibility of military and civilian superiors for crimes under international law committed by their subordinates arises when three cumulative conditions are met:⁴⁴

been committed before Israel was established as a State and outside its territory. See M. Sfar, *Investigations*, in O. Ben-Naftali, M. Sfar, H. Viterbo, *The ABC of the OPT: A Legal Lexicon of the Israeli Control over the Occupied Palestinian Territory* (Cambridge University Press 2018), pp. 183–184.

³⁶ *Ibid.*, p. 185.

³⁷ B’tselem, *Promoting Accountability: The Turkel Commission Report on Israel’s Addressing Alleged Violations of International Humanitarian Law* (August 2013), p. 5.

³⁸ M. Sfar, *Investigations*, in O. Ben-Naftali, M. Sfar, H. Viterbo, *The ABC of the OPT: A Legal Lexicon of the Israeli Control over the Occupied Palestinian Territory* (Cambridge University Press 2018), p. 185.

³⁹ Israeli criminal law does not include a specific offence of torture, and instead recognizes a “defence of necessity” that can apply when allegations of torture are leveled against Israeli State agents, particularly with reference to interrogations of arrested or detained Palestinians. UN treaty bodies have repeatedly recommended that Israel should criminalize torture under domestic law and should exclude the “defence of necessity” in torture cases. See Committee against Torture, *Concluding Observations: Israel*, UN Doc. CAT/C/ISR/CO/5 (3 June 2016), paras. 12–15; Human Rights Committee, *Concluding Observations: Israel*, UN Doc. CCPR/C/ISR/CO/5 (30 March 2022), paras. 28–29.

⁴⁰ Turkel Commission, *Second Report*, p. 365.

⁴¹ *Ibid.*, Recommendation 1, pp. 362–366.

⁴² State Comptroller, *Report on Operation “Protective Edge”: IDF Activity from the Perspective of International Law, Particularly with Regard to Mechanisms of Examination and Oversight of Civilian and Military Echelons* (14 March 2018), p. 10.

⁴³ ICTY, *Prosecutor v. Hadzihasanovic*, Case No. IT-01-47-AR72, Appeals Chamber, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility (16 July 2003), para. 31; International Criminal Tribunal for Rwanda (ICTR), *Prosecutor v. Muvunyi*, Case No. ICTR-2000-55A-T, Appeals Chamber, Judgement and Sentence (12 September 2006), para. 473.

⁴⁴ AP I, art. 86; ICRC, *Customary IHL Database*, rule 153; ICTY Statute, art. 7(3); ICTR Statute, art. 6(3); ICC Statute, art. 28.

- i. A *de jure* or *de facto* superior-subordinate relationship exists;⁴⁵
- ii. The superior has the requisite knowledge that a subordinate is about to commit, is committing or has committed a crime;⁴⁶ and
- iii. The superior fails to take the necessary and reasonable measures to prevent the commission of the crime or to punish the alleged perpetrator.⁴⁷

Under IHRL, States are under an obligation to take measures to hold superiors individually criminally responsible for torture and other ill-treatment, enforced disappearance and arbitrary deprivations of life committed by their subordinates providing that certain circumstances are made out.⁴⁸ For example, as indicated by the UN Committee against Torture, Israel must take measures to hold criminally liable “those exercising superior authority – including public officials ... for torture or ill-treatment committed by subordinates where they knew or should have known that such impermissible conduct was occurring, or was likely to occur, and they failed to take reasonable and necessary preventive measures.”⁴⁹ Furthermore, as the Human Rights Committee has recommended, it is incumbent on Israel that “[i]nvestigations should explore, inter alia, the legal responsibility of superior officials with regard to violations of the right to life committed by their subordinates.”⁵⁰

However, to date, no provision in Israeli criminal law recognizes individual criminal responsibility pursuant to the superior responsibility doctrine. While the Turkel Commission recommended amending domestic law accordingly,⁵¹ this recommendation, which the Ciechanover Commission’s report subsequently reaffirmed,⁵² has remained a dead letter.⁵³

By omitting to provide for superior responsibility as a mode of individual criminal liability in its domestic criminal law, Israel fails to comply with its obligations under IHRL, IHL and international criminal law.

⁴⁵ ICC, *Prosecutor v. Bemba Gombo*, Case no. ICC-01/05-01/08, Pre-Trial Chamber II, Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo, 15 June 2009, paras. 414–416; ICTY, *Prosecutor v. Delalić*, Case No. IT-96-21-A, Appeals Chamber, Judgment, 20 February 2001, paras. 188-198.

⁴⁶ Under article 28(a) of the ICC Statute, military superiors are held liable when they “knew or should have known” that subordinates were committing or about to commit a crime; under article 28(b), civilian superiors are liable when they “knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes.” See also ICTY Statute, art. 7(3); *Statute of the International Criminal Tribunal for Rwanda*, UN Doc. S/RES/955 (8 November 1994) (ICTR Statute), art. 6(3).

⁴⁷ ICTR, *Prosecutor v. Gacumbitsi*, Case No. ICTR-2001-64-A, Appeals Chamber, Judgment (7 July 2006), para. 143.

⁴⁸ *International Convention for the Protection of All Persons from Enforced Disappearance*, 2716 UNTS 3, 20 December 2006 (ICPPED), art. 6(1)(b) (Israel is not yet a party to the ICPPED); *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, UN Doc. E/CN.4/2005/102/Add.1 (8 February 2005), principle 27(b); *Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions*, UN Doc. E/1989/89 (January 1991), principle 19; *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders (27 August–7 September 1990), principle 24.

⁴⁹ Committee against Torture, *General Comment No. 2: Implementation of Article 2 by States Parties*, UN Doc. CAT/C/GC/2 (24 January 2008), para. 26.

⁵⁰ Human Rights Committee, *General Comment No. 36: Article 6 (The Right to Life)*, UN Doc. CCPR/C/GC/36 (30 October 2018), para. 27; *Concluding Observations: Israel*, UN Doc. CCPR/C/ISR/CO/5 (30 March 2022), para. 23.

⁵¹ Turkel Commission, *Second Report*, Recommendation 2, pp. 277, 368–369.

⁵² *Ciechanover Report*, p. 13.

⁵³ State Comptroller, *Report on Operation “Protective Edge”: IDF Activity from the Perspective of International Law, Particularly with Regard to Mechanisms of Examination and Oversight of Civilian and Military Echelons* (14 March 2018), p. 93.

2.3. The dual role of the Military Advocate General

An independent and impartial body must conduct investigations into credible allegations of crimes under international law.⁵⁴ As the Minnesota Protocol⁵⁵ sets out: “[i]nvestigations must be independent of any suspected perpetrators and the units, institutions or agencies to which they belong ... Investigators must be impartial and must act at all times without bias. They must analyse all evidence objectively.”⁵⁶ While IHL does not exclude the possibility that war crimes be investigated and prosecuted by the military,⁵⁷ “[i]nquiries into serious human rights violations, such as extrajudicial executions and torture, must be conducted under the jurisdiction of ordinary civilian courts.”⁵⁸ Human rights violations and serious crimes under international law should be excluded from the jurisdiction of military tribunals, which should adjudicate only military offences committed by military personnel and acts of a disciplinary or similar nature not constituting human rights violations.⁵⁹

The Military Advocate General Corps (MAG Corps)⁶⁰ is the institution in charge of both deterring the perpetration of violations of IHL and IHRL by members of the IDF and holding IDF members accountable. The MAG Corps is mandated to enforce law and order within the IDF and in the territories administered by it, including the OPT, as well as to provide legal advice to the IDF. The duties of the MAG Corps also include: conducting military prosecutions before the military courts; representing branches of the military where needed; and supervising disciplinary law in the army.⁶¹

The Military Advocate General (MAG) is the commander of the MAG Corps. The Minister of Defense appoints the MAG on recommendation of the Chief of Staff,⁶² and their tenure is not temporally defined by law.⁶³ According to the Military Justice Law, the MAG fulfills a dual role by acting: (i) as the legal adviser to the IDF Chief of General Staff and all other military authorities; and (ii) as the head of the Military Prosecution System with the support of the Military Police Criminal Investigative Division.⁶⁴

The MAG’s dual role and the MAG Corps have been criticized for compromising the independence and impartiality of the military investigative system, as the MAG provides legal advice to the same military bodies whose activities it may subsequently be called upon to investigate.⁶⁵ In 2007, the

⁵⁴ Human Rights Committee, *General Comment No. 31: Nature of the General Legal Obligation on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.13 (26 May 2004), para. 15.

⁵⁵ While the Minnesota Protocol *per se* concerns investigations into potentially unlawful deaths, its standards can be applied to investigations into crimes under international law more generally.

⁵⁶ *The Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016)*, Office of the High Commissioner for Human Rights, (New York/Geneva 2017), paras. 29, 31.

⁵⁷ GC IV, art. 146; AP I, art. 87; ICRC, *Commentary on Geneva Convention III (2020)*, para. 5107, at <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=FB2C21E0040F0217C125858400446E95>.

⁵⁸ *The Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016)*, para. 28.

⁵⁹ *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, principle 29; *Draft Principles Governing the Administration of Justice through Military Tribunals (Decaux Principles)*, UN Doc. E/CN.4/2006/58 (13 January 2006), principle 9; Human Rights Committee, *Concluding Observations: Colombia*, UN Doc. CCPR/C/79/Add.2 (1992), paras. 5–6.

⁶⁰ For more information about the functioning of the MAG Corps, see Turkel Commission, *Second Report*, pp. 279–283.

⁶¹ *Ibid.*, p. 280.

⁶² The Military Justice Law, art. 177(a), cited in Turkel Commission, *Second Report*, p. 281, footnote 52.

⁶³ *Ibid.*, p. 281.

⁶⁴ The MAG is also responsible for the legal supervision of disciplinary proceedings, and for carrying out every other function imposed on him in accordance with every law and army regulations. See *Report of the detailed findings of the independent international Commission of inquiry on the protests in the Occupied Palestinian Territory*, UN Doc. A/HRC/40/CRP.2 (18 March 2019), para. 718.

⁶⁵ On the requirements of independence and impartiality for a military investigative system, see among others, Geneva Academy and ICRC, *Guidelines on Investigating Violations of International Humanitarian Law: Law, Policy, and Good Practice* (September 2019), Guideline 7, paras. 122–134, at <https://www.geneva-academy.ch/joomla-tools-files/docman-files/Guidelines%20on%20Investigating%20Violations%20of%20IHL.pdf>.

MAG Corps separated its law enforcement units from its legal advice units.⁶⁶ However, the MAG's role has remained unchanged, which means that she or he is still in charge of providing legal advice to the army, while, simultaneously, being responsible for investigating alleged violations of IHRL and IHL committed by IDF members. This arrangement reveals a "built-in conflict of interest in [the MAG's] function", which, in turn, fatally undermines any confidence in the credibility, legitimacy and independence of investigations of any incident in which a policy the MAG "authored and authorized" may be called into question.⁶⁷ This dual role of the MAG is "virtually unparalleled in the world."⁶⁸ In the great majority of European countries, for instance, there is a structural separation between the legal counsel unit providing advice to the army, and the civilian prosecutorial authorities in charge of investigating alleged breaches of international law by members of the armed forces.⁶⁹ As reported by the comparative study included in the Turkel Commission's report, even in the UK, Australia and Canada, where investigations are carried out within the military justice system, civilians take part in the proceedings, and the army's legal advice unit is separated from the investigation and prosecutorial unit.⁷⁰

The Turkel Commission addressed the MAG's overt lack of independence by recommending, among other things: the adoption of legislation to further strengthen the MAG's professional subordination to the authority of the Attorney-General; the appointment of the MAG by the Minister of Defense upon the recommendation of a public professional committee, instead of the IDF Chief of Staff; and limiting the MAG's tenure to one six years' term without extension.⁷¹ In its 2018 report, the Israeli State Comptroller affirmed that the Turkel Commission's recommendation regarding the MAG's professional subordination to the Attorney-General had been implemented, albeit without resort to primary legislation, but that the Turkel Commission's recommendation to limit the MAG's tenure had not.⁷²

Given its dual role within the IDF as a legal adviser and investigator, the MAG does not satisfy the requirements of independence and impartiality required under international law with respect to investigations into credible allegations that IDF members have committed crimes under international law.

2.4. Lack of effective civilian oversight over the military justice system

The security and armed forces of the State should always ultimately be subject to civilian control by a democratically-elected government. The UN Human Rights Council has called upon States "to make continuous efforts to strengthen the rule of law and promote democracy", including by ensuring that "the military remains accountable to relevant national civilian authorities."⁷³ The UN Human Rights Committee has underlined the importance of ensuring civilian oversight over the military from a rule of law perspective, by expressing concern at "the lack of full and effective control by civilian authorities over the military and the security forces"⁷⁴ in certain States, as well as "the lack of a clear

⁶⁶ This separation was integrated in the *The Organizational Order of the MAG Corps*, approved by the Planning Department in 2008, which is a document with no special normative status and it only binds the Planning Department of the IDF. For more detailed information see Turkel Commission, *Second Report*, p. 28; IDF, *The IDF Military Justice System*, at <https://www.idf.il/en/minisites/military-advocate-generals-corps/the-idf-military-justice-system/>.

⁶⁷ M. Sfar, *Investigations*, in O. Ben-Naftali, M. Sfar, H. Viterbo, *The ABC of the OPT: A Legal Lexicon of the Israeli Control over the Occupied Palestinian Territory* (Cambridge University Press 2018), p. 194.

⁶⁸ B'tselem, *Promoting Accountability: The Turkel Commission Report on Israel's Addressing Alleged Violations of International Humanitarian Law* (August 2013), p. 13.

⁶⁹ *Ibid.*

⁷⁰ Turkel Commission, *Second Report*, pp. 152–264.

⁷¹ *Ibid.*, Recommendation 7, p. 427.

⁷² State Comptroller, *Report on Operation "Protective Edge": IDF Activity from the Perspective of International Law, Particularly with Regard to Mechanisms of Examination and Oversight of Civilian and Military Echelons* (14 March 2018), pp. 13, 107–112.

⁷³ Human Rights Council Resolution 19/36, UN Doc. A/HRC/Res/19/36 (19 April 2012), para. 16(j)(vi).

⁷⁴ Human Rights Committee, *Concluding Observations: El Salvador*, UN Doc. CCPR/C/79/Add. 34 (18 April 1994), para. 4.

legal framework, defining and limiting the role of the security forces and providing for effective civilian control over them.”⁷⁵

The Israeli military justice system purports to be subject to civilian oversight through the respective roles of: the Attorney-General, who “heads the justice department of the executive authority and of the judicial system serving the public”;⁷⁶ and the Israeli Supreme Court, sitting as the High Court of Justice (HCJ).⁷⁷ As the following sections articulate, however, none of these institutions is capable of providing effective civilian oversight over the Israeli military justice system, as required under international law.

2.4.1. The Attorney-General

The Attorney-General, as the legal adviser for the government and all public authorities, is in charge of issuing “professional directives” that are legally binding on all State entities, including the IDF and the MAG Corps.⁷⁸ In April 2015, the Attorney-General issued two Directives with the stated intention of implementing some of the Turkel Commission’s recommendations.⁷⁹ Pursuant to these Directives, the Attorney-General has the authority to intervene and instruct the MAG on how to act in specific cases, particularly when: (i) the MAG deems the case to be of “special public interest”; (ii) a decision has implications that go beyond the military sphere; (iii) a decision departs from accepted legal norms; or (iv) the Attorney-General believes that the MAG “has not given proper weight to the general prosecution policy or to the need for uniformity and harmony between the various prosecution bodies.”⁸⁰

The Israeli human rights NGO B’tselem has expressed legitimate concern that the Attorney-General very seldom exercises its power of civilian oversight over the MAG and the MAG Corps by questioning their decisions.⁸¹ In this respect, there seems to be a general practice whereby the Attorney-General defers to the MAG’s deliberations. This deference may be partially explained by the fact that the MAG Corps’ International Law Department, which provides advice on IHL to all State authorities, including outside the military, is the only State authority with specialized IHL expertise.⁸² However, such deference, in turn, betrays a failure on the part of the Attorney-General to fulfill its civilian oversight duty over the MAG and the MAG Corps.⁸³ Moreover, Palestinian NGOs have reported that the appeals process before the Attorney-General against the MAG’s decisions has “no clear or transparent

⁷⁵ Human Rights Committee, *Concluding Observations: Romania*, CCPR/C/79/Add. 11 (29 July 1999), para. 9.

⁷⁶ The Attorney-General also serves as legal counsel for the Government and all public authorities, and oversees the legal department in charge of preparing and reviewing proposed legislation. In order to carry out his mandate, the Attorney-General is assisted by six deputies, who are in charge of managing the legal consul and legislation departments at the Ministry of Justice. See Turkel Commission, *Second Report*, pp. 314-315.

⁷⁷ When sitting as the HCJ, the Israeli Supreme Court acts as a court of first and last instance. The HCJ exercises judicial review over all acts and decisions of governmental authorities, including the IDF, wherever they may be performed. In addition, the HCJ has powers “in matters in which it considers it necessary to grant relief in the interests of justice and which are not within the jurisdiction of any other court or tribunal.” For more information, see David Kretzmer, *The law of belligerent occupation in the Supreme Court of Israel*, in *International Review of the Red Cross* (2012), p. 3.

⁷⁸ Israel Ministry of Foreign Affairs, *The 2014 Gaza Conflict, 7 July – 26 August 2014: Factual and Legal Aspects* (May 2015), para. 438, at <http://mfa.gov.il/ProtectiveEdge/Documents/2014GazaConflictFullReport.pdf>.

⁷⁹ Attorney General, *Directives regarding the Military Advocate General and Review of the Military Advocate General’s decisions*, at <https://www.justice.gov.il/En/Units/AttorneyGeneral/Pages/AttorneyGeneralPazar042015.aspx>.

⁸⁰ Attorney-General Directive No. 9.1002: *The Military Advocate General* (2015), p. 3, at <https://www.justice.gov.il/En/Units/AttorneyGeneral/Documents/AGDirectiveMilitaryAdvocateGeneral.pdf>.

⁸¹ B’tselem, *The Occupation’s Fig Leaf*, p. 28. See also M. Sfard, *Investigations*, in O. Ben-Naftali, M. Sfard, H. Viterbo, *The ABC of the OPT: A Legal Lexicon of the Israeli Control over the Occupied Palestinian Territory* (Cambridge University Press 2018), pp. 193–195.

⁸² B’tselem, *Promoting Accountability: The Turkel Commission Report on Israel’s Addressing Alleged Violations of International Humanitarian Law* (August 2013), p. 9.

⁸³ Eyal Benvenisti, *The Duty of the State of Israel to Investigate Violations of the Law of Armed Conflict*, Expert Opinion Submitted to the Turkel Commission (13 April 2011), p. 24, cited by B’tselem, *The Occupation’s Fig Leaf*, p. 28; M. Sfard, *Investigations*, in O. Ben-Naftali, M. Sfard, H. Viterbo, *The ABC of the OPT: A Legal Lexicon of the Israeli Control over the Occupied Palestinian Territory* (Cambridge University Press 2018), p. 193.

procedures and has no accompanying or suggested timeframe for the rendering of decisions”; in turn, this results in appeals pending for years before being decided.⁸⁴

2.4.2. The High Court of Justice

The HCJ is empowered to preside and adjudicate over judicial review proceedings brought in respect of the Israeli military justice system. Pursuant to Israel’s Military Justice Law, the HCJ may hear petitions by individuals and NGOs challenging, by way of judicial review proceedings, a decision of the MAG or the Attorney-General. The HCJ has the authority to “review and reverse” such decisions, including those concerning whether or not to open a criminal investigation, issue a criminal indictment, bring specific charges, or appeal a decision of the military courts.⁸⁵

For instance, the HCJ has reviewed the MAG’s policy not to launch an investigation in cases of alleged civilian deaths caused by the IDF in the West Bank,⁸⁶ as well as concrete MAG and Attorney-General’s decisions regarding investigations.⁸⁷ The Turkel Commission highlighted that the HCJ’s tends to limit its role of civilian oversight mechanism to MAG and Attorney-General’s decisions deemed “extremely unreasonable” or in the presence of a “material injustice”,⁸⁸ a threshold that appear to be too high to ensure effective review by the HCJ.

One major concern is that the HCJ tends to approve the MAG and Attorney-General’s decisions regarding the termination of investigations into alleged serious violations of IHRL and/or IHL by IDF members. For instance, on 3 September 2020, the HCJ unanimously rejected a petition submitted in March 2019 by the Association for Civil Rights in Israel regarding the closing of the investigation into the killing of 17-year-old Mohammad al-Qusbah, who was shot dead in July 2015 while fleeing after having thrown a stone at an IDF’s vehicle. The HCJ found the disciplinary measure imposed on the IDF officer involved in the killing – namely, a delay in promotion – to be a proportionate punishment.⁸⁹

On 24 April 2022, the HCJ rejected a petition filed by Adalah, Al Mezan and the Palestinian Center for Human Rights against the MAG and Attorney-General’s decisions to close the investigation into the killing of four boys on 16 July 2014, who had been targeted by an airstrike during operation “Protective Edge” while playing on a beach in Gaza. Despite the extensive evidence presented by the petitioners, who claimed that the airstrike in itself had violated IHL and that the subsequent investigation carried out by Israeli authorities presented numerous flaws and contradictions, the HCJ decided not to reverse the MAG and Attorney-General’s decisions. The petitioners lamented that the HCJ’s ruling “did not address the substance of any of the petitioners’ arguments regarding the flaws in the probe”, and relied, “among other things, on secret evidence, reviewed only by the Supreme Court outside of the presence of the petitioners’ lawyers”, adopting in full the arguments and determinations put forward by the MAG and the Attorney-General.⁹⁰

⁸⁴ Al Haq, Al Mezan, Addamer, Cairo Institute for Human Rights Studies, Habitat International Coalition, *Joint Submission to the United Nations Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied Since 1967, Mr Michael Lynk, on Accountability* (31 May 2020), para. 84, at <http://mezan.org/en/uploads/files/159117061414.pdf>.

⁸⁵ IDF, *The IDF Military Justice System*, at <https://www.idf.il/en/minisites/military-advocate-generals-corps/the-idf-military-justice-system/>.

⁸⁶ *B’Tselem – Israeli Information Center for Human Rights in the Occupied Territories v. the Chief Military Prosecutor*, HCJ 9594/03.

⁸⁷ *Adalah – The Legal Center for Arab Minority Rights in Israel v. GOC Central Command*, HCJ 3799/02 60(3) 67 (2005); *Abu Rahme v. Brigadier-General Avichai Mandelblit*, HCJ 7195/08 (2009); *Tzofan v. Military Advocate-General*, HCJ 425/89 43(4) 718 (1989).

⁸⁸ Turkel Commission, *Second Report*, pp. 316-318.

⁸⁹ *Report of the United Nations High Commissioner for Human Rights*, UN Doc. A/HRC/46/22 (15 February 2021), para. 17.

⁹⁰ *Adalah, Israeli Supreme Court Rejects Petition against Closure of Investigation into Bakr Boys’ Killings during 2014 Gaza War* (24 April 2022), at <https://www.adalah.org/en/content/view/10613>.

A further concern arises as a result of the length of the proceedings: petitions to the HCJ are often filed a long time after the occurrence of an incident, generally when the possibility of bringing the perpetrators to trial is extremely limited or when statutes of limitation may apply.⁹¹ Moreover, the HCJ lacks the authority to conduct judicial review on its own initiative, as it can review the MAG's conduct only when prompted by an individual petition.⁹²

Recommendations

In light of the above, the Israeli authorities should:

- **Enact legislation to proscribe war crimes in domestic criminal law;**
- **Enact legislation to incorporate superior responsibility as a mode of individual criminal liability into domestic law;**
- **Transfer the competence to investigate and prosecute alleged violations of IHRL and IHL committed by IDF members from the MAG to an independent and impartial civilian authority;**
- **Empower such an independent and impartial civilian authority to investigate and prosecute high-ranking military commanders or government officials for their role in giving orders or adopting and promulgating policies that result in serious violations of IHRL and IHL;**
- **Limit the MAG's competence in respect of enforcing criminal jurisdiction against IDF members to offences of a disciplinary or similar nature not constituting human rights violations;**
- **Establish effective civilian oversight mechanisms over the military.**

3. The Israeli military justice system and the duty to investigate

Israel fails to comply with its duty to investigate credible allegations of violations of IHRL and IHL in compliance with its obligations under international law, particularly in relation to (i) the grounds and mechanisms surrounding the opening of an investigation, and (ii) the conduct of investigations in practice, which fail to adhere to international standards.

3.1. The duty to investigate under international law

States have an obligation to investigate crimes under international law, including arbitrary deprivations of life, torture and other ill-treatment, and enforced disappearances.⁹³ The duty to investigate is part of the obligation to protect human rights and to provide effective remedies for human rights violations.⁹⁴ A failure to conduct effective investigations amounts to a breach of

⁹¹ B'tselem, *Promoting Accountability: The Turkel Commission Report on Israel's Addressing Alleged Violations of International Humanitarian Law* (August 2013), p. 9.

⁹² Also, the petitioners have to cover the expenses related to the process and can only rely on information that is not classified; see B'tselem, *The Occupation's Fig Leaf*, p. 29.

⁹³ *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 1465 UNTS 85 (10 December 1984) (CAT), arts. 12–16; ICPPED, arts. 3, 10, 12; *Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions*, principle 9; *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, principle 19; *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, UN Doc. A/RES/60/147 (16 December 2005), para. 4; Human Rights Committee, *General Comment No. 31*, paras. 15, 18.

⁹⁴ Human Rights Committee, *General Comment No. 31*, para. 15. See also ICJ, *The Right to a Remedy and to Reparation for Gross Human Rights Violations–Practitioners' Guide No. 2* (October 2018), at <https://www.icj.org/wp-content/uploads/2018/11/Universal-Right-to-a-Remedy-Publications-Reports-Practitioners-Guides-2018-ENG.pdf>, p. 21.

international law, including the International Covenant on Civil and Political Rights,⁹⁵ to which Israel is party.⁹⁶

In respect of the right to life, a State's duty to investigate is triggered, at a minimum, where State authorities "know or should have known of potentially unlawful deprivations of life",⁹⁷ including "where reasonable allegations of a potentially unlawful death are made."⁹⁸ The duty to investigate, therefore, does not arise solely where the competent authorities receive a formal complaint.⁹⁹ The duty exists whenever the State has an obligation to respect the right to life, and in relation to any alleged victims or perpetrators within the territory of a State or otherwise subject to its jurisdiction.¹⁰⁰ The duty to investigate includes all cases where the State or its agents have allegedly caused, or contributed to, a death by act or omission, regardless of whether it is suspected or alleged that the death itself was unlawful.¹⁰¹

This duty governs all peacetime situations and also applies to cases of death during an armed conflict other than those that occur during the conduct of hostilities. In the latter situation, the conduct of investigations into potentially unlawful death must take account of the concurrent application of the rules of IHL and the specific circumstances that characterize armed conflict situations.¹⁰² Under IHL, what triggers the duty to investigate is the suspicion that a war crime has been committed.¹⁰³ According to the Minnesota Protocol:

Where, during the conduct of hostilities, it appears that casualties have resulted from an attack, a post-operation assessment should be conducted to establish the facts, including the accuracy of the targeting. Where there are reasonable grounds to suspect that a war crime was committed, the State must conduct a full investigation and prosecute those who are responsible. Where any death is suspected or alleged to have resulted from a violation of IHL that would not amount to a war crime, and where an investigation ("official inquiry") into the death is not specifically required under IHL, at a minimum further inquiry is necessary. In any event, where evidence of unlawful conduct is identified, a full investigation should be conducted.¹⁰⁴

Under international law, the duty to investigate is discharged if the investigation is carried out effectively, namely in a manner that is capable of leading to the identification, apprehension and, if appropriate, punishment of the perpetrator(s) of crimes under international law.¹⁰⁵ To be effective, an investigation must comply with the internationally recognized standards of independence, impartiality, promptness, thoroughness and transparency.¹⁰⁶

⁹⁵ *International Covenant on Civil and Political Rights*, 999 UNTS 171 (16 December 1966) (ICCPR); Human Rights Committee, *General Comment No. 31*, para. 15; *General Comment No. 36*, paras. 27–28; ICJ, *The investigation and prosecution of potentially unlawful death—Practitioners' Guide No. 14* (September 2019), p. 42, at <https://www.icj.org/wp-content/uploads/2019/09/Universal-PG-14-Unlawful-death-Publications-Reports-Practitioners-Guides-series-2019-ENG.pdf>.

⁹⁶ Israel ratified the ICCPR on 3 October 1991.

⁹⁷ Human Rights Committee, *General Comment No. 36*, para. 27.

⁹⁸ *The Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016)*, para. 15. See also, ICJ, *The investigation and prosecution of potentially unlawful death—Practitioners' Guide No. 14*, pp. 41–43.

⁹⁹ *The Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016)*, para. 15.

¹⁰⁰ *Ibid.*, para. 19.

¹⁰¹ *Ibid.*, para. 16.

¹⁰² *Ibid.*, paras. 16, 20.

¹⁰³ ICRC, *Customary IHL Database*, rule 158. See also Geneva Academy and ICRC, *Guidelines on Investigating Violations of International Humanitarian Law*, paras. 111, 119–120.

¹⁰⁴ *The Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016)*, para. 21 (footnotes omitted).

¹⁰⁵ Human Rights Committee, *General Comment No. 36*, para. 27; Human Rights Committee, *Sathasivam v. Sri Lanka*, UN Doc. CCPR/C/93/D/1436/2005 (8 July 2008), para. 6.4.

¹⁰⁶ Human Rights Committee, *General Comment No. 31*, para. 15; *The Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016)*, paras. 22–33.

3.2. Gaps relating to the opening of an investigation

3.2.1. The threshold to open an investigation and the “real combat nature” clause

As discussed above, the MAG Corps is the entity responsible for conducting investigations into alleged crimes and misconduct committed by the IDF, with the aid of the Military Police Criminal Investigative Division (MPCID).¹⁰⁷ The grounds that trigger the duty to investigate complaints and claims of IHRL and IHL violations by the IDF in the West Bank and Gaza are set out in the Military Justice Law,¹⁰⁸ and in various guidelines issued by the MAG.¹⁰⁹

Until the beginning of the Second Intifada in September 2000, almost every case of death and certain cases of injury to Palestinian residents in the West Bank and the Gaza Strip caused by the IDF led to the immediate opening of an investigation. According to the MAG, this policy was justified by the fact that, prior to the Second Intifada, the military was conducting exclusively law enforcement operations in the West Bank and Gaza.¹¹⁰ The MAG amended its investigation policy in 2000, justifying this modification as a consequence of the generalized escalation of violence between the IDF and the Palestinians that turned the “frictions” into “combat activity.”¹¹¹ According to the new investigation policy, following an incident where a Palestinian is killed by an IDF member, the unit to which such person belongs to must prepare an “operational debriefing”,¹¹² and submit it to the MAG. The MAG would then decide “whether the case involve[ed] suspected criminal conduct” to a degree justifying an MPCID investigation.¹¹³ This new policy was challenged by NGOs before the HCJ requesting that it be reversed in order for every civilian death in the OPT to be independently investigated.¹¹⁴

In 2011, the MAG announced another policy modification in connection with “a significant change in the nature of the operational activity of the IDF forces in the West Bank that, generally, no longer bears a clear combat character.”¹¹⁵ Pursuant to this 2011 policy, still in force at the time of writing, every case of death of a Palestinian resulting from operations by the IDF forces in the West Bank will trigger the opening of an immediate investigation except in “cases where it is clear that the operations during which the Palestinian inhabitant was killed were of a real combat nature.”¹¹⁶ In the latter case, the decision by the MAG of whether or not to open an investigation will be delayed until

¹⁰⁷ In 2017, the Military Police Criminal Investigative Unit for Operational Affairs (CIUO) was created to support the work of the MPCID. The CIUO is a dedicated unit within the Military Police specializing in investigations of suspected misconduct occurring during operational activities. See IDF, *Gaza Border Events: Questions & Answers* (1 February 2019), p. 96, at <https://www.idf.il/media/48555/gaza-border-events-questions-and-answers.pdf>.

¹⁰⁸ *General Staff Order 33.0304: Chief Military Police Commissioner’s Inspection and Investigation*, cited in Turkel Commission, *Second Report*, p. 291.

¹⁰⁹ Turkel Commission, *Second Report*, p. 319. Israel’s duty to investigate is also established in the jurisprudence of the HCJ. In the *Targeted killings* case, which addressed the use of armed force in situations of conduct of hostilities, the HCJ held that: “... after an attack on a civilian suspected of taking an active part, at such time, in hostilities, a thorough investigation regarding the precision of the identification of the target and the circumstances of the attack upon him is to be performed (retroactively). That investigation must be independent.” See *Public Committee against Torture in Israel et al. v. Government of Israel et al.*, HCJ 769/02 (13 December 2006), para. 40.

¹¹⁰ During those times, the IDF also had more restrictive rules of engagement with regard to the use of force. See B’tselem, *The Occupation’s Fig Leaf*, p. 10.

¹¹¹ This change also brought an increase in the number of IDF soldiers in the occupied territory as well as a change of methods and means of warfare pursuant to the new open-fire regulations allowing the use of force, including lethal force, against persons identified as “being involved in the fighting or in terror activity in certain circumstances.” See B’tselem, *The Occupation’s Fig Leaf*, p. 10.

¹¹² For information on “operational debriefings”, see below section 3.2.2.

¹¹³ B’tselem, *The Occupation’s Fig Leaf*, p. 10.

¹¹⁴ The proceedings in such petition continued for years until the next change of policy announced by the MAG in 2011. See B’tselem, *The Occupation’s Fig Leaf*, pp. 10–11. See also *Report of the United Nations Fact-Finding Mission on the Gaza Conflict*, UN Doc. A/HRC/12/48 (25 September 2009), para. 1406.

¹¹⁵ Turkel Commission, *Second Report*, p. 321, citing the *Letter of Major-General Avichai Mandelblit, the MAG, to Yehuda Weinstein, Attorney-General, Investigations Policy of IDF operations in the West Bank* (4 April 2011), p. 8.

¹¹⁶ *Ibid.*

after the submission of an “operational debriefing” and other relevant materials.¹¹⁷ This new policy was reaffirmed and approved by the HCJ.¹¹⁸

One major concern arises from the fact that the policy fails to define the concept of “real combat nature.” On its face, such language appears to refer to the conduct of hostilities. This interpretation seems to be confirmed by the fact that law enforcement operations, including “disturbances of the peace” or “riots at checkpoints”, have explicitly been defined by the IDF as of “non-combat” nature. Accordingly, the policy of opening an investigation into the death of a Palestinian would apply to deaths occurred in the context of law enforcement operations but not to fatalities arising within the conduct of hostilities. In practice, however, the MAG appears to adopt a very broad definition of the notion of “real combat nature.” For instance, available figures for 2016 show that at least 79 per cent of the incidents in which Palestinians were killed in the West Bank by IDF gunfire were defined by the MAG as incidents of “a real combat nature”, and did not trigger an immediate investigation.¹¹⁹ This is a cause for grave concern given that, in contrast to the Gaza Strip, there have not been active hostilities in the West Bank since the end of the Second Intifada in 2005.

The “real combat nature” clause in the 2011 policy does not comply with Israel’s obligations under international law, particularly because the lack of clarity regarding its meaning and scope adversely affects the fulfillment of Israel’s duty to investigate. When potentially unlawful deaths occur in connection with the conduct of hostilities, an investigation should be opened whenever “reasonable grounds to suspect that a war crime was committed” exist.¹²⁰ In all other cases, Israeli authorities should open an investigation “where they know or should have known of potentially unlawful deprivations of life”¹²¹ of Palestinians. More generally, as recommended by the Human Rights Committee, Israeli authorities should open an investigation into “all incidents involving the excessive use of force by the Israeli Security Forces”,¹²² therefore, *a fortiori*, whenever such a use results in a fatality.

3.2.2. Operational debriefings

At present, there are two tracks for examining and investigating allegations of violations of IHL and IHRL by the IDF:

1. The immediate investigation track, which is opened following:
 - a) Claims relating to civilian deaths in the West Bank in the course of IDF’s law enforcement operations (as opposed to operations of a “real combat nature”);¹²³
 - b) Complaints of acts that, *prima facie*, raise a “reasonable suspicion” regarding the commission of war crimes within the conduct of hostilities (e.g., looting, rape or abuse of detainees). Cases of deaths of civilians during the conduct of hostilities are most of the times not falling within this category, as they are deemed to require further assessment through an operational debriefing before triggering an investigation.¹²⁴
2. The track that envisages the MAG delaying the decision on whether to launch an investigation until she or he receives the findings of an operational debriefing, upon which she or he

¹¹⁷ Turkel Commission, *Second Report*, p. 322. See also B’tselem, *The Occupation’s Fig Leaf*, p. 11.

¹¹⁸ *B’Tselem v. the Chief Military Prosecutor*, HCJ 9594/03 (21 August 2011), paras. 10–11.

¹¹⁹ Yesh Din, *Position Paper submitted to the UN Independent Commission of Inquiry on the 2018 protests in the OPT* (19 November 2018), pp. 10–11.

¹²⁰ *The Minnesota Protocol on the Investigation of Potentially Unlawful Death*, para. 21.

¹²¹ Human Rights Committee, *General Comment No. 36*, para. 27.

¹²² *Concluding Observations: Israel* CCPR/C/ISR/CO/5 (30 March 2022), para. 13.

¹²³ It should be noted that since the policy on the opening of investigations refers to “deaths”, any conduct not resulting in a fatality would not trigger an immediate investigation.

¹²⁴ Israel Ministry of Foreign Affairs, *The 2014 Gaza Conflict, 7 July – 26 August 2014: Factual and Legal Aspects* (May 2015), para. 424: “[b]ecause the death or injury of civilians during an armed conflict – an unfortunate but inevitable reality of war – does not in and of itself establish a reasonable suspicion of criminal misconduct, the collection of additional information is often critical when addressing allegations of wrongdoing during combat activity.”

determines whether there is a reasonable suspicion that a crime has been committed and an investigation is warranted.¹²⁵

The MAG Corps receives claims about alleged violations of IHL and IHRL through complaints filed by victims or their families, NGOs or lawyers representing them, media reports or the IDF.¹²⁶ Pursuant to the IDF Reporting Procedure, any case of death or injury to a Palestinian civilian should be reported to the MAG, via a preliminary report, within 48 hours from the incident. In addition, an operational debriefing of the incident should be produced and approved by the area commander and sent to the MAG within 21 days, together with the material that was collected during its preparation. The preliminary report is reviewed by the MAG Corps for Operational Matters and, if it does not give rise to a *prima facie* suspicion of criminality, the decision as to whether to launch an investigation is postponed until after the receipt and assessment of the operational debriefing.¹²⁷

According to Israeli military law, the operational debriefing is an "inquiry made by the army, based on army orders, concerning an incident that occurred during training or military operations, or with regard thereto."¹²⁸ Operational debriefings are confidential reviews of incidents and operations conducted by soldiers from the same unit or line of command, together with a superior officer. They are meant to serve operational purposes and examine the performance of the forces, and to learn what aspects should be preserved and what aspects should be improved.¹²⁹ The findings of operational debriefings are used by the MAG when deciding whether or not to open an investigation; if an investigation is opened and a case goes to trial, the operational debriefing cannot be used as evidence in the proceedings.¹³⁰

In light of the above, it is clear that an operational debriefing is fundamentally different, in its purpose and procedure, from a criminal investigation.¹³¹ The operational debriefing is conducted by officers instead of trained investigators, and its "primary function is pre-empting the recurrence of problematic scenarios"; as such, "it is forward-looking, whereas a criminal investigation is meant to uncover the truth about a past event",¹³² and ensure the perpetrators are held to account. Those carrying out the operational debriefing also lack the necessary independence required under international law since they are the same individuals whose activity is under review.¹³³ Moreover, an operational debriefing usually does not include evidence from the plaintiffs or other witnesses, and it is normally based on soldiers' testimonies only.¹³⁴ The Turkel Commission criticized the MAG for using operational debriefings "for the purpose of fulfilling his obligation to conduct a fact-finding assessment", adding that this was problematic because "the operational debrief is not focused on questions of criminality", and that it "may unreasonably delay the decision on initiating an investigation."¹³⁵

Operational debriefings fall short of the international standards governing investigations into credible allegations of violations of IHRL and IHL, particularly in respect of the required independence of investigators from the persons whose conduct is under scrutiny. Moreover, operational debriefings lack effectiveness, as they are not investigations of a criminal nature. By relying on operational

¹²⁵ Turkel Commission, *Second Report*, pp. 335-336.

¹²⁶ Under article 225 of the Military Justice Law, there is a general duty to report offences.

¹²⁷ Turkel Commission, *Second Report*, p. 336.

¹²⁸ The Military Justice Law, art. 539A(a).

¹²⁹ *Report of the United Nations Fact-Finding Mission on the Gaza Conflict*, UN Doc. A/HRC/12/48 (25 September 2009), para. 1795.

¹³⁰ The Military Justice Law, art. 539A(a).

¹³¹ *Report of the detailed findings of the independent international Commission of inquiry on the protests in the Occupied Palestinian Territory*, UN Doc. A/HRC/40/CRP.2 (18 March 2019), para. 720; *Report of the United Nations Fact-Finding Mission on the Gaza Conflict*, UN Doc. A/HRC/12/48 (25 September 2009), paras. 1794-1797.

¹³² M. Sfar, *Investigations*, in O. Ben-Naftali, M. Sfar, H. Viterbo, *The ABC of the OPT: A Legal Lexicon of the Israeli Control over the Occupied Palestinian Territory* (Cambridge University Press 2018), p. 192.

¹³³ Turkel Commission, *Second Report*, p. 381.

¹³⁴ *Ibid.*, p. 32.

¹³⁵ *Ibid.*, pp. 378-382.

debriefings to decide whether to open a criminal investigation into alleged violations of IHL or IHRL, the procedure followed by the MAG does not comport with international law and standards.

3.2.3. The Fact-Finding Assessment Mechanism

In its report, the Turkel Commission recommended the establishment of a mechanism to conduct a “fact-finding assessment” with a view to ensuring that any immediate information about an alleged breach of IHL or IHRL be collected by a team of experts on military operations, international law, and investigations independent of the chain of command and of the commander of the unit whose activity is under scrutiny. In the Turkel Commission’s view, such a mechanism would be called for in situations where there is no *prima facie* suspicion of criminal activity and yet, since the latter cannot be excluded, additional information is necessary to determine whether or not to open a criminal investigation.¹³⁶

Following the 2012 Operation “Pillar of Defense” in Gaza, the Israeli Government established an *ad hoc* Fact-Finding Assessment Mechanism (FFAM) purportedly to inquire into alleged violations of IHL that had occurred during the said Operation.¹³⁷ This mechanism, however, failed to increase the number of criminal investigations opened into complaints of violations of IHL committed by the IDF. In fact, according to UN reports, a few months after the end of Operation “Pillar of Defense”, the MAG issued a public document indicating that it found no basis for opening criminal investigations into the approximately 65 incidents that had been reported, including incidents as a result of which several civilian casualties had occurred.¹³⁸

Shortly after the commencement in 2014 of Operation “Protective Edge”, the IDF Chief of General Staff established a standing FFAM, headed by a Major General who was not part of the chain of command during the Operation. The FFAM’s task was to gather “information and relevant materials in order to assess the facts of individual incidents”, with a view to “provid[ing] the MAG with as much factual information as possible in order to enable the MAG to reach decisions regarding whether or not to open a criminal investigation.”¹³⁹ Israel’s State Comptroller, in its capacity as the ombudsperson, found numerous flaws with regard to the FFAM’s inquiry into Operation “Protective Edge.” First, the FFAM remained subordinated to the IDF Chief of General Staff, of which it was therefore not independent. Second, shortcomings existed in respect of the impartiality of the FFAM as well as the thoroughness and effectiveness of its work. Third, in 80 per cent of cases the time it took the FFAM to examine the events exceeded the time limits provided by law. Fourth, it was not envisaged that the MAG’s decision on the opening of investigations and their findings be published.¹⁴⁰

Similarly, during the “Great March of Return” in Gaza in 2018, the IDF Chief of Staff entrusted the FFAM with examining “exceptional incidents allegedly occurring during the Gaza border events”, and transmitting the relevant findings and materials to the MAG for review. A dedicated team was formed within the FFAM, comprising “senior active duty and reservist officers with relevant professional military expertise ... accompanied by legal advisors”, who were all outside the chain of command during the “Great March of Return” events.¹⁴¹ The OHCHR raised concern regarding the “quality of the Military Advocate General’s decisions concerning possible criminal behaviour in relation to the cases referred to him”, also in light of the fact that the FFAM examination did not consider whether

¹³⁶ Ibid., pp. 382–383.

¹³⁷ IDF, *Decisions of the IDF Military Advocate General Regarding Exceptional Incidents that Allegedly Occurred During Operation ‘Protective Edge’*, Update No. 6 (15 August 2018), pp. 1–2.

¹³⁸ *Israeli practices affecting the human rights of the Palestinian people in the Occupied Palestinian Territory, including East Jerusalem*, UN Doc. A/68/502 (4 October 2013), paras. 32–32.

¹³⁹ IDF, *Operation Protective Edge: Investigation of exceptional incidents* (2015), at <https://mfa.gov.il/MFA/ForeignPolicy/IsraelGaza2014/Pages/Operation-Protective-Edge-Investigation-of-exceptional-incidents-Update-4.aspx>.

¹⁴⁰ State Comptroller, *Report on Operation “Protective Edge”: IDF Activity from the Perspective of International Law, Particularly with Regard to Mechanisms of Examination and Oversight of Civilian and Military Echelons* (14 March 2018), pp. 129–130.

¹⁴¹ IDF, *Gaza Border Events: Questions & Answers* (1 February 2019), p. 93.

IDF orders and procedures complied with international law.¹⁴² In light of this, the OHCHR questioned whether the FFAM “meets accountability requirements under international law”, raising concern about its deployment in relation to the “Great March of Return” events in Gaza.¹⁴³

In relation to the May 2021 hostilities in Gaza, the Palestinian Centre for Human Rights submitted 57 criminal complaints relating to the killing or injuring of Palestinian civilians to the MAG; the MAG, in turn, has referred 11 of those complaints to the FFAM. As of February 2022, the OHCHR reported that there is no available information regarding any criminal investigation opened.¹⁴⁴

While the inquiries conducted by the FFAM differ from full criminal investigations, Israel requires the FFAM as a necessary step to ascertain whether the grounds for opening a full, criminal investigation exist in certain circumstances. However, FFAM’s inquiries fail to meet the requirements of independence, impartiality, promptness, thoroughness and transparency required for investigations of potential violations of IHRL and IHL. By making the opening of a criminal investigation dependent of the FFAM enquiry, Israel fails to meet its obligations under international law and standards.

3.3. Failure to adhere to the international standards on investigations

3.3.1. Independence and impartiality

Those conducting investigations into credible allegations of violations of IHRL and IHL must be – and must be perceived to be – independent of undue influence that may arise from institutional hierarchies and chains of command. Investigators and investigative mechanisms must be “independent institutionally and formally, as well as in practice and perception, at all stages”,¹⁴⁵ and must be able to conduct an investigation without fear of reprisal or expectations of favour for any finding or decision made.¹⁴⁶ Impartiality presupposes a lack of pre-conceived ideas and prejudice by those who carry out the investigation.¹⁴⁷ Investigators must be impartial, and must act at all times without bias and conflict of interest in relation to the case in question.¹⁴⁸ They must also act in accordance with recognized professional duties, standards and ethics, and analyze all evidence objectively.¹⁴⁹ To guarantee independence and impartiality, an investigative authority must not be involved in the case under investigation; if this is the case, it should refrain from participating in the investigative proceedings.¹⁵⁰ Independence can be compromised if investigations into alleged violations by members of the armed forces are carried out by the armed forces themselves.¹⁵¹

The Israeli investigation system lacks independence and impartiality. As discussed in section 2.3, the MAG has a dual role in the military justice system, serving, on the one hand, as the legal adviser to the IDF Chief of General Staff and other military authorities and, on the other, as the head of the Military Prosecution System within the army. Such a dual role compromises the independence and impartiality of the military investigative system, given that the very person tasked with providing legal advice to the military before and during military operations is the same one deciding whether or not to open criminal investigations into IDF members’ conduct. This dual role creates an inherent

¹⁴² *Report of the United Nations High Commissioner for Human Rights, A/HRC/40/43* (14 March 2019), para. 12.

¹⁴³ *Ibid.*, para. 15. For further data on the closing of investigations into incident related to the “Great March of Return” events, see Palestinian Center for Human Rights and B’Tselem, *Unwilling and Unable: Israel’s Whitewashed Investigations of the Great March of Return Protests* (December 2021), p. 9.

¹⁴⁴ *Report of the United Nations High Commissioner for Human Rights, UN Doc. A/HRC/49/25* (23 February 2022), para. 7.

¹⁴⁵ *The Minnesota Protocol on the Investigation of Potentially Unlawful Death*, para. 28.

¹⁴⁶ See also Geneva Academy and ICRC, *Guidelines on Investigating Violations of International Humanitarian Law*, para. 123.

¹⁴⁷ ICJ, *The Right to a Remedy and to Reparation for Gross Human Rights Violations–Practitioners’ Guide No. 2* (October 2018), p. 101.

¹⁴⁸ ICJ, *The investigation and prosecution of potentially unlawful death–Practitioners’ Guide No. 14*, p. 56.

¹⁴⁹ *Ibid.*

¹⁵⁰ Geneva Academy and ICRC, *Guidelines on Investigating Violations of International Humanitarian Law*, para. 125.

¹⁵¹ ICJ, *The Right to a Remedy and to Reparation for Gross Human Rights Violations–Practitioners’ Guide No. 2* (October 2018), pp. 99–100.

conflict of interests in cases where military operations, carried out following the MAG's legal advice, give rise to credible allegations of unlawful conduct. In such instances, the MAG is in charge of deciding whether or not to open a criminal investigation into conduct that they or their subordinates have previously approved in their legal adviser roles.¹⁵² For example, the MAG and the Attorney-General regularly participated in cabinet meetings during the 2014 Operation "Protective Edge" in Gaza. As affirmed by B'tselem, "[m]edia reports and past experience indicate that almost all the decisions made during Operation Protective Edge were made after legal counsel was provided by the MAG and the attorney general."¹⁵³

Given its dual role, the MAG does not satisfy the requirements of independence and impartiality, failing to comply with international law and standards. As recommended above, the competence to conduct investigations into alleged violations of IHRL and IHL committed by IDF members should be transferred to an independent and impartial civilian authority.

3.3.2. Promptness

The duty to investigate entails an obligation of promptness in the conduct of investigations. State authorities must conduct an investigation "as soon as possible" and must proceed "without unreasonable delay."¹⁵⁴ The requirement of promptness does not justify a rushed or unduly hurried investigation. While the existence of active hostilities may justify the delay of on-site investigations, this circumstance does not relieve a State from its duty to investigate at a later stage.¹⁵⁵ Investigations are also required to give effect to the right to an effective remedy of victims and their families;¹⁵⁶ in this sense, the promptness of an investigation also serves to guarantee the effectiveness of such remedies.¹⁵⁷

A criminal investigation must be opened promptly because the collection of evidence is often possible only very soon after an incident has occurred. The effects of the passage of time, such as changes at the crime scene, loss of evidence, fading of memories, collusion among suspects and threats against witnesses, can seriously preclude the effectiveness of an investigation.¹⁵⁸ In addition, promptness must be respected even once the investigation has started, meaning that "there must be sustained investigative activity and proper justification for delay when that is not the case."¹⁵⁹ An investigation conducted within a reasonable period of time contributes to its thoroughness and effectiveness, also increasing public trust in the investigative system.¹⁶⁰

The Israeli military justice system does not provide, let alone guarantee, a strict timeframe for opening or conducting an investigation; the duration of investigations sometimes extends over several years, compromising their effectiveness.¹⁶¹ One of the reasons that might compromise the possibility of a prompt investigation is the fact that the operational debriefing within each unit is carried out before the actual investigation, which, in turn, results in a delay in the opening of a

¹⁵² B'tselem, *Israeli authorities have proven they cannot investigate suspected violations of international humanitarian law by Israel in the Gaza Strip* (September 2014), at https://www.btselem.org/accountability/20140905_failure_to_investigate.

¹⁵³ Ibid.

¹⁵⁴ *The Minnesota Protocol on the Investigation of Potentially Unlawful Death*, para. 23.

¹⁵⁵ Ibid. See also Geneva Academy and ICRC, *Guidelines on Investigating Violations of International Humanitarian Law*, Guideline 9, para. 145.

¹⁵⁶ See also section 3.3.5 below.

¹⁵⁷ On the requirement of promptness with respect to the right to an effective remedy, see ICJ, *The Right to a Remedy and to Reparation for Gross Human Rights Violations—Practitioners' Guide No. 2* (October 2018), pp. 65–68.

¹⁵⁸ Geneva Academy and ICRC, *Guidelines on Investigating Violations of International Humanitarian Law*, Guideline 9, para. 143.

¹⁵⁹ Ibid., para. 144.

¹⁶⁰ Turkel Commission, *Second Report*, pp. 397–398.

¹⁶¹ Ibid., p. 398.

criminal investigation, sometimes of months.¹⁶² Such a delay undermines the reliability of eyewitness accounts given by soldiers, and decreases the chances of prompt access to the scene of the incident by investigators, and the collection of testimonies of Palestinian witnesses and victims.¹⁶³ It has also been reported that, even when investigations are open, investigators encounter obstacles in scheduling the interviews of complainants and suspected soldiers and officers, resulting in statements being taken several months after the occurrence of the incident.¹⁶⁴ Furthermore, some cases remain pending before the FFMA several years after the relevant complaints have been submitted to the MAG. Notwithstanding this, the latter is reported to have taken no action to overcome such inordinate delays.¹⁶⁵

By not ensuring that investigations into alleged violations of IHRL and/or IHL are promptly opened, Israel's fails to comply with its obligations under international law and standards.

3.3.3. Thoroughness

Thoroughness is a necessary requirement to achieve the intended purpose of an investigation, which is to uncover the facts and identify the perpetrators.¹⁶⁶ Thoroughness refers to "the practical and/or procedural steps that will be necessary to ensure that the facts can be adequately elucidated."¹⁶⁷ A thorough investigation must be conducted professionally.¹⁶⁸ It should include, when relevant, an adequate autopsy or other forensic examinations, the collection and analysis of all physical and documentary evidence, as well as statements from victims, witnesses and any State official who may be involved in, or otherwise concerned by, the incident that gave rise to the obligation to conduct an investigation in the first place.¹⁶⁹ To meet these requirements, investigators must, to the extent possible, collect all evidence, including documentary, digital and physical evidence, as well as identify all relevant witness. Any investigative mechanism must, at a minimum, have the power to compel witnesses to testify and require the production of evidence.¹⁷⁰ Investigative mechanisms must further be capable of ensuring the safety and security of witnesses including, where necessary, through an effective witness protection programme.¹⁷¹

The Minnesota Protocol further provides that an investigation should, for instance, seek to discover any failure to take reasonable measures that could have prevented a death. It should also seek to identify policies and systemic shortcomings that may have contributed to a death, and identify

¹⁶² B'tselem, *Israeli authorities have proven they cannot investigate suspected violations of international humanitarian law by Israel in the Gaza Strip*, (September 2014), at https://www.btselem.org/accountability/20140905_failure_to_investigate.

¹⁶³ Ibid.

¹⁶⁴ B'tselem, *The Occupation's Fig Leaf*, pp. 18–20.

¹⁶⁵ Al Haq et al., *Joint Submission to the United Nations Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied Since 1967, Mr Michael Lynk, on Accountability* (31 May 2020), para. 83, at <https://mezan.org/en/uploads/files/159117061414.pdf>.

¹⁶⁶ Additionally, thoroughness is required to ensure the public and the victim's confidence in the integrity, credibility and legitimacy of the investigation. More broadly, it also enhances confidence in the rule of law, the separation of powers, as well as equality before the law and equal protection of the law.

¹⁶⁷ Geneva Academy and ICRC, *Guidelines on Investigating Violations of International Humanitarian Law*, Guideline 8, para. 135.

¹⁶⁸ The authorities in charge of criminal investigations must have sufficient financial and human resources, including qualified investigators and other relevant experts. They should be adequately trained, equipped and funded; they should have operational expertise and knowledge about applicable legal frameworks or have the possibility to rely on legal advisers. See Inter-American Court of Human Rights, *Mapiripán Massacre v. Colombia*, Judgment (15 September 2005), para. 224; Geneva Academy and ICRC, *Guidelines on Investigating Violations of International Humanitarian Law*, Guideline 7, paras. 122–134.

¹⁶⁹ *Principles on the Effective Prevention and Investigation of Extralegal, Arbitrary and Summary Executions*, principle 9. See also Geneva Academy and ICRC, *Guidelines on Investigating Violations of International Humanitarian Law*, Guideline 8, para. 135.

¹⁷⁰ *The Minnesota Protocol on the Investigation of Potentially Unlawful Death*, para. 25; European Court of Human Rights, *Paul and Audrey Edwards v. United Kingdom*, Judgment (14 March 2002), para. 303.

¹⁷¹ *The Minnesota Protocol on the Investigation of Potentially Unlawful Death*, para. 27. See also ICJ, *The investigation and prosecution of potentially unlawful death—Practitioners' Guide No. 14*, p. 55.

patterns where they exist.¹⁷² Investigations must seek to identify not only direct perpetrators but also all others who were responsible for the death including, for example, officials in the chain of command who may have been complicit in the death.¹⁷³

Conducting thorough and effective investigations during active hostilities in a context of armed conflict may entail specific challenges, including accessing, preserving and transporting evidence; identifying and communicating with victims and witnesses to obtain their testimonies; cultural and human rights considerations;¹⁷⁴ ongoing hostilities and their impact on the safety of investigative personnel. Nonetheless, such circumstances, whenever they arise, will not relieve the authorities of their obligation under international law to investigate but “they may affect the modalities or particulars of the investigation.”¹⁷⁵ This might result in lower evidentiary standards compared to investigations conducted in peacetime, but such standards must still allow to reach reliable findings. Regardless of the circumstances, “investigations must always be conducted as effectively as possible and never be reduced to mere formality.”¹⁷⁶

Despite the evidentiary constraints that may exist during armed conflict, certain challenges should be anticipated and overcome, where possible, through preparedness and training prior to deployment.¹⁷⁷ Means to adjust standard investigative procedures to armed conflict include the use of technologies, such as video recording equipment during operations; and, when there is no ground control, the possibility to use recorded operational planning to review decision-making problems as well as using digital communication to enable the remote participation of victims and witnesses.¹⁷⁸ One obstacle to the thoroughness of an investigation often arises when State authorities classify information essential to its effectiveness as “secret”, particularly on “national security” grounds. According to the *Global Principles on National Security and the Right to Information*, information concerning serious violations of IHRL and IHL, including crimes under international law, should never be withheld on “national security” grounds.¹⁷⁹

Israeli and Palestinian NGOs have numerous times denounced the lack of effectiveness of Israel’s investigative system.¹⁸⁰ While conducting an investigation, it seems that the MPCID officers do not assess the legality and rationale of the orders given by commanders, limiting their focus to the conduct of the individual soldiers involved in the incident under examination.¹⁸¹ Most of the times, the only persons to be questioned are Palestinian victims and the soldiers under investigation, whereas eyewitnesses are not heard. Furthermore, even if both the complainants and suspected soldiers are officially offered the opportunity of a confrontation, this virtually never happens, “even in cases in which their accounts [are] clearly contradictory.”¹⁸² Another identified trend is the MPCID’s failure, in the majority of cases, to collect external evidence, including from the scene of the incident.

¹⁷² Ibid., p. 55.

¹⁷³ *The Minnesota Protocol on the Investigation of Potentially Unlawful Death*, para. 26.

¹⁷⁴ Specific sensitivities need to be taken into account with regard to autopsy, burial, and exhumations of bodies. See Geneva Academy and ICRC, *Guidelines on Investigating Violations of International Humanitarian Law*, Guideline 8, para. 138.

¹⁷⁵ *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, UN Doc. E/CN.4/2006/53 (8 March 2006), para. 36.

¹⁷⁶ Ibid. See also Geneva Academy and ICRC, *Guidelines on Investigating Violations of International Humanitarian Law*, Guideline 8, para. 137.

¹⁷⁷ Geneva Academy and ICRC, *Guidelines on Investigating Violations of International Humanitarian Law*, Guideline 8, para. 139.

¹⁷⁸ Ibid., paras. 139–141.

¹⁷⁹ *Global Principles on National Security and the Right to Information* (Tshwane Principles) (12 June 2013), principle 10.A(1-2), at <https://www.justiceinitiative.org/publications/global-principles-national-security-and-freedom-information-tshwane-principles>.

¹⁸⁰ B’tselem, *The Occupation’s Fig Leaf*, p. 18; Al Haq et al., *Joint Submission to the United Nations Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied Since 1967, Mr Michael Lynk, on Accountability* (31 May 2020), paras. 79 ff.

¹⁸¹ B’tselem, *The Occupation’s Fig Leaf*, p. 18.

¹⁸² Ibid.

This is explained by the fact that investigators, even when the circumstances allow, rarely reach the scene of the incident.¹⁸³

In light of this, there is serious concern that Israel fails to ensure that investigations be conducted in a thorough and effective manner as prescribed by international law and standards.

3.3.4. Transparency

International law demands investigative processes and outcomes to be transparent, including through openness to the scrutiny of the general public.¹⁸⁴ The Minnesota Protocol indicates the necessity to “adopt explicit policies regarding the transparency of investigations. States should, at a minimum, be transparent about the existence of an investigation, the procedures to be followed in an investigation, and an investigation’s findings, including their factual and legal basis.”¹⁸⁵ The Minnesota Protocol cautions that any limitations on transparency must be strictly necessary for a legitimate purpose, such as protecting the privacy and safety of the affected individuals, ensuring the integrity of ongoing investigations, or securing sensitive information about intelligence sources or military or police operations: “[i]n no circumstances may a State restrict transparency in a way that would conceal the fate or whereabouts of any victim of an enforced disappearance or unlawful killing, or would result in impunity for those responsible.”¹⁸⁶ Without jeopardizing an ongoing investigation, it should be possible to access information on the investigative process.¹⁸⁷

The principle of transparency is not explicitly recognized under IHL.¹⁸⁸ Also, in situation of armed conflict, there might be a problem regarding the classification of information on “national security” grounds. As noted in the previous section, the withholding of information essential to an investigation on “national security” or other grounds may undermine its effectiveness, and is at odds with the principle of transparency.¹⁸⁹

Following Operation “Protective Edge” in 2014, Israel took steps to improve the transparency of its military justice system. The MAG, in line with the Turkel Commission’s recommendations, published six updates since the conclusion of the hostilities regarding the status of fact-finding assessments and criminal investigations.¹⁹⁰ In these reports, the MAG included data on the number of complaints received and criminal investigations opened, as well as relevant information on their progress. It also clarified the reasons for not opening certain investigations and closing existing ones without proceeding to prosecution. However, the information made available appeared inadequate to enable a review and an assessment of the procedures used by the FFAM and the MAG in the examination of incidents of reported violations of IHRL and/or IHL. For instance, the MAG’s reports do not provide the necessary level of detail to purportedly justify actions that result in civilian harm.¹⁹¹

NGOs directly engaging with the military justice system have repeatedly asked the MAG Corps and the IDF spokesperson to release accurate information and data about their work, such as how many complaints they receive, how many of these result in the opening of an investigation, and the way criminal investigations are handled. Each time, the answers have been “partial and full of

¹⁸³ Ibid.

¹⁸⁴ *The Minnesota Protocol on the Investigation of Potentially Unlawful Death*, para. 32; ICJ, *The investigation and prosecution of potentially unlawful death—Practitioners’ Guide No. 14*, pp. 58–59.

¹⁸⁵ *The Minnesota Protocol on the Investigation of Potentially Unlawful Death*, para. 32.

¹⁸⁶ Ibid., para. 33.

¹⁸⁷ ICJ, *The investigation and prosecution of potentially unlawful death—Practitioners’ Guide No. 14*, pp. 59–60.

¹⁸⁸ Turkel Commission, Second Report, p. 145. See also Geneva Academy and ICRC, *Guidelines on Investigating Violations of International Humanitarian Law*, Guideline 10, para. 146.

¹⁸⁹ Ibid., para. 153.

¹⁹⁰ See, for example, IDF, *Decisions of the IDF Military Advocate General Regarding Exceptional Incidents that Allegedly Occurred During Operation ‘Protective Edge’*, Update No. 6 (15 August 2018).

¹⁹¹ *Report of the detailed findings of the independent commission of inquiry established pursuant to Human Rights Council Resolution S-21/1*, UN Doc. A/HRC/29/CRP.4 (23 June 2015), para. 627.

contradictions.”¹⁹² More generally, the information provided by the MAG is deemed “insufficient to allow for effective public and international scrutiny.”¹⁹³

By not guaranteeing an adequate level of transparency of investigations, Israel fails to meet its obligations under international law and standards.

3.3.5. Participation of victims and their families

Victims and their families must be able to meaningfully participate in an investigation.¹⁹⁴ In this sense, they must be “involved in the procedure to the extent necessary to safeguard [their] legitimate interests.”¹⁹⁵ Their testimony must be heard and they must have access to relevant information.¹⁹⁶ Decisions not to prosecute must be publicly reasoned and notice must be given to the families.¹⁹⁷

The UN Principles on Extra-legal Executions state that the families of the deceased and their legal representatives shall be informed of, and have access to, any hearing as well as to all information relevant to the investigation, and shall be entitled to present other evidence. The family of the deceased shall have the right to insist that a medical or other qualified representative be present at the autopsy. When the identity of a deceased person has been determined, a notification of death shall be posted, and the family or relatives of the deceased shall be informed immediately. The body of the deceased shall be returned to them upon completion of the investigation.¹⁹⁸ The Minnesota Protocol further specifies that:

Family members should be granted legal standing, and the investigative mechanisms or authorities should keep them informed of the progress of the investigation, during all its phases, in a timely manner. Family members must be enabled by the investigating authorities to make suggestions and arguments as to what investigative steps are necessary, provide evidence, and assert their interests and rights throughout the process.¹⁹⁹

With regard to the Israeli military justice system, lawyers representing complainants have often reported having no access to investigatory materials because they are labelled “classified information.”²⁰⁰ NGOs and lawyers representing victims meet obstacles in obtaining information on behalf of the victims.²⁰¹ When the MAG Corps provides information, this is often incomplete.²⁰²

By not adequately guaranteeing the participation of victims and their families in investigations, Israel breaches its obligations under international law and standards.

3.4. Failure to comply with the duty to investigate in practice

The Israeli military justice system’s failure to comply with the duty to investigate under international law is illustrated by available figures related to the number of investigations opened in the aftermath of military operations or law enforcement incidents that had resulted in potentially unlawful deaths.

¹⁹² B’tselem, *The Occupation’s Fig Leaf*, p. 31.

¹⁹³ *Report of the detailed findings of the independent commission of inquiry established pursuant to Human Rights Council Resolution S-21/1*, UN Doc. A/HRC/29/CRP.4 (23 June 2015), para. 629.

¹⁹⁴ *The Minnesota Protocol on the Investigation of Potentially Unlawful Death*, para. 35.

¹⁹⁵ European Court of Human Rights, *Finucane v. the United Kingdom*, Judgment (1 July 2003), para. 71.

¹⁹⁶ European Court of Human Rights, *Hugh Jordan v. the United Kingdom*, Judgment (4 May 2001), para. 133.

¹⁹⁷ *Ibid.*, paras. 122 ff.

¹⁹⁸ *Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions*, principle 16.

¹⁹⁹ *The Minnesota Protocol on the Investigation of Potentially Unlawful Death*, para. 35.

²⁰⁰ *Report of the detailed findings of the independent commission of inquiry established pursuant to Human Rights Council Resolution S-21/1*, UN Doc. A/HRC/29/CRP.4 (23 June 2015), para. 627; B’tselem, *The Occupation’s Fig Leaf*, p. 31.

²⁰¹ B’tselem, *The Occupation’s Fig Leaf*, p. 31.

²⁰² *Ibid.*

In relation to the 2014 Operation "Protective Edge" – which caused the death of 2,251 Palestinians, including 1,462 civilians – of the 500 complaints related to 360 incidents referred to the MAG and evidencing IDF's misconduct, only 31 triggered the opening of a criminal investigation.²⁰³ In one case, the MAG indicted three soldiers on charges of looting, and aiding and abetting looting. A military court eventually convicted the individuals concerned of theft and aiding and abetting theft, and sentenced them accordingly.²⁰⁴ With respect to the other 30 cases, 28 investigations were closed without resulting in criminal charges and two were still pending as of August 2018, when the MAG provided the latest update.²⁰⁵ Complaints relating to 189 incidents have been dismissed without a criminal investigation.²⁰⁶

Over 220 allegations, which according to the MAG Corps did not disclose *prima facie* reasonable suspicion of criminal misconduct, were transferred to the FFAM for examination. After receiving the findings of the FFAM, the MAG closed 160 cases without opening a criminal investigation, as it had determined that no reasonable grounds for suspicion of criminal behaviour existed. With regard to 53 incidents, the MAG ordered a preliminary investigation by the MPCID. In the remaining seven cases where the MAG ordered the opening of a criminal investigation, five were closed without further action and two are still pending. In any event, the MAG has not issued any indictment in relation to incidents causing significant civilian casualties.²⁰⁷

With regard to the 2021 Operation "Guardian of the Walls" in Gaza – in which 261 Palestinians were killed, including at least 130 civilians – the Palestinian Centre for Human Rights submitted 57 criminal complaints to the MAG concerning the killing of 101 individuals and the injuring of another 100. The MAG indicated that it had referred 11 of those complaints to the FFAM. The OHCHR reported that, as of 31 October 2021, it was "not aware of any criminal investigation opened into the conduct of Israeli security forces during hostilities in May 2021."²⁰⁸

The flaws of the Israeli military justice system in investigating misconduct of its soldiers are also striking in cases of incidents occurring outside the conduct of hostilities. For instance, in 2018 Israeli security forces killed 299 Palestinians, including 57 children, and wounded 29,878 people, including 7,242 children.²⁰⁹ The majority of the killings and injuries took place during law enforcement operations, in particular the "Great March of Return" in Gaza.²¹⁰ At the end of 2018, it was reported that investigations had been opened into eight incidents of alleged killing of demonstrators.

²⁰³ IDF, *Decisions of the IDF Military Advocate General Regarding Exceptional Incidents that Allegedly Occurred During Operation 'Protective Edge'*, Update No. 6 (15 August 2018), pp. 1–2.

²⁰⁴ *Ibid.*; *Report of the United Nations High Commissioner for Human Rights*, UN Doc. A/HRC/40/43 (14 March 2019), para. 5.

²⁰⁵ In March 2022, the OHCHR reported that "the most recent update by the Military Advocate General of Israel was provided on 15 August 2018. No further updates have been published since, and no notable progress in the investigation and prosecution of alleged violations in the context of the hostilities in 2014 was made public during the reporting period." See *Report of the United Nations High Commissioner for Human Rights*, UN Doc. A/HRC/49/25 (23 February 2022), para. 14.

²⁰⁶ *Report of the United Nations High Commissioner for Human Rights*, UN Doc. A/HRC/40/43 (14 March 2019), para. 5.

²⁰⁷ IDF, *Decisions of the IDF Military Advocate General Regarding Exceptional Incidents that Allegedly Occurred During Operation "Protective Edge"*, Update No. 5 (24 August 2016), at http://www.nuhanovicfoundation.org/user/file/2016_press_release_mag_update_no_5_24_august_2016.pdf. See also *Report of the detailed findings of the independent international Commission of inquiry on the protests in the Occupied Palestinian Territory*, UN Doc. A/HRC/40/CRP.2 (18 March 2019), para. 724.

²⁰⁸ *Report of the United Nations High Commissioner for Human Rights*, UN Doc. A/HRC/49/25 (23 February 2022), paras. 6–7.

²⁰⁹ *Report of the United Nations High Commissioner for Human Rights*, UN Doc. A/HRC/40/43 (14 March 2019), para. 14.

²¹⁰ On 30 March 2018, large-scale demonstrations began along the fence between Israel and the Gaza Strip, under the banner of the "Great March of Return", calling for the right to return of Palestinian refugees and protesting the Israeli closure of Gaza. In this context, 183 Palestinians, including 35 children, were killed. Three Israeli soldiers and over 23,313 Palestinians were injured, including over 6,106 with live ammunition. For more information, see *Report of the independent international commission of inquiry on the protests in the Occupied Palestinian Territory*, UN Doc. A/HRC/40/74 (25 February 2019), paras. 22–26, 37–38.

Considering the high number of civilian casualties, and the fact that the Gaza-based Palestinian NGOs Al Mezan and Palestinian Centre for Human Rights had respectively submitted 82 and 56 claims to the Israeli authorities in relation to individuals killed or wounded by live ammunition in Gaza,²¹¹ these figures seem woefully small. As of April 2021, out of a total of 236 investigations, 140 were still under investigation or review, 95 have been closed with no investigation, and only one indictment has been filed. The indictment was served against a soldier from the Givati brigade for an incident in which Othman Rami Jawad Hillis, a 14-year-old boy from Gaza City, was shot and killed as he was climbing the Separation fence during the protests, on 13 July 2018. The soldier was merely charged with a disciplinary offence as part of a plea bargain and only sentenced to 30 days of military community service, a suspended prison term and a demotion to the rank of private.²¹²

A similar situation is reported in the West Bank in the context of law enforcement operations conducted by Israeli forces. According to the OHCHR:

[b]etween 1 January 2017²⁷ and 31 October 2021, 428 Palestinians (including 91 children) were killed by Israeli security forces in law enforcement operations in the Occupied Palestinian Territory. OHCHR is aware of criminal investigations opened in relation to these deaths, of which at least 13 were closed without further action being taken and 5 resulted in indictments, 3 of which led to convictions. ... in most cases a criminal investigation is not opened and details of the decision are not made public ... In the rare cases where investigations result in criminal charges, these are often starkly incommensurate with the gravity of the conduct.²¹³

The failure to prosecute IDF members, who opened fire on individuals not posing a threat to life, raises serious concern with regard to the Israeli military justice system's functioning and its failure to comply with Israel's obligations under international law. More generally, the number of cases that have not been submitted to criminal investigation despite the gravity of the allegations of violations of IHRL and/or IHL they raised, and which have been closed by the MAG for lack of "reasonable suspicion" of criminal behaviour, attests to the Israeli military justice system's failure to comply with the duty to investigate under international law.

3.5. Review of selected cases

3.5.1. Events in Rafah, 1 August 2014 (The Black Friday)

In the morning of 1 August 2014, during Operation "Protective Edge" in Gaza, Israel launched a major attack – entailing airstrikes and ground incursions – in the town of Rafah. During this attack, which lasted around ten hours, three Israeli soldiers and 177 Palestinians, including 144 civilians, were killed. At the time of the attack, some areas of Rafah were closed off by the IDF to impede movement in and out of the city. Residents of Rafah, who were returning to their homes after the announcement of a ceasefire, found themselves trapped with no safe place to go. According to media reports, in three hours the IDF fired over 1000 shells and dropped at least 40 bombs against the city, including on hospitals, while tanks and bulldozers destroyed dozens of houses. Ambulances and civilian vehicles were also targeted while attempting to evacuate civilians from the warzone.²¹⁴

²¹¹ *Report of the United Nations High Commissioner for Human Rights*, UN Doc. A/HRC/40/43 (14 March 2019), para. 17.

²¹² Yesh Din, *Killing Time: Updated figures* (21 June 2021), pp. 4 and 6, at <https://www.yesh-din.org/en/killing-time-updated-figures-april-2021/>.

²¹³ *Report of the United Nations High Commissioner for Human Rights*, UN Doc. A/HRC/49/25 (23 February 2022), para. 17.

²¹⁴ *Report of the detailed findings of the independent commission of inquiry established pursuant to Human Rights Council Resolution S-21/1*, UN Doc. A/HRC/29/CRP.4 (24 June 2015), paras. 349–350.

As a result of these events, the MAG received numerous allegations concerning IHL violations committed by the IDF, including indiscriminate attacks against civilians and civilian objects, as well as credible allegations disclosing evidence of a failure to abide by the principles of proportionality and precaution in attacks. Following the examination of the FFAM's findings, the MAG decided to close all cases without opening a criminal investigation and without taking action against any of the IDF officers involved.²¹⁵ Despite acknowledging that Palestinian civilians might have been incidentally killed during the operation, the MAG concluded that no civilian was directly targeted, and the majority of those who lost their lives had perished "as collateral damage" of airstrikes directed at legitimate military objectives.²¹⁶ In a few incidents, the MAG did recognize that the civilian presence in the targeted area had been larger than expected, but insisted that this critical fact would not have affected the outcome of the proportionality assessment conducted prior to the attack as prescribed by IHL. The MAG also emphasized the IDF's purported use of precaution measures to reduce the risk of "collateral damage" prior to airstrikes. However, according to the MAG, in some cases issuing warnings would not have been feasible without jeopardizing the effectiveness of the attacks. Overall, the MAG concluded that, based on the available information, there was no reasonable suspicion of criminal misconduct by the IDF.²¹⁷

On the basis of publicly available information, the MAG's explanations appear wholly insufficient to conclude that the IHL principles concerning the lawful conduct of hostilities were respected during the said attack. From the reports provided by a UN Commission of Inquiry, it seems that the intense bombing and shelling carried out in a densely populated area, without allowing civilians to evacuate, could qualify as an indiscriminate attack against civilians, which may amount to a war crime. The targeting of ambulances and hospitals, which are especially protected civilian objects under IHL, also demonstrates the non-compliance of such attacks with the principle of distinction. Furthermore, taking into consideration the high number of civilian deaths as a result of air bombing and shelling, it seems difficult to conclude that the principles of proportionality and precautions were respected before the launch of each attack. In any event, given the credible allegations of serious violations of IHL reported, and the high number of civilian deaths and injuries, these incidents should have triggered the opening of an effective investigation. The decision not to conduct a criminal investigation is a graphic illustration of the MAG's failure to consistently open a criminal investigation in cases where there is *prima facie* evidence of criminal behaviour by IDF officers, in violation of international law and standards.

3.5.2. The killing of Abdelfattah al-Sharif in Hebron

On 24 March 2016, two Palestinians armed with knives – Ramzi Aziz al-Tamimi al-Qasrawi and Abdel Fattah al-Sharif – stabbed an Israeli soldier at a military checkpoint in the Tel Rumeida neighborhood in Hebron, West Bank, causing him injuries that were not life-threatening. The other soldiers standing by the checkpoint immediately responded by opening fire, killing Mr. Al-Qasrawi and seriously injuring Mr. Al-Sharif. As reinforcements reached the scene of the incident, Sergeant Elor Azaria approached Mr. Al-Sharif while he was lying incapacitated on the floor, and fatally shot him in the head while standing less than two meters away. A video footage of the incident was published by B'tselem and went viral on social media, causing widespread condemnation of Sergeant Azaria's actions.²¹⁸

After receiving the operational debriefing, the MAG decided to open a criminal investigation into the case and Sergeant Azaria was arrested. He was initially treated as a murder suspect, but the military prosecution eventually charged him with manslaughter and conduct unbecoming of a non-

²¹⁵ IDF, *Decisions of the IDF Military Advocate General Regarding Exceptional Incidents that Allegedly Occurred During Operation 'Protective Edge'*, Update No. 6 (15 August 2018), pp. 4–21.

²¹⁶ *Ibid.*, p. 15.

²¹⁷ *Ibid.*, pp. 4–21. See also *Report of the United Nations High Commissioner for Human Rights*, UN Doc. A/HRC/40/43 (14 March 2019), paras. 7–8.

²¹⁸ *Ibid.*, para. 21.

commissioned officer.²¹⁹ At trial, Sergeant Azaria pleaded not guilty.²²⁰ In January 2017, he was convicted of manslaughter and, albeit manslaughter carries a sentence of up to 20 years' imprisonment under Israeli domestic law, Sergeant Azaria was sentenced to a mere term of 18 months in prison in addition to a rank demotion.²²¹ While the Military Appeals Court confirmed the conviction and the 18 months' sentence, on September 2017 the IDF Chief of General Staff, Gadi Eisenkot, reduced Sergeant Azaria's sentence to 14 months' imprisonment, purportedly "out of considerations for compassion, mercy and his combat service."²²² Sergeant Azaria began his prison term on 9 August 2017 and was granted early release on 8 May 2018, after having served nine months in prison, meaning only two thirds of his sentence.²²³

The lenient sentence against Sergeant Azaria, as well as his early release, sparked widespread criticism and controversy. It seems indeed difficult to reconcile the punishment imposed on Sergeant Azaria with the severity of the offence he committed, namely, the apparent extrajudicial execution of an unarmed man who was lying incapacitated on the floor, thereby not posing any threat whatsoever either to Sergeant Azaria or to anyone else. Under article 147 of GC IV, the willful killing of a protected person constitutes a grave breach of this Convention, i.e., a war crime.

The prosecution and conviction of Sergeant Azaria represents an exception²²⁴ in a system where, as mentioned above, the majority of allegations do not trigger the opening of a criminal investigation and are closed by the MAG without further action. Yet, even in the rare cases when an investigation is opened and the perpetrators face trial, the military justice system's conduct is deeply flawed and delivers excessively lenient sentences, promoting impunity as opposed to accountability for human rights violations. The excessively lenient verdict also stands in contrast to the sentences imposed by other Israeli courts on Palestinians convicted of far less serious crimes, including, for example, the sentencing of Palestinian children to more than three years' imprisonment for throwing stones at cars, or the eight months' imprisonment – almost the same amount of time served by Sergeant Azaria – handed down to then 17-year-old Ahed Tamimi for slapping an IDF soldier.²²⁵

3.5.3. The killing of Samir Awad in the West Bank

On 15 January 2013, 16-year-old Palestinian Samir 'Awad was shot and killed by live ammunition fired by Israeli security forces in the vicinity of the Separation Wall close to Budrus, a Palestinian village in the West Bank. According to testimony gathered by B'tselem, Samir and a few other teenager friends had gone near the Separation Wall to throw stones at military patrols along the fence. In that part of the West Bank, the Separation Wall was by then made up of an initial fence and secondary rows of barbed wire around it, used to prevent access to the fence. The victim used an opening in the barbed wire to try to reach the fence. When approaching the fence, Samir spotted four Israeli soldiers and immediately tried to escape but, as reports indicate, he got caught between the barbed wire and the fence as the soldiers told him to stop and fired in the air. In panic, Samir did not stop and was first shot at in one of his legs. When he got up and tried to continue running

²¹⁹ YNet News, *Sgt. Elor Azaria convicted of manslaughter after Hebron shooting* (1 April 2017), at <https://www.ynetnews.com/articles/0,7340,L-4902894,00.html>.

²²⁰ YNet News, *Elor Azaria pleads not guilty to manslaughter charges* (23 May 2017), at <https://www.ynetnews.com/articles/0,7340,L-4806780,00.html>.

²²¹ The Independent, *Elor Azaria: Israeli soldier sentenced to 18 months in jail for shooting dead wounded Palestinian attacker* (21 February 2017), at <https://www.independent.co.uk/news/world/middle-east/israel-soldier-sentence-latest-elor-azaria-manslaughter-hebron-shooting-palestinian-wounded-attacker-a7591061.html>.

²²² The Jerusalem Post, *Army chief cuts 4 months from Hebron shooter's sentence* (27 September 2017), at <https://www.jpost.com/Israel-News/IDF-Chief-of-Staff-reduces-Hebron-shooters-sentence-by-four-months-506095>.

²²³ *Report of the United Nations High Commissioner for Human Rights*, UN Doc. A/HRC/40/43 (14 March 2019), para. 21.

²²⁴ The Azaria case is the first prosecution of an Israeli officer on duty in more than 12 years. See The Independent, *Five children who got longer sentences for throwing stones than Israeli soldier who shot incapacitated Palestinian dead* (22 February 2017), at <https://www.independent.co.uk/news/world/middle-east/israel-soldier-sentence-latest-elor-azaria-manslaughter-hebron-palestinian-shooting-wounded-attacker-children-stone-throwing-jerusalem-a7593126.html>.

²²⁵ *Ibid.*; The Times of Israel, *Hebron shooter gets hero's welcome after serving term* (8 May 2018), at <https://www.timesofisrael.com/hebron-shooter-gets-heros-welcome-after-serving-term/>.

away from the soldiers, they shot him again in the back and in the head. Samir 'Awad succumbed to his injuries on arrival at the hospital in Ramallah.²²⁶

Immediately after the incident, the MAG Corps announced the opening of a criminal investigation. According to media reports, the preliminary inquiry by the MAG Corps found that the soldiers acted in contravention of open-fire regulations, which permit the use of live ammunition by soldiers only in cases of concrete and imminent threat to life.²²⁷ The circumstances of the case, as reported by eye witnesses and field researchers, including the fact that the victim was shot in the back while fleeing, clearly indicate he posed no threat to the life of IDF soldiers or anyone else, and that the use of live ammunitions against Samir was unlawful. As a result, his killing may well constitute an extrajudicial execution and a grave breach of GC IV.²²⁸

Over a year after the incident and the opening of an investigation, the MAG had still not decided whether to issue an indictment against the suspected soldiers. On 30 March 2014, the father of the victim, together with B'tselem, filed a petition to the HCJ demanding that the MAG decide whether to indict the soldiers or to close the case.²²⁹ The petitioners stressed that the unreasonable delay in conducting the investigation was jeopardizing its effectiveness. The HCJ ordered the MAG to issue a decision before 1 May 2014. On 1 September 2014, the Attorney-General's Office responded to the petition, stating that it needed an extra six months to reach a decision, adding that one of the suspects had already been discharged from service after completing his term and was no longer under the authority of the military,²³⁰ causing the case to be transferred to the Attorney-General's Office. On 1 December 2014, the HCJ instructed the MAG Corps and the Attorney-General's Office to reach a decision on whether to charge or close the case by 1 March 2015. The HCJ further added the Attorney-General as a respondent in the petition.²³¹

On 15 April 2015, over two years after the incident, the Attorney-General's Office informed the HCJ that it had decided to file an indictment against the two suspected soldiers for the offence of

²²⁶ Amnesty International, *Trigger-Happy: Israel's Use of Excessive Force in the West Bank* (February 2014), p. 16, at <https://www.amnestyusa.org/pdfs/mde150022014en.pdf>.

²²⁷ Israel Security Forces in the OPT mainly perform law enforcement activities, including dispersing demonstrations, making arrests, enforcing travel restrictions, and conducting body frisks and home searches. While conducting these activities, soldiers are bound by the military's open-fire regulations (rules of engagement) that regulate and limit the use of firearms. According to the open-fire regulations, live ammunition may be fired in two situations: (i) shooting to kill, when members of the security forces or other individuals are in life-threatening danger. Even then, the use of firearms is permitted exclusively as a last resort and against the assailant(s) only; and (ii) shooting at lower limbs, as the last resort when attempting to arrest the person in question, only after law enforcement agents have given warning and fired in the air, and only when no one else is in danger of getting hurt. The regulations were updated in December 2015 but were rendered only partially available to the public in 2017, following a petition by Adalah to the HCJ. According to the updated version, which allows for the use of lethal force in a wider number of situations, "an officer is permitted to open fire [with live ammunition] directly on an individual who clearly appears to be throwing or is about to throw a firebomb, or who is shooting or is about to shoot fireworks, in order to prevent endangerment." The regulations further add that "stone throwing using a slingshot" would justify the fatal use of live ammunition. See Adalah, *Israeli police reveal new open-fire regulations in response to Adalah's court petition*, 5 July 2016, at <https://www.adalah.org/en/content/view/8845>; B'tselem, *Open-Fire Policy*, 11 November 2017, at <https://www.btselem.org/firearms>. For analysis of the open-fire regulations applicable during the "Great March of Return" events, see ICJ, *Submission of the International Commission of Jurists to the UN Human Rights Committee in View of the Committee's Examination of Israel's Fifth Periodic Report* (31 January 2022), pp. 6–11, at https://www.icj.org/wp-content/uploads/2022/01/ISRAEL_HRCommittee_Submission.pdf.

²²⁸ Amnesty International, *Trigger-Happy: Israel's Use of Excessive Force in the West Bank* (February 2014), p. 16.

²²⁹ B'tselem, *Father of Palestinian youth killed by soldiers in Budrus petitions High Court to end delay in investigation* (30 March 2014), at https://www.btselem.org/press_releases/20140327_samir_awad_investigation_petition.

²³⁰ According to the Israeli domestic system, after soldiers have been discharged from their military service, martial law continues to apply to them for the subsequent six months. After that, the MAG has no longer jurisdiction and the cases must be transferred to the civilian authority, namely the Attorney-General's Office. In previous years, as reported by one of the judges of the HCJ, the practice in the military had been to expedite investigations and legal proceedings when there was knowledge that the suspect was soon to be discharged. It seems that in this case, as many others, the trend is to try to do the opposite. See B'tselem, *HCJ instructs MAG Corps and State Attorney's Office to reach a decision in Samir 'Awad case within three months* (1 December 2014), at https://www.btselem.org/press_releases/20141201_hearing_in_samir_awad_investigation_petition.

²³¹ *Ibid.*

committing “a reckless and negligent act using a firearm”, comparatively speaking a minor offence related to the use of firearms, punishable with a maximum sentence of three years’ imprisonment. Reportedly, charges of manslaughter were not sustained as the Israeli investigation was unable to determine who, between the two soldiers involved in the incident, had fired the bullet that caused the death of Samir.²³²

The trial began on 22 September 2016 at the Ramla Magistrates Court. On 5 June 2018, the Attorney-General’s Central District Office decided to withdraw the indictment arguing that the prosecution’s evidence had been weakened since there was reportedly no proof that the open-fire regulations had been violated, and there was no longer “a reasonable prospect of conviction.”²³³ However, many reports assert that the main reason for withdrawing the indictment was the defence lawyers’ argument that convicting the soldiers would amount to a “selective enforcement” of the law, since it was very rare for an indictment to be brought against IDF soldiers for shooting and killing Palestinians. The defence lawyers further added that in the last seven years, out of 110 cases in which soldiers had shot and killed Palestinians, only four indictments had been filed.²³⁴ As affirmed by Yesh Din, “[w]hen the State Attorney’s Office decides time and time again not to investigate or prosecute soldiers for harming Palestinians, it creates its own defence of discrimination.”²³⁵

The above-mentioned cases are emblematic of several, fatal flaws of the Israeli justice system, attesting to its inability to hold perpetrators of serious violations of IHRL and/or IHL to account, and to ensure justice and effective remedies for victims and their families.

Recommendations

In light of the above, the Israeli authorities should:

- **Reform the laws and institutions governing the initiation of an investigation into violations of IHRL and/or IHL, in particular by:**
 - **Prescribing the opening of an investigation into all incidents involving the use of firearms by the IDF in the OPT, especially when resulting in a potentially unlawful death or serious injury;**
 - **Repealing the “real combat nature” clause as a ground to exclude the opening of an investigation;**
 - **Ensuring that “operational debriefings” do not hinder the decision on whether to open a criminal investigation into crimes allegedly committed by IDF members;**
 - **Reforming the FFAM to guarantee its independence from the IDF, as well as the impartiality, promptness and thoroughness of its inquiries;**
- **Ensure that criminal investigations are conducted in accordance with international law and standards, in particular by:**
 - **Setting a specific timeframe concerning the opening, conduct and outcome of an investigation to comply with the principle of promptness;**

²³² Haaretz, *Israeli Soldiers’ Indictment Over Palestinian’s Death to Be Quashed* (5 June 2018), at <https://www.haaretz.com/israel-news/.premium-israeli-soldiers-indictment-over-palestinian-s-death-to-be-quashed-1.6152004>.

²³³ B’tselem, *Soldiers who shot 16-year-old in the back charged with “reckless and negligent act”; COs who ordered the stakeout will not be held accountable* (31 December 2015, updated on 18 December 2018), at https://www.btselem.org/accountability/20151231_soldiers_who_killed_youth_indicted_for_reckless_negligent_act.

²³⁴ *Report of the United Nations High Commissioner for Human Rights*, UN Doc. A/HRC/40/43 (14 March 2019), para. 19.

²³⁵ Middle East Eye, *Israeli troops avoid charges over death of Palestinian teen shot in back* (5 June 2018), at <https://www.middleeasteye.net/news/israeli-troops-avoid-charges-over-death-palestinian-teen-shot-back>.

- **Ensuring that investigations into alleged serious violations of IHRL and IHL be conducted thoroughly, especially by guaranteeing the effective collection of external evidence, including from the scene of the incidents, and with respect to the holding of interviews and the gathering of testimonies from suspects, complainants and witnesses;**
- **Ensuring the transparency of investigations, including by refraining from classifying information relating to violations of IHRL and IHL;**
- **Guaranteeing the meaningful participation of victims, their families and legal representatives in the investigations, including by providing access to the proceedings and regular updates on the progress of investigations.**

In addition, the ICJ calls on:

- I. **Third States to fully support and cooperate with the investigations of the ICC and the Palestine/Israel COI;**
- II. **Third States to consider exercising universal jurisdiction, also pursuant to articles 146, 147 and 148 of the Fourth Geneva Convention, with a view to prosecuting alleged perpetrators of crimes under international law who are present on their territory or otherwise under their jurisdiction; and**
- III. **Third States and the European Union to ensure not to aid or assist in the commission of internationally wrongful acts by Israel, including crimes under international law. This should entail halting the transfer of arms, technology and other equipment that may be used in the commission of such acts.**

4. The right to an effective remedy and reparation

The right to an effective remedy and reparation is a general principle of law, and has been affirmed by a consensus of all States in the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation, adopted by the UN General Assembly in 2005.²³⁶ The obligation is enshrined in various human rights treaties,²³⁷ and reflected in customary international law.²³⁸ This right obliges the responsible State to provide an effective remedy by ensuring that victims or their families have access to a competent body to file a claim, as well as to adequate reparation for the harm suffered.²³⁹ The distinctive requirement of remedies is effectiveness: a remedy must be accessible, enforceable, and capable of stopping an ongoing violation.²⁴⁰

Reparation is an integral component of the right to an effective remedy.²⁴¹ The forms of reparation to be provided include compensation, rehabilitation, restitution, satisfaction and guarantees of non-repetition.²⁴² These forms of reparation are not alternative options; they must all be available in principle, although not all will be relevant in each and every case. Reparation should be proportional

²³⁶ *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* (UN Basic Principles and Guidelines on the Right to a Remedy and Reparation), principle 11; *Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions*, principles 4, 16, 20.

²³⁷ ICCPR, art. 2(3); CAT, arts. 13–14; ICPPED, arts. 8(2), 20(2), 24(4–5).

²³⁸ ICJ, *The Right to a Remedy and to Reparation for Gross Human Rights Violations—Practitioners’ Guide No. 2* (October 2018), pp. 153, 156.

²³⁹ *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, principle 31; *UN Basic Principles and Guidelines on the Right to a Remedy and Reparation*, principle 11.

²⁴⁰ Human Rights Committee, *General Comment No. 31*, para. 15.

²⁴¹ *Ibid.*, para. 16.

²⁴² *UN Basic Principles and Guidelines on the Right to a Remedy and Reparation*, principles 15–23; Human Rights Committee, *General Comment No. 31*, para. 16; Committee against Torture, *General Comment No. 3: Implementation of Article 14 by States Parties*, UN Doc. CAT/C/GC/3 (13 December 2012), para. 2.

to the gravity of the violation and the harm suffered by the victims and their families,²⁴³ and tailored to their needs, as appropriate.²⁴⁴ This means that compensation, for example, must reflect the material (e.g., loss of earnings) and moral damages (e.g., psychological harm) actually incurred by the victim or their family.²⁴⁵

States also have an obligation to provide full reparation for breaches of IHL committed by their armed forces and by persons or groups acting on their instructions or under their direction or control, whether in international or non-international armed conflicts.²⁴⁶ The UN Basic Principles and Guidelines on the Right to a Remedy and Reparation require States to provide “[e]qual and effective access to justice [and] [a]dequate, effective and prompt reparation” for serious violations of IHL.²⁴⁷

Palestinians residing in the OPT, especially in Gaza, face numerous obstacles that prevent them from seeking an effective remedy.²⁴⁸ On 16 July 2012, the Knesset passed Amendment No. 8 to the Civil Wrongs (State Liability) Law of 1952, which applies retroactively from 12 September 2005. The Law allows Israeli courts to dismiss civil liability cases brought by Palestinians whenever the alleged damage has occurred in connection with an “act of war.”²⁴⁹ According to article 1 of the Law (as per Amendment No. 8), an “act of war” includes “any action combating terror, hostile acts, or insurrection.” This definition is particularly broad as the terms “terror”, “hostile acts” and “insurrection” are vague and undefined. The risk is that most of the incidents occurring in the OPT are interpreted as falling under the “act of war” clause, which would effectively deprive Palestinians of their right to bring civil suits in Israeli courts for harm suffered at the hands of the IDF, including in connection with crimes under international law, such as arbitrary deprivations of life.

In 2012, the Nazareth District Court dismissed the lawsuit brought by Mr. Aldaia for the destruction of his home during operation “Cast Lead”, which caused the death of 22 people and the injury of several others. Although the IDF admitted having mistakenly targeted the plaintiff’s house, the Nazareth District Court found that the incident was covered by the “act of war” clause.²⁵⁰

In November 2017, the Beersheba District Court dismissed a compensation claim brought by the Palestinian NGO Al Mezan for damage caused by two attacks carried out by the IDF on 13 July 2010 and 28 April 2011 in Johr Al Deek in Gaza. During the 2010 attack, the wife of Naser Abu Is’ayid was killed and four other family members were injured; during the 2011 attack, three of his children were injured and his house totally destroyed. Despite the fact that the petitioners had alleged that the IDF committed “serious wrongdoing”, the District Court dismissed the claim stating that the killing, injuries and damage had occurred in connection to “acts of war”, meaning the State could not incur liability according to Amendment No. 8 to the 1952 Law. The decision was upheld by the HCJ.²⁵¹

In May 2021, the Beersheba District Court ruled against a civil claim brought by the family of Iman al-Hams, a 14-year-old girl who was shot to death in 2004 by the IDF near the security zone in Rafah, Gaza. While the District Court acknowledged that the IDF had acted negligently and in

²⁴³ UN Basic Principles and Guidelines on the Right to a Remedy and Reparation, principle 18.

²⁴⁴ Committee against Torture, *General Comment No. 3*, para. 6.

²⁴⁵ UN Basic Principles and Guidelines on the Right to a Remedy and Reparation, principle 20(b).

²⁴⁶ *Hague Convention IV respecting the Laws and Customs of War on Land and Annexed Regulations*, 18 October 1907, art. 3; AP I, art. 91; ICRC, *Customary IHL Database*, rule 150.

²⁴⁷ UN Basic Principles and Guidelines on the Right to a Remedy and Reparation, principle 11.

²⁴⁸ *Report of the United Nations High Commissioner for Human Rights*, UN Doc. A/HRC/40/43 (14 March 2019), paras. 25–26.

²⁴⁹ Civil Wrongs (State Liability) Law (as per Amendment No. 8) (1952), art. 5.

²⁵⁰ *The Late A.M. Eldaya v. The State of Israel*, Civil Case (Nazareth District Court) 35106-08 (5 September 2012). See also Adalah, *Obstacles for Palestinians in Seeking Civil Remedies for Damages before Israeli Courts* (May 2013), pp. 7–8, at <https://www.adalah.org/uploads/oldfiles/Public/files/English/Publications/Articles/2013/Obstacles-Palestinians-Court-Fatmeh-EIAjou-05-13.pdf>.

²⁵¹ Al Haq et al., *Joint Submission to the United Nations Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied Since 1967, Mr Michael Lynk, on Accountability* (31 May 2020), paras 104–107.

violation of both the applicable rules of engagement and IHL, it dismissed the claim based on the “acts of war” clause.²⁵²

Moreover, article 5(B) of the Civil Wrongs (State Liability) Law of 1952 (as per Amendment No. 8) excludes residents of “enemy territories”, i.e. Gazans, from filing suits in Israel’s domestic courts:

Notwithstanding any other provision of law, the State shall not be subject to liability under the law of torts for damage sustained by ... [a] citizen of an Enemy State, unless he is legally in Israel, or someone who is not a citizen of the State of Israel, who is a resident of a territory that was designated by the government as enemy territory ...

Israel designated Gaza as “hostile territory” in 2007, and in 2014 declared it “enemy territory” for purposes of the Civil Wrongs (State Liability) Law of 1952.²⁵³ Such a declaration, together with the “act of war” clause, effectively bar Gazans from bringing civil suits in Israeli courts.²⁵⁴

In November 2018, the Beersheba District Court rejected the compensation claim of a Gaza resident, 15-year-old Atiyeh Al-Nabaheen, who was shot in November 2014 by the IDF and is now a quadriplegic. Al-Nabaheen was shot in the front yard of his family home at approximately 500 metres from Gaza’s perimeter fence, while returning from school. He was unarmed and not involved in any violent activity and, in general, no violent acts were taking place in the area at the moment of the shooting. Notwithstanding the fact that the State did not challenge such facts, the District Court dismissed his case. An appeal against the District Court ruling brought by Al Mezan and Adalah is pending before the HCJ.²⁵⁵ It is worth noting that the UN Commission of Inquiry on the “Great March of Return” recommended that Israel amend the Civil Wrongs (State Liability) Law of 1952 to allow Gazans to seek redress for violations of international law.²⁵⁶

It should further be added that Gaza residents are denied the right to attend evidence hearings in Israel in cases against the IDF, which often results in their case being dismissed for lack of evidence. This is due to the 15-year closure of the Gaza Strip, which restricts the issuing of exit permits for Gazans to enter Israel to exceptional and imperative humanitarian needs.²⁵⁷ In the West Bank as well, Palestinians face serious obstacles in accessing justice. Palestinians may file complaints with police officers in the District Coordination and Liaison Offices (DCOs),²⁵⁸ or in police stations in the West Bank. However, this procedure has proven to be extremely tortuous and complex due to a lack of clear information about the presence of police officers at the DCO, failure to respect the published work schedule of police officers, long waiting hours, and lack of interpreters. There have also been cases where complaints have eventually been registered at the DCO but never transmitted to the investigative police.²⁵⁹

By barring Palestinians from bringing civil suits in its domestic courts, and by posing other obstacles to the filing of complaints with the competent authorities, Israel violates its obligation to provide an

²⁵² Beersheba District Court, *Al-Hams v. State of Israel*, Case No. 5709-12-12 (19 May 2021), cited in *Report of the United Nations High Commissioner for Human Rights*, UN Doc. A/HRC/49/25 (23 February 2022), para. 24.

²⁵³ Adalah, *Israeli court: State isn't liable for damages for severely wounding Gaza boy in 2014; new law grants comprehensive immunity to Israeli military in Gaza* (15 November 2018), at <https://www.adalah.org/en/content/view/9622>.

²⁵⁴ Al Haq et al., *Joint Submission to the United Nations Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied Since 1967, Mr Michael Lynk, on Accountability* (31 May 2020), para. 100. For further analysis, see Adalah, *Obstacles for Palestinians in Seeking Civil Remedies for Damages before Israeli Courts* (May 2013).

²⁵⁵ Al Mezan, *The Gaza Bantustan: Israeli Apartheid in the Gaza Strip* (November 2021), p. 50, at <https://www.mezan.org/en/uploads/files/16381763051929.pdf>.

²⁵⁶ *Report of the detailed findings of the independent international Commission of inquiry on the protests in the Occupied Palestinian Territory*, UN Doc A/HRC/40/CRP.2 (18 March 2019), para. 800(c).

²⁵⁷ *Report of the United Nations High Commissioner for Human Rights*, UN Doc. A/HRC/40/43 (14 March 2019), paras. 25–26; Adalah, *Obstacles for Palestinians in Seeking Civil Remedies for Damages before Israeli Courts*, pp. 4–6.

²⁵⁸ A DCO is where Israeli soldiers and Palestinian policemen work in tandem on joint patrols. DCOs are located in the West Bank and manage the Palestinian police stations operating in 26 West Bank villages.

²⁵⁹ B'tselem, *The Occupation's Fig Leaf*, p. 30.

effective remedy and reparations for violations of IHRL and IHL, including crimes under international law, committed by IDF members.

Recommendations

In light of the above, the Israeli authorities should:

- I. Ensure that all victims of alleged violations of international law have access to effective remedies, including reparation, in particular by:**
 - i. Amending the Civil Wrongs (State Liability) Law of 1952, and repealing Amendment No. 8, to ensure that civil claims brought by Palestinians residing in the West Bank and Gaza are not dismissed based on the “act of war” or “enemy territory” clauses;**
 - ii. Guaranteeing Palestinians residing in Gaza access to Israel in order to participate in legal proceedings related to their claims;**
 - iii. Facilitating and expediting procedures for Palestinians residing in the West Bank to lodge complaints against violations of IHRL or IHL committed by the IDF.**

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