



An Illusion of Justice

An Update of Genuinely Unwilling

March 2013

PCHR
المركز الفلسطيني
لحقوق الإنسان





Introduction

This report is an update of previous reports by the Palestinian Centre for Human Rights (PCHR), which discuss the issues hindering the delivery of justice to Palestinian victims of violations of international law.¹ It supports the conclusions of previous reports and provides an update with respect to the status of cases filed by PCHR, as of 25 March 2013.

Specifically, this report concludes that the Israeli authorities are unwilling to conduct effective domestic investigations into cases which accuse Israeli forces of violating international law and, moreover, that such investigations cannot be conducted within the Israeli national system. The report will outline the issues which obstruct the investigation and prosecution of violations of international law in the Israeli military court system. For this purpose, the report will highlight the outcomes of cases arising from the 2008-2009 Israeli offensive on the Gaza Strip, 'Operation Cast Lead', during which 1,167 Palestinian civilians were killed, including 318 children and 111 women.²

Since 1995, PCHR has monitored, investigated, and documented violations of international law committed by Israel, the Occupying Power in the occupied Palestinian territory (oPt), and the Palestinian authorities. PCHR's investigations indicate that Israel has committed widespread and systematic violations of international

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See PCHR, 'Genuinely Unwilling: Israel's Investigations into Violations of International Law including Crimes Committed during the Offensive on the Gaza Strip, 27 December 2008 – 18 January 2009', released on 11 February 2010. (Available at: <http://www.pchrgaza.org/files/2010/israeli-inve.-%20english.pdf>); PCHR, 'Genuinely Unwilling: An Update – The Failure of Israel's Investigative and Judicial System to Comply with the Requirements of International Law, with particular regard to the Crimes Committed during the Offensive on the Gaza Strip', released on 15 August 2010. (Available at: <http://www.pchrgaza.org/files/2010/Genuinely%20Unwilling%20-%20An%20Update.pdf>)

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The events of the offensive will not be recounted herein. For further details, please see: Palestinian Centre for Human Rights report, 'Targeted Civilians: A PCHR Report on the Israeli Military offensive against the Gaza Strip (27 December 2008 – 18 January 2009)', released on 21 October 2009, at p. 10-14. (Available at: http://www.pchrgaza.org/files/Reports/English/pdf_spec/gaza%20war%20report.pdf)

law, including grave breaches of the Geneva Conventions and crimes against humanity. In an effort to access justice for the victims of these violations, PCHR has approached the relevant Israeli judicial mechanisms, calling for the prosecution of those responsible and seeking reparations for the victims. However, as will be presented in this report, none of the Israeli mechanisms have responded effectively. This has led to the development of a culture of impunity, in which Israel is permitted to consistently violate the rule of law without repercussion.

International law requirements

The obligation of States to investigate and prosecute alleged violations of international law is derived from various sources. The 1949 Geneva Conventions oblige States to hold accountable those who are responsible for violations of international humanitarian law.³ Article 146 of the Fourth Geneva Convention further obliges all States to search for persons alleged to have committed, or to have ordered to be committed, grave breaches of international humanitarian law, and to bring such persons before its own courts for a proper trial. This obligation has been identified as a norm of customary international law, which holds that, with respect to serious violations of international humanitarian law, “States must investigate war crimes allegedly committed by their nationals or armed forces, or on their territory, and, if appropriate, prosecute the suspects. They must also investigate other war crimes over which they have jurisdiction, and, if appropriate, prosecute the suspects.”⁴

2 International human rights law is also relevant for investigation of

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Article 52, First Geneva Convention; Article 53, Second Geneva Convention; Article 132, Third Geneva Convention; and Article 149, Fourth Geneva Convention.

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See, Rule 158, International Committee of the Red Cross (ICRC), Customary International Humanitarian Law, Volume I: Rules, Cambridge University Press, Cambridge, 2005.

certain activities during armed conflicts. For example, according to the UN Human Rights Committee, the 1966 International Covenant on Civil and Political Rights “applies also in situations of armed conflict to which the rules of international humanitarian law are applicable. While, in respect of certain Covenant rights, more specific rules of international humanitarian law may be specially relevant for the purposes of the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive.”⁵ Moreover, a failure by a State Party to investigate alleged violations of the human rights norms enshrined in the Covenant could in and of itself give rise to a separate breach of the Covenant.⁶ The United Nations General Assembly has reinforced the obligation to ensure the protection of civilians in armed conflict through its resolutions 64/10 and 64/254.

It should be noted that any investigation into suspected violations committed during armed conflict must, inter alia, be independent and impartial,⁷ address all those individuals with suspected criminal responsibility (including, where appropriate, senior military and political leaders),⁸ analyse the entire operation (i.e. the overall policy),⁹ and be capable of leading to the identification and prosecution of those responsible.¹⁰ In the event that the responsible national authorities fail to comply with this obligation, it is in the interest of the whole international community (and the individual member States thereof) to ensure that those alleged to be responsible are held to account.¹¹ With respect to grave breaches of the Geneva Conventions, this is an obligation.¹² Furthermore, in the context of armed conflicts in Rwanda and

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General Comment No.29 on States of Emergencies, adopted on 24 July 2001, reproduced in Annual Report for 2001, A/56/40, Annex VI, paragraph 3

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Human Rights Committee, ‘General Comment 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant’, U.N. Doc.CCPR/C/21/Rev.1/Add.13 (2004) at paras. 15 and 18.

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Findlay v. the United Kingdom, European Court of Human Rights, Application No. 22107/93, 25 February 1997, §73; R. v. Genereux, 1. S.C.R. 259, [1992]; Bati v. Turkey, European Court of Human Rights, Application No. 33097/96, 57834/00, 3 September 2004, §135.

8

See, for example, Articles 25 and 27 of the Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998, ISBN No. 92-9227-227-6.

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Ergi v. Turkey, European Court of Human Rights, Application No. 23818/94, 28 July 1998, §84.

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Hugh Jordan v. the United Kingdom, European Court of Human Rights, Application No. 24746/94, 4 August 2001, §107; McCann and Others v. the United Kingdom, European Court of Human Rights, Application No. 18984/91, 27 September 1995; For a substantial analysis of investigations, see, supra n. 3, PCHR’s report: ‘Genuinely Unwilling: An Update’, at p. 19-25.

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Antonio Cassese, When May Senior State Official be Tried for International Crimes? Some Comments on the Congo v. Belgium Case, 13 European Journal of International Law 4, 853, 891 (2002).

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Article 147, Fourth Geneva Convention.

the former Yugoslavia, the United Nations Security Council has recognised that such prosecutions contribute to the maintenance of international peace and security.¹³

It is noted that one of the core components of the rule of law is the requirement that the law be applied equally. In this regard, all parties suspected of committing international crimes must be held to the same standards.¹⁴ With respect to 'Operation Cast Lead', PCHR has concluded that, to-date, the Palestinian authorities in both the West Bank and the Gaza Strip have comprehensively failed to conduct effective investigations into alleged violations of international law, and have taken no steps to ensure that responsible individuals are held to account.¹⁵

As confirmed by national and international human rights organisations and the UN Committee of Independent Experts established by the Human Rights Council, it is unambiguously clear that all parties have failed to conduct domestic investigations that are prompt, effective, independent, and in conformity with international law. Furthermore, all parties have failed to prosecute suspected perpetrators of crimes under international law. According to the report of the UN Committee of Independent Experts, published on 18 March 2011, all parties' investigations into alleged war crimes have comprehensively failed to meet the requirements of international standards.¹⁶ Significantly, the Committee found that Israel had failed to investigate high-level officials and had not adequately investigated all allegations of violations.

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See, Security Council Resolution 955, 8 November 1994, U.N. Doc. S/Res/955; Security Council Resolution 827, 25 May 1993, U.N. Doc. S/Res/827.

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See in this regard, International Law Commission Articles on State Responsibility for Internationally Wrongful Acts (2001), U.N. Doc. A/56/49(Vol.1)/Corr.4.

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See, for example, PCHR, Memorandum on the Status Domestic Investigations Conducted into Alleged Violations of International Law committed in the Context of Operation 'Cast Lead' Submitted by the Palestinian Centre for Human Rights, at para. 5, p. 1. (Available at: <http://pchrgaza.org/files/2011/PCHR%20Memorandum.pdf>).

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Report of the Committee of Independent Experts in International Humanitarian and Human Rights Law established Pursuant to Council Resolution 13/9 (A/HRC/16/24).

To substantiate these assertions, the report will first highlight the unwillingness of Israel, through its investigative and judicial mechanisms, to undertake effective investigations, and then present information on the status of the criminal complaints brought before the concerned Israeli authorities by PCHR.

Israel's Judicial and Investigative Mechanisms

The Israeli military justice system, responsible for investigating complaints regarding the conduct of soldiers, comprises three bodies: (1) the Military Advocate General (MAG); (2) the Military Police Criminal Investigation Division (MPCID); and (3) the court martial.¹⁷ Israel's Military Justice Law¹⁸ establishes four investigative mechanisms: disciplinary proceedings; operational debriefings (also referred to by Israeli forces as command investigations, military probes, operational probes, etc.); special operational debriefings performed by a senior officer at the request of the Chief of Staff (slightly modified operational debriefings); and investigations conducted by the MPCID.

Through its considerable experience dealing with the Israeli military justice system, PCHR has found that, although it constitutes a functioning legal system, in practice it is fundamentally biased against Palestinian victims, rendering the impartial and effective pursuit of justice impossible. In PCHR's experience, the Israeli investigative system is utilised to provide an illusion of respect for the rule of law and compliance with international obligations. This conclusion can be deduced from the following observations:

- Since the beginning of the Second Intifada in 2000, the Military Advocate General (MAG) has pursued a policy of not automatically opening criminal investigations into the killing

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For an overview of the Israeli judicial and investigative mechanisms, please see, *supra* n. 3: 'Genuinely Unwilling: An Update', at p. 26-70..

¹⁸

The Military Justice Law, 5715–1955

and injury of Palestinian civilians. Moreover, the State, through the Attorney General, has argued that criminal responsibility will only apply to “intentional” acts.¹⁹ This claim is clearly inconsistent with the requirements of international criminal law, whereby individual responsibility may be attributed on the basis of intentional, reckless, or even, when expressly provided, negligent acts.²⁰

- The Military Justice Law confers significant powers on District Chiefs of the Israeli forces (the commanding officers of the relevant command or corps, such as the Southern Command, or the General Staff), allowing them to intervene in and influence the legal process. District Chiefs are entitled to file an appeal against a judgment handed down in a court of first instance, to consent to a military court’s final judgment as a confirming authority and, significantly, to order the quashing of a charge sheet. This relationship raises serious concerns with respect to the independence and impartiality of the military justice system and the principle of the separation of powers.
- The MAG serves a twofold function: acting as legal advisor to the military; and enforcing penal laws intended to ‘represent the rule of law and the public interest’. The office of the MAG is itself involved in preparing the rules of engagement and providing the legal framework regulating attacks by Israeli forces. International law requires that, should these guidelines violate international humanitarian law, the members of the MAG should be investigated and prosecuted. This illustrates

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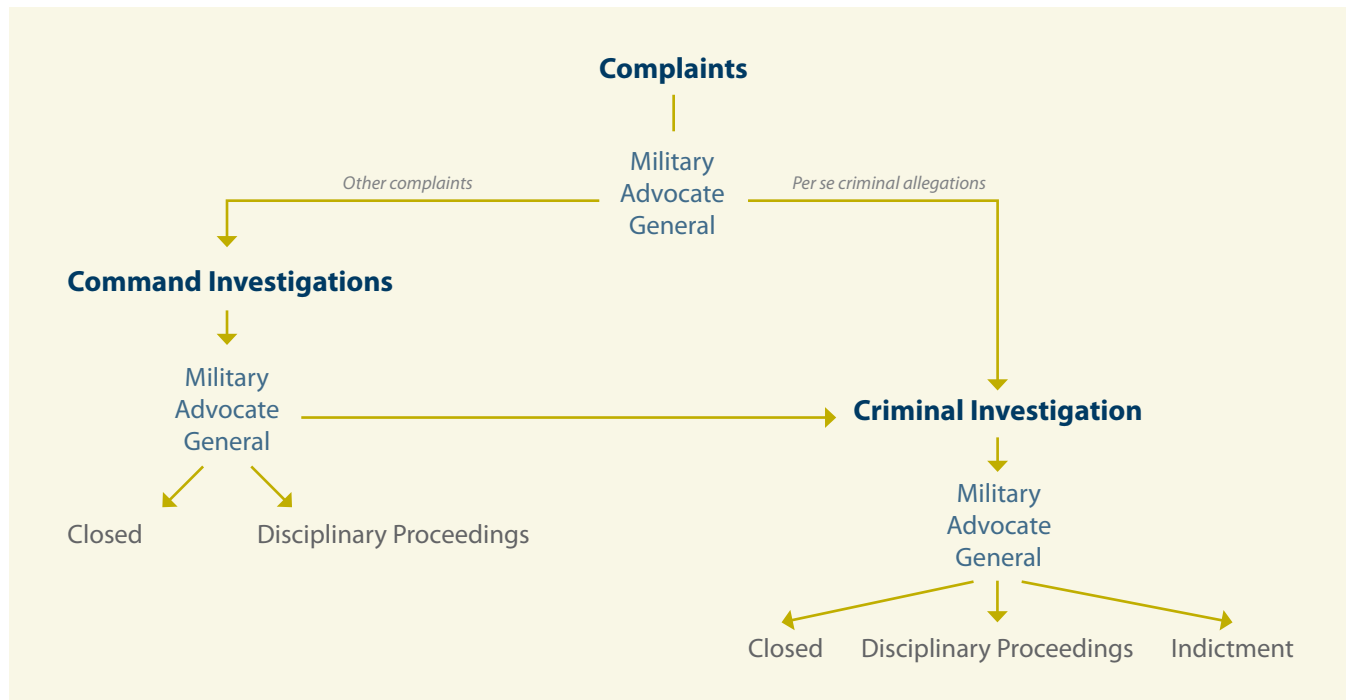
See, HCJ 3292/07, Adalah, Al Haq and PCHR et al. v. Attorney General. It is noted that the intentional nature of an act cannot be determined in advance, and will require an effective investigation.

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Also the The Turkel Commission’s report: Israel’s Mechanisms for Examining and Investigating Complaints and Claims of Violations of the Laws of Armed Conflict According to International Law, released on 6 February 2013, recommends that the MAG shall decide on opening an investigation if there is reasonable suspicion of criminal activity, or further information’s is required to determine whether there is reasonable suspicion in a particular incident, at p. 383.

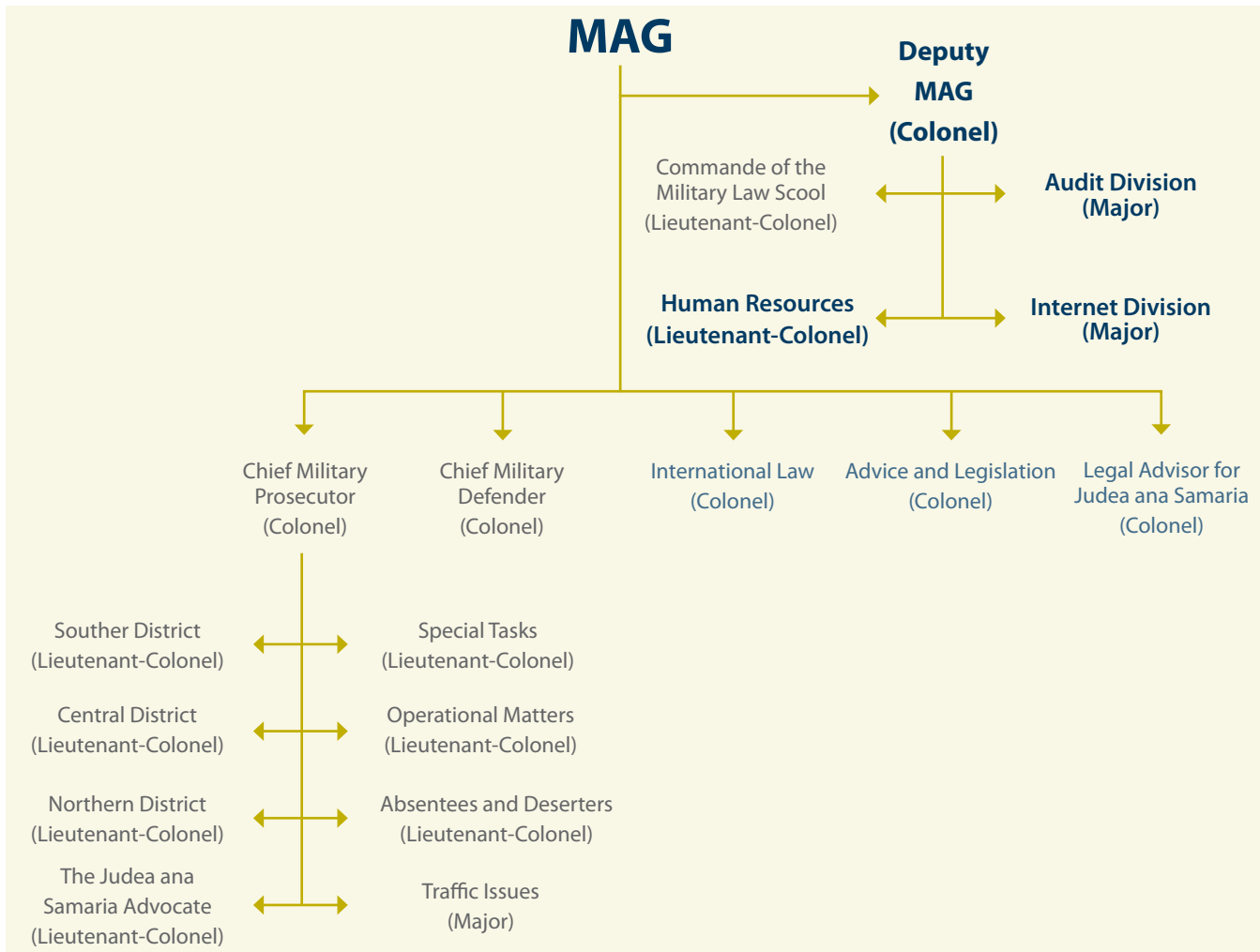
that the MAG cannot be considered independent or impartial, as it is itself involved in the planning of attacks.

- The role of the MAG and its hierarchy can be illustrated through the diagrams presented by the State of Israel in the January 2010 report, Gaza Operation Investigations: An Update, and another provided by the Turkel Commission²¹:



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The Turkel Commission's report: Israel's Mechanisms for Examining and Investigating Complaints and Claims of Violations of the Laws of Armed Conflict According to International Law, released on 6 February 2013, at p. 290.



As can be seen from these diagrams, it is the MAG who is the principal decision-making organ; at all stages, the decision to open or close an investigation rests with the MAG, and this

undermines the impartiality and independence of the entire investigative procedure. In effect, this system operates as a loop, with the MAG responsible for each strategic decision. This system is open to manipulation, in that the MAG can allow investigations to proceed – to provide an illusion of investigative rigour – only to subsequently close them. PCHR believes that a number of investigations opened in the context of ‘Operation Cast Lead’ fulfilled this exact purpose. For example, in the Samouni case, the assistant military prosecutor, which is subordinate to the MAG’s authority, without delving into the details of the case, replied saying that the outcome of their investigation refuted the allegations against the Israeli forces.²² The role of the MAG clearly conflicts with the obligation to conduct effective investigations, which must be independent.

- The Israeli Attorney General, and ultimately the Supreme Court, may review the decisions of the MAG. However, the Attorney General rarely intervenes in the MAG’s decisions, and the Supreme Court justices have time and again demonstrated their hesitance to interfere with the MAG’s discretion.²³
- Both operational debriefings and MPCID investigations focus solely on specific attacks, failing to address any command level policy-based decisions which preceded the attacks. Many of the violations of international law committed in the context of ‘Operation Cast Lead’ – and during armed conflict in general – occurred as a result of such decisions, many of which, such as the choice of targets or the weapons to be used, were made

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Correspondence from Military Prosecution for Operational Affairs to PCHR, on 1 May 2012. (Annexure: Samouni family case: dismissal of investigations).

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See, Genuinely Unwilling: An Update, at p. 34.

before hostilities began.²⁴ Necessarily, these decisions must also be effectively investigated. Given that military actions are the result of official State policy, and that domestic processes fail to address policy-level decisions, PCHR does not believe that military actions can be properly investigated and prosecuted within Israel. The same observation is reflected in the Committee of Independent Experts' second report, which held that the investigations conducted by the parties fell short of satisfying international standards.²⁵ The Committee found that Israel had failed to investigate high-level officials and had not adequately investigated all allegations of violations.

- While Israel claims that the MPCID is staffed by “hundreds of trained investigators, including reservists, who are posted in different regional and specialized units”, it fails to mention the following: the MPCID has no base in the oPt; investigations routinely do not visit the site of an incident; most investigators do not speak Arabic; and the MPCID does not have a criminal forensic lab at its disposal. This was also noted in second report of the Turkel Commission, which was appointed by the State of Israel to examine whether Israel’s current examination and investigation mechanisms are in compliance with international standards. The Commission recommended that: “A Department for Operational Matters should be established in the Military Police Criminal Investigation Division to work with the MAG Corps for Operational Matters with bases in the areas where the incidents under investigation occur. The investigators should include persons that are fluent in Arabic.”²⁶

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Turkel Commission 2013 Report, at p. 392-395.

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Report of the Committee of Independent Experts in International Humanitarian and Human Rights Law established Pursuant to Council Resolution 13/9 (A/HRC/16/24).

- Operational debriefings: Since the beginning of the Second Intifada, operational debriefings have been used as the primary mechanism of analysis with respect to alleged violations committed in the course of military operations in the oPt. In the majority of the small number of cases which Israel actually subjects to analysis, operational debriefings constitute the only 'investigative' step; only in exceptional cases do operational debriefings result in a decision to open a subsequent MPCID investigation is made. Although Israel refers to such debriefings as 'investigations', PCHR believes that these procedures can, by no means, be considered genuine investigations. Not only do they fail to meet the international legal requirements associated with effective investigations, under the Military Justice Law they simply do not constitute investigations. An operational debriefing is a procedure intended to analyze an incident from an internal military perspective, so that lessons may be learned and conclusions drawn for the purpose of enhancing the performance of the Israeli military.²⁷ The Turkel Commission endorsed this conclusion in its second report, stating that: "the use of an operational debrief may unreasonably delay the decision on initiating an investigation. Likewise, the operational debrief is not focused on questions of criminality [...]. The Commission's view is that the operational debrief should primarily serve the operational needs of the military. Therefore, the Commission recommends that a separate mechanism shall be established in order to conduct a fact-finding assessment."²⁸

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Turkel Commission 2013 Report, at p. 396-397.

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Article 539(A)(a) of the Military Justice Law defines an operational debriefing as: "a procedure held in the army, according to the army orders and regulations, with respect to an incident that has taken place during a training or military operation or with connection to them."

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Turkel Commission 2013 Report, at p. 382.



Criminal Complaints

The structural flaws in the Israeli system are illustrated through the outcome of the **490 criminal complaints** (on behalf of **1,046 victims**) submitted by PCHR to the Israeli Military Prosecutor, requesting the opening of a criminal investigation. As noted in the UN Committee of Experts' first report, many of these cases involved serious violations of international humanitarian law.²⁹ In response to 490 complaints, PCHR has received 44 responses over a period of 4 years. The communications received from the office of the Israeli MAG to date can be broken down as follows:

- 19 responses indicating that the complaint had been received, that it will be reviewed, and PCHR will be informed of the outcome;
- 21 responses informing PCHR that the complaints are under review;
- 1 response indicating that the case was closed as the witness would not travel to Beit Hanoun ('Erez') crossing for an interview with the MPCID;
- 1 response indicating that a soldier had been charged;
- 1 response indicating that the Elain Khadir case, regarding a house robbery, had been closed; and

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See, UN Human Rights Council (12th Session) Report of the United Nations Fact-Finding Mission on the Gaza Conflict (A/HRC/12/48) (commonly referred to as the 'Goldstone Report'). The report noted that many of the Israel attacks, were indiscriminate and deliberated against the civilian population, in Chapter X and XI of the report.

- 1 response indicating that the Samouni case, which involved the killing of 21 civilians, injury of 29 others, and destruction of one residential house, had been closed.

In relation to the Samouni case, after receiving the response that the investigations were closed,³⁰ PCHR wrote to the MAG to request the details and outcomes of the investigations but, to date, PCHR has not received any response. It should also be noted that a number of cases filed by PCHR have apparently been closed, as reported, inter alia, by the Israeli media. However, PCHR has not received official notifications in relation to most of those cases. Only 53 eyewitnesses and victims have been summoned by the MPCID to the Beit Hanoun ('Erez') crossing to provide testimonies for investigation purposes. The Committee of Independent Experts has noted the lack of respect shown to victims and witnesses by the MPCID at the Erez crossing.³¹

In total, it appears that the MAG has issued 4 indictments with respect to crimes committed during 'Operation Cast Lead', resulting in the following convictions:

- One individual was convicted of the theft of a credit card (looting), and served seven and a half months in prison;
- Two individuals were convicted in relation to the use of a 9-year-old boy as a human shield, and each given a three-month suspended sentence;

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See Annexure: Samouni family case: dismissal of investigations.

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Report of the Committee of Independent Experts in International Humanitarian and Human Rights Law established Pursuant to Council Resolution 13/9 (A/HRC/16/24).

- One individual was convicted of 'misuse of a firearm' in relation to the shooting of a group of unarmed civilians who were carrying white flags, which resulted in the death of two women, and sentenced to 45 days of imprisonment.

Significantly, **these convictions failed to reflect the gravity of the actual crimes committed.** The soldier indicted in connection with the shooting and killing of two unarmed civilians who were carrying white flags was convicted for "misuse of a firearm" as opposed to the grave breach of wilful killing, and served a sentence of just 45 days. The two soldiers convicted in relation to the use of a 9-year-old boy as a human shield were charged with offences relating to 'inappropriate behaviour' and 'overstepping authority', despite a previous ruling of the Israeli High Court of Justice regarding the use of human shields. PCHR believe that the three-month suspended sentence handed down illustrates a callous disregard for the fundamental dignity of the victim, as well as the requirements of international law.



Conclusion

The observations outlined above confirm PCHR's conclusion that the Israeli judicial and investigative systems are manipulated to ensure that those responsible for serious violations of international law will never be held to account. PCHR believes that the Israeli investigative system as a whole is flawed, in law, in practice, or both. This reality precludes genuine investigations and prosecutions being carried out in accordance with the requirements of international law. This conclusion is underlined by the case-specific information provided above, evidencing as it does the systematic denial of the right of victims to an effective judicial remedy and a systemic disregard for their fundamental dignity.



Annexure:

Samouni family case: dismissal of investigations

Military Prosecution for Operational Affairs

01 May 2012

Mr. Iyad Al-Alami

Palestinian Centre for Human Rights

Re: Information Concerning Finalizing Consideration of
Investigation – Al-Samouni Family

In reference to your letter dated 18 May 2009

1. In response to your letter dated 18 May 2009 and other letters concerning this case, the military police opened an investigation into the circumstances of the deaths of 12 members of the al-Samouni family in al-Zaytoun neighbourhood on 05 January 2009 during Operation Cast Lead;
2. After reviewing the items of investigation, it was evident that the investigation completely refuted the serious accusations directed against the IDF by various parties, which claimed that attacks were launched intentionally and directly against people who were not directly involved in hostilities, or in recklessness and in disregards as concerning the possibility of harming these people. It also ruled out the basis of such accusations that war crimes were committed, as according to

international law. To describe an attack as a war crime, there must be a criminal intention.

3. Additionally, it was found that with regard to the incident, in which people who were not directly involved in hostilities, none of the parties that were involved in the incident acted negligently that could give rise to criminal responsibility.
4. In this regard, we stress that field conditions of Operation Cast Lead in general, which mostly took place in a densely populated environment, and of this incident in specific, affected the way field decisions were taken during this incident.
5. In the end, we have decided that there is no need to order any legal action against any of the parties involved in the incidents, and accordingly, we have decided to close the case in the military police.

Respectfully,

Major Durid Tofil,
Assistant Military Prosecutor for Operational Affairs