



Adalah – The Legal Center for Arab
Minority Rights in Israel

The Accused – Part II

Failures and Omissions by the Attorney General in Investigating the October 2000 Events

Executive Summary

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Adalah is publishing this report – “The Accused – Part II: Failures and Omissions by the Attorney General in Investigating the October 2000 Events” – ten years after the events, in which the following thirteen young Palestinian Arab citizens of Israel were shot dead by the Israeli police forces: **Ahmed Ibrahim Siyyam Jabareen, Mohammed Ahmed Jabareen, Rami Khatem Ghara, Eyad Sobhi Lawabny, Aseel Hassan Asleh, Ala Khaled Nassar, Misleh Hussein Abu Jarad, Walid Abdul-Menem Abu Saleh, Emad Farraj Ghanaym, Ramez Abbas Bushnaq, Mohammed Ghaleb Khamayseh, Wissam Hamdan Yazbak, and Omar Mohammed Akkawi.** The report examines the Attorney General’s (AG) decision of January 2008 to close the investigatory files into the deaths and injuries of October 2000. It is a sequel to “The Accused” a report published by Adalah in 2007, which examined the prior decision of the Ministry of Justice’s Police Investigation Department (Mahash) to close the investigation files. The conclusion that inevitably emerges from an examination of the AG’s decision is that the decision to close the investigation files was gravely flawed.

Chapter One of the report addresses the duty of the State of Israel to investigate any suspicions that criminal offences have been committed. It contains a detailed review of the standards for criminal investigations, as set forth in international law, including promptness, independence, thoroughness, protection for witnesses, representation for the victim’s family in the proceedings, and publication of the findings. Also discussed is the duty to investigate alleged crimes under Israeli law, in light of the argument made by Mahash and subsequently the AG that no complaints had ever been filed concerning the October 2000 killings. The report refutes this argument on the factual level and argues that in any event the duty of the law enforcement authorities to investigate any suspicion that a criminal offence has been committed is established as soon as the authorities learn of the occurrence, and is not contingent on the filing of a formal complaint.

The report states that these standards were not followed in Mahash’s investigations into the October 2000 killings, and that the AG did not even examine this aspect of Mahash’s work, but rather laid the blame for the failure to fulfill this duty on the victims and their families.

Chapter Two of the report examines the manner in which the Attorney General evaluated the evidence before him from the following aspects: the minimum threshold

required for indicting a suspect, the kind of offenses that he defined in order to gauge whether or not there was sufficient evidence to indict, his examination of the circumstantial evidence, and his position towards the reliability of the testimony and the witnesses.

The AG's decision deviates from established legal custom regarding the evidentiary threshold required for the purpose of filing an indictment. The Supreme Court of Israel has determined that evidence on which an indictment is based should establish a "reasonable prospect for conviction". However, the evidentiary threshold that was adopted by the AG in reaching his decision on the events of October 2000 was that there should be **full and unequivocal evidence leaving no reasonable room for doubt** in filing indictments against those responsible for the killings. Establishing this evidentiary threshold, which is far higher than the norm, was one of the principal factors in the closing of the investigations. Conversely, the AG related to intelligence material that was devoid of any evidentiary value but favored the accounts of the events given by police officers, as "evidence with the potential to acquit", thereby employing an evidentiary threshold significantly lower than is customary.

In general, the prosecution is given broad discretion on the question of whether or not to put a defendant on trial, which involves factual, legal and value-based decisions. However, in the case of the October events, all the related decisions were biased in such a way as to shield the suspected police officers from indictment and prevent an accurate account of the events from coming to light. It should be emphasized that **the Or Commission of Inquiry into the October 2000 events found in its report of September 2003 that there was no legal justification for the opening of fire by the Israeli security forces in any of the 13 killings cases.** Especially problematic in this context is the manner in which the evidence concerning the use of sniper fire against demonstrators was examined, in particular the method of "triple" firing of live rounds, involving the simultaneous firing by three snipers at the same person, without any prior warning.

Another relevant aspect of the manner in which the AG examined the evidence, is the type of offences, in which the AG concluded that there was insufficient evidence for an indictment. If the AG believed there to be insufficient evidence to prove the *mens rea* required for offenses such as murder, then he ought to have examined whether there was sufficient evidence to charge the suspects with manslaughter, which requires a lower level of *mens rea*, or with the lesser offense of causing death by negligence. In fact, however, the AG totally ignored these possibilities.

Another failing concerns the manner in which the AG evaluated the circumstantial evidence and drew associated conclusions. The AG evaluated each piece of circumstantial evidence separately and dismissed each as an independent basis for proof of guilt. This method is contrary to Israeli Supreme Court case law, which holds that every piece of evidence should be examined so as to determine whether it, in itself, establishes a factual finding, and not whether it constitutes proof of guilt. The possibility of proving guilt should arise from the evaluation of the entirety of the evidence.

Also with regard to the circumstantial evidence, the AG completely disregarded the location of the bullet wounds on the bodies of the deceased as evidence that the fire had not been directed at the lower part of the body, contrary to the Israeli police directives governing the opening of fire. By contrast, the Or Commission of Inquiry relied – and

rightly so – on the location of bullet wounds in the upper part of the bodies as a fact that demonstrates that the firing was unlawful.

Furthermore, the AG's decision clearly shows that he relied extensively on the testimonies provided by suspected police officers. It consistently ignores the varying and contradictory versions of events given by the police officers implicated in the killing. In addition, the AG systematically gave preference to testimony given by police officers over that provided by Arab citizens. We are aware that the prosecution and the judiciary tend to attribute greater reliability to police testimony. However, such a tendency is always problematic, and all the more so in cases in which police officers themselves are suspects. In such cases there is a heightened need to view police testimonies as testimonies given by suspects – who may seek to distance themselves from the suspected offences or to minimize their involvement in their accounts – and to give appropriate weight to inconsistencies and contradictions in their testimonies. In this context, Mahash relied largely on the testimony taken by the Or Commission of Inquiry, in many cases refraining from re-questioning police officers who were involved in the events and whose testimonies were found problematic. Mahash employed the opposite approach with regard to the Arab witnesses, re-questioning witnesses who had been examined by the Or Committee and found reliable, and then raising questions over their reliability. The decisions not to re-question police officers and to re-question Arab citizens are not neutral. Such decisions seek not to find guilt and assume innocence on the part of police officers, while making negative assumptions regarding the character of Arab witnesses. The AG did not criticize Mahash's approach or order re-questioning in appropriate cases, but adopted the same approach.

Chapter Three of the report discusses the attribution of responsibility to the victims of the lethal firing, a pattern that repeats itself in the AG's decision. The AG expanded on the theoretical motives of the victims, and consequently attributed clear responsibility to them for the injuries they sustained. If Mahash was negligent, sabotaged the investigations and laid responsibility with the families of the victims and on the Arab minority in Israel as a whole and its leadership, as argued by Adalah in *The Accused – Part I*, the AG went further still by placing responsibility for the deaths on the victims themselves.

In the AG's decision the intentions attributed to the victims were reviewed, even though they were based on hearsay evidence, which is inadmissible in a criminal proceeding. This is particularly problematic given the repeated claim made by the AG in his decision that the evidence had been examined through the prism of criminal law. Moreover, the victims' motives were examined, *prima facie*, for the purpose of answering questions about whether police officers were in danger.

The report contends that the AG's purpose in referring to the intentions of the victims was to present the victims in a negative light and to portray the police officers who opened fire at them as coming under hostile attack by extremists who wished to die a martyr's death. The report argues that the AG's preoccupation with the intentions and motives of the victims – which clearly constitute inadmissible evidence and are wholly irrelevant to the examination of the evidence aimed at establishing criminal guilt – testifies primarily to the intentions and motives of the AG and his examination team.

Chapter Four discusses the disregard demonstrated by the AG for the serious flaws in the conduct of Mahash, which strove to avoid conducting a serious investigation into the

events of October 2000 and to close the investigation files, and his backing of Mahash. The chapter analyses Mahash's decision, which was backed by the AG, not to open an investigation into the deaths and injuries immediately after the events. Although Mahash did conduct a small number of investigative activities, it decided not to conduct investigations in the immediate aftermath of the events, but instead to wait until a "basis for opening an investigation" could be determined. It also decided that the families of the victims and other interested parties would have to provide the basis for such an investigation. The picture portrayed by the AG on this point, that Mahash commenced investigations but encountered objective difficulties and was therefore unable to complete them, does not reflect the facts. Mahash officials explicitly stated to the legal clerks who collected the material on behalf of the Or Commission that they had decided not to conduct investigations due to their alleged inability to do so. They did not claim in the Mahash report that investigations had taken place into the events. This means that there were no attempts to investigate, but rather that a conscious and deliberate decision was made not to conduct investigations, despite the fact that Mahash was aware that civilians had been shot by police using live rounds and rubber-coated steel bullets.

This chapter examines a further contention made by Mahash, which was also backed by the AG, that its failure to conduct investigations was due to the fact that the families of the victims did not file complaints regarding the deaths. This argument is baseless, both legally and factually, since the duty to investigate is not contingent on the filing of a formal complaint. Furthermore, as the report shows, complaints were filed, be they general or individual, regarding all the deaths, and it was Mahash who created obstacles to investigations into the killings and addressing these complaints.

On the further subject of the failure to perform autopsies on most of the bodies of the 13 deceased men, the AG again adopted Mahash's version of events, according to which it had not been possible to perform autopsies in October 2000. In addition, without critically examining Mahash's actions, he placed the responsibility for lack of autopsies on the victims' families. As the report shows, autopsies were performed on four of the 13 deceased men with the consent of their families. The report details the unfolding of events concerning the autopsy of Mohammed Jabareen, which indicate that neither the police nor Mahash asked for an autopsy to be performed, and that it was only because of his family's insistence that an autopsy was performed. In this case the police acted, probably in coordination with Mahash, in order to bring the body to burial without an autopsy being performed even though the family of the victim had already given their consent to an autopsy, and even demanded that an autopsy should be conducted promptly. Moreover, Mahash did not use the autopsy findings in order to promote the investigation.

In the other cases Mahash took no significant steps to enable the autopsies, or at the very least to enable the performance of a pathological examination of the bodies, as required by its role as the investigative authority. In this context, the AG adopted the excuse cited by Mahash for the failure to perform autopsies on the bodies, namely that the families of the victims conducted burial services "within a very few hours of the event." In fact, however, only one of the 13 funerals took place on the same day as the death. Furthermore, the victims' families were required to obtain burial permits to conduct the funerals, which were issued with the approval of the police, with Mahash's consent. Thus it was Mahash that made it possible for the funerals of the deceased to be conducted soon after the killings, and Mahash that thwarted the possibility of performing autopsies on most of the bodies. In addition, Mahash did not apply to the courts to obtain an order

for autopsies to be performed on any of the bodies after the events, and made no effort to persuade the families, some of whom were represented by attorneys, to agree to the performance of an autopsy. Nor did Mahash's investigators consult forensic experts in order to examine the need or the possibility of performing pathological examinations on the bodies that did not involve a full autopsy, although it is reasonable to assume that the families would have consented to that.

The AG did not conduct a thorough examination of Mahash's omissions with respect to other actions concerning the collection of evidence related to the victims' bodies. In not one of the cases were the clothes of the victims collected – the kind of evidence that is routinely examined by forensic experts – which may have helped to draw conclusions regarding the type of ammunition that was used, the firing range, etc. Bullets and bullet fragments that were removed from the victims' bodies were also not collected in any of the 13 cases by the police or Mahash's investigators, or else they were collected only as a result of pressure from the families and others.

The fact that Mahash did not investigate the deaths and injuries ruled out any possibility of conducting an effective investigation, contributed to the disappearance of evidence, and created a situation of immunity for the police officers involved. Therefore, Mahash is not responsible only for an investigative failure, but for causing real damage to any future criminal investigation into the killings.

The second part of Chapter Four deals with the lack of criticism in the AG's decision of Mahash's omissions and investigative failures during the period from the establishment of the Or Commission of Inquiry until Mahash's decision to close the investigation files was issued in September 2005. The chapter discusses the failure to conduct criminal investigations during the period during which the Or Commission was active, and argues that Israeli law does not preclude the conduct of a criminal investigation into cases that are also under examination by an official commission of inquiry. The relevant case law states that a criminal investigation and an investigation by an official commission of inquiry are mutually complementary. In the past, official commissions of inquiry have operated in Israel in parallel with criminal proceedings.

The chapter then sets forth in detail Mahash's subsequent failure to implement the recommendations of the Or Commission, and in many cases to re-question police officers whose testimony was found by the commission to be problematic, as well as the backing given by the AG for these omissions.

Chapter Five of the report explores the contradictions between the conclusions of the Or Commission and those drawn by the Attorney General. As the report shows, the AG endorsed Mahash's findings even where they contradicted the findings of the Or Commission. Indeed, the findings of the AG and the investigative team appointed by him went even further than those of Mahash in contradicting the findings and conclusions of the Or Commission.

These facts are particularly grave in view of the thorough and in-depth work that was conducted by the Or Commission, which was headed by a Supreme Court judge and included a district court judge. Yet more serious are the many cases in which Mahash and the AG drew conclusions contradictory to those reached by the Or Commission on normative issues where the commission has clear superiority over Mahash. A striking

example is the contradiction between the conclusions reached by the Or Commission and Mahash regarding the legality of opening fire on civilians.

The report emphasizes that the Or Commission directed Mahash to continue investigating, which Mahash failed to do in an effective manner. As a result, Mahash's decision to close the investigation files was based primarily on the same materials that were available to the Or Commission; however, in many cases Mahash reached contradictory conclusions.

This chapter also discusses the problems that arise from the way in which the AG, as Mahash before him, perceived and portrayed the character of the events themselves. The AG related to the responsibility of the police command as if it were acting in the circumstances of a military operation – which is governed by the laws of war and the purpose of which is to defeat an enemy – and not a police operation, the purpose of which is to maintain public order and peace.

Chapter Six presents the conclusions of this report, according to which senior members of Mahash and the State Attorney's Office responsible for investigating the October 2000 killings were operating in a conflict of interest. The chapter emphasizes the legal significance of these conflicts of interest and their implications at both the criminal and public levels. It states that by operating in a state of conflict of interest, the senior Mahash officials involved and the State Attorney's Office *prima facie* failed in their legal obligation toward the public and impeded the investigation of the killings. The report further argues that there is a serious suspicion that the gravity of these actions far exceeds the threshold of criminal liability.

As the chapter demonstrates, the conflict of interests of the Mahash investigators is a structural problem that arose with the establishment of the department and the manner in which it operates, and is not unique to the investigations into the events of October 2000. However, the serious and unprecedented failures that characterized Mahash's actions in this case – which rose to the level of impeding the investigations – is revealed in its full force and requires measures to be taken in response at both systemic and individual levels.

The institutional conflict of interests of Mahash – the entity charged with investigating the activities of the police force of which its investigators are members – created fertile conditions for it to consistently and deliberately refrain from conducting investigative activities both during and after events that it was required to re-investigate following the conclusions issued by the Or Commission. The few investigative activities that Mahash did conduct were neither independent nor professional. Furthermore, the fact that Mahash refrained from investigating the October 2000 killings and injuries actually precluded any possibility of holding an effective investigation, contributed to the disappearance of evidence, and fostered police impunity.

The chapter also discusses a personal conflict of interest that detracts from the legitimacy of the decision of the AG. It describes a press conference that was held in September 2005, just three days after the publication of Mahash's decision to close the investigations, at which then-Attorney General Menachem Mazuz participated, alongside then-State Attorney Eran Shendar. Shendar headed Mahash during October 2000 and played an active and central role in the decisions not to investigate and in Mahash's

omissions. Also in attendance was the head of Mahash at the time, Adv. Herzl Shbiro, who, together with Mazuz and Shendar, publicly and fully endorsed Mahash's decision.

The chapter sets forth how, following vehement criticism of Mahash's decision to close the investigation files, the AG announced that he would examine the decision as if an appeal had been submitted to him, without waiting for the end of the appeals period and without any appeal being submitted. The AG's announcement came despite the fact that, at that time, Adalah had already submitted a motion to him to request the investigation materials in order to submit an appeal. Moreover, the position of the victims' families that the AG's public expression of support for Mahash's decision to close the investigations disqualified him from serving as a neutral instance to consider the appeal to be submitted against Mahash's decision had already been made clear.

A further conflict of interests set out in this chapter concerns the legal team appointed by the AG to examine Mahash's decision. All members of this team are employees of the State Attorney's Office and therefore subordinate to the State Attorney, Eran Shendar, who headed Mahash at the time of the October 2000 events. As the report argues, this additional conflict of interests also seriously compromises the independence of the examination.

The clear conclusion drawn in the report is that the AG's decision cannot be considered independent or neutral, either in terms of the investigation into the killings and the decision not to put the killers on trial, or the manner in which Mahash operated and failed to investigate. The AG sought to publicly acquit Mahash of the accusations concerning its grave shortcomings. The process of examining Mahash's decision to close the investigation files should have been carried out by an examination committee independent of the State Attorney's Office, and not by a team subordinate to a figure tainted by a conflict of interests, and who had publicly pronounced his position on the matter.

The conclusions set forth in the chapter point to a grave suspicion that the AG and the examination team committed a breach of their legal obligations by examining Mahash's report while in a serious conflict of interest. This, *prima facie*, establishes grounds for their criminal indictment. Furthermore the personal liability of senior members of Mahash arises from their failure to investigate and for hampering the investigations.

The report's conclusion is that the AG's decision left untouched the absolute immunity granted by Mahash to the police officers implicated in the lethal shootings that led to the deaths of 13 Arab citizens of Israel in October 2000. This impunity encourages the recurrence of serious violations of human rights and leaves the victims and their families without protection or remedy. The impunity also has a collective aspect, as its effect is to leave all Arab citizens of Israel vulnerable to harm and without protection. Justice was not done, lessons were not learned and there has been no personal liability for any of those responsible for the lethal shootings. The root cause of the deaths of the 13 Arab citizens in October 2000 has not been eradicated. Moreover, by endorsing Mahash's decision, notwithstanding its grave failings, the Attorney General established low and inappropriate standards for the authorities' duty to investigate and indict those responsible for injuries inflicted on citizens. The result of this policy is to render citizens who are injured by representatives of the state defenseless.

The overall, systemic failure of Mahash, the AG and State Attorney's Office is the only chapter of the October events not to have been investigated at all. If the immunity that has been granted to the police by the investigating authorities and the prosecution is to be eliminated, if justice is to be done on behalf of the victims and their families, if the damage that has been done to public trust is to be repaired, and if the events of October 2000 are to be investigated effectively, then an additional investigation of the activities of Mahash, the State Attorney's Office and the AG must be conducted by an independent, external and neutral committee.

The authors of the report state that it is necessary to re-open the investigations into the killings and injuries of October 2000 and to transfer them to an independent, professional and neutral body that should act in accordance with the provisions of Israeli law and international law as it relates to the conducting of criminal investigations, and which should be empowered as follows:

1. To examine the existing evidence against police officers in each of the investigation files and:
 - (a) file indictments in cases where sufficient evidence is found, including in cases where the Or Commission found there was sufficient evidence to indict the guilty parties;
 - (b) perform additional investigative activities in cases where the evidence in the file is insufficient for the filing of an indictment;
2. To examine the activities of the (former) senior personnel of Mahash, the (former) Attorney General, the (former) State Attorney, and the examination team within the State Attorney's Office that examined Mahash's decision regarding the investigation into the deaths and injuries of October 2000, and to decide on the appropriate measures at the administrative and criminal levels.
3. To order systemic actions to be taken in order to prevent the recurrence of similar omissions and failures from blighting future investigations.

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