



ADALAH BRIEFING PAPER

ISRAELI MILITARY PROBES AND INVESTIGATIONS FAIL TO MEET INTERNATIONAL STANDARDS OR ENSURE ACCOUNTABILITY FOR VICTIMS OF THE WAR ON GAZA

January 2010

INTRODUCTION

This short paper addresses the status of Israel's current military operational probes and investigations into suspected gross violations of international humanitarian and human rights law committed during the War on Gaza from 27 December 2008 to 18 January 2009. During the three-week offensive, code-named "Operation Cast Lead," at least 1,440 Palestinians were killed, including 431 children and 114 women, over 5,300 Palestinians injured, and an estimated 22,000 buildings completely destroyed or badly damaged, including 4,230 destroyed homes. The level of devastation is unprecedented, and has greatly exacerbated the already grave humanitarian situation resulting from Israel's ongoing blockade of Gaza, in place since June 2007, and its prevention of reconstruction aid to Gaza.

The UN Fact-Finding Mission on the Gaza Conflict ("the Goldstone Mission") was mandated by the UN Human Rights Council on 3 April 2009 to investigate all violations of international law committed in the context of the war, and issued its report on 15 September 2009. The Goldstone Mission recommended that Israel be required, within three months, "to launch appropriate investigations that are independent and in conformity with international standards, into the serious violations of international humanitarian and international human rights law reported by the Goldstone Mission and any other serious allegations that might come to its attention."¹ On 5 November 2009, the UN General Assembly (GA) adopted a resolution² endorsing the Goldstone report and calling on Israel, the Palestinian Authority and Hamas to launch independent investigations. **In November 2009, the Swedish Presidency issued a statement to the UN on behalf of the EU emphasizing the importance of independent domestic investigations into alleged violations of IHL, and committing to "follow closely" those investigations.**³

Under the UN GA resolution, the UN Secretary General is to report back to the GA on the progress of domestic investigations by Israel and Palestinians on 5 February 2010. Israel is expected to present its own report to the GA, to be followed by a vote on a new GA resolution.

This briefing paper is organized as follows:

- I. **Lack of domestic remedies in Israel for Palestinian victims from Gaza**
- II. **Status of Israeli military operational probes and investigations**
- III. **UN human rights treaty bodies call for accountability**
- IV. **Recommendations for action**

Three appendices are attached to this paper: Appendix I – Status of complaints submitted to the Israeli authorities by Adalah, and Adalah, Al Mezan and Al Haq; Appendix II – Letter sent to Prime Minister Benjamin Netanyahu by human rights organizations based in Israel calling for an independent and impartial investigation mechanism by Israel; and Appendix III - Letters sent to President Mahmoud Abbas and Prime Minister Ismail Haniyeh by Palestinian human rights organizations calling for internal investigations by the Palestinian Authority and Hamas.

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I. LACK OF DOMESTIC REMEDIES IN ISRAEL FOR PALESTINIAN VICTIMS FROM GAZA

a. Palestinian civilians in Gaza enjoy no legal protection under the Israeli legal system

Since 2003, the Military Advocate General (MAG) has pursued a **policy of not opening criminal investigations into the killing and injury of Palestinian civilians in the OPT**. In 2003, B'Tselem and the Association for Civil Rights in Israel challenged this policy;⁴ seven years later, the petition remains pending before the Israeli Supreme Court. The available evidence indicates that it is the Israeli army's position that violations of international humanitarian law and international crimes are restricted to cases of intentional attacks against civilians.⁵ The position contradicts Israeli and international criminal law, according to which criminal responsibility may be found for intentional, reckless or negligent acts.⁶ To date the court has not criticized the MAG's heavy reliance on military operational probes conducted by the army itself, or the state's policy of opening criminal investigations only in cases of "willful killings."

The Supreme Court has also refused to intervene in the case of **Salah Shehadeh**, the Hamas leader in Gaza whose house was hit by a one-ton bomb dropped by the Israeli Air Force. The bombing killed Shehadeh and at least 14 civilians, including nine children, injured at least 100, and caused massive destruction to residential buildings. In 2008, the court refused to overturn the decisions of the AG and the MAG not to open a criminal investigation.⁷ A further petition, filed to the Israeli Supreme Court by Adalah, Al Haq, and the Palestinian Center for Human Rights in April 2007, sought criminal investigations into the killing of civilians and extensive home demolitions during two Israeli military attacks launched on Gaza in 2004.⁸ The petition provided detailed documentation of grave breaches of the Fourth Geneva Convention; it, too, remains pending. Here the AG repeated the state's position that criminal responsibility will attach only for "intentional" killings or injuries.

Since 2006, the Israeli Supreme Court has approved "**punitive collective sanctions**" proposed by the Defense Minister with the legal advice of the Attorney General (AG) against the entire population of Gaza, including: the closure of border crossings for humanitarian aid and vital commodities and goods;⁹ the denial of passage for the seriously ill for medical treatment unavailable in Gaza;¹⁰ the denial of passage to the West Bank for marriage¹¹ and university education;¹² cuts in fuel and electricity supplies;¹³ and the total ban on family members from Gaza visiting their relatives incarcerated in Israel.¹⁴ The state argued that fuel and electricity cuts to Gaza constituted "legitimate economic warfare" in the *Al-Basyouni* case, which challenged their legality.¹⁵ The Supreme Court accepted the state's legal position that Israel was no longer an occupying power in Gaza, and that **Gaza is a "hostile territory"** (para. 12). It also approved the state's legally baseless concept of a "minimum humanitarian standard" and exonerated it of responsibility for the ongoing humanitarian crisis in Gaza.

b. The MAG and AG cannot investigate these cases objectively or impartially

The Office of the MAG provided legal advice to the army during the planning stages of the operation and throughout its execution,¹⁶ as confirmed by the Israeli government in a report on the factual and legal aspects of the War on Gaza issued in July 2009.¹⁷ The former Justice Minister chaired an inter-ministerial committee "to coordinate Israel's efforts to offer legal defense to anyone who took part in the operation."¹⁸ The Attorney General's office advised on the "punitive collective sanctions". These facts disqualify them from investigating suspected violations of international law by the military objectively or impartially.

c. Past domestic commissions of inquiry demonstrate the need for an independent international monitoring body

In November 2000, Israel established an official commission of inquiry (the Or Commission) into the killing of 13 Palestinian citizens of Israel and the injury of hundreds of others by Israeli security

forces during protest demonstrations in October 2000. The commission found the security forces' opening of fire and use of live ammunition and snipers unjustified in every instance, and police commanders responsible for using excessive force, and recommended that the Police Investigations Unit (Mahash) investigate the killings. In 2005, Mahash recommended that *no indictments* be issued. In 2008, the AG endorsed Mahash's report and announced the final closure of the case against police, with no indictments filed despite the Or Commission's findings and recommendations. The AG related to these events like military operations, in which soldiers are under great risk of harm. He emphasized, as in the B'Tselem and Adalah cases noted above, that only where there is a suspicion of "intent" to kill or injure beyond a reasonable doubt will an indictment be issued. Thus, there has been no accountability for the October 2000 killings of Palestinian citizens of Israel.

d. The Goldstone Mission voiced its "serious doubts" about Israel's willingness to investigate, and found inherently discriminatory features in the Israeli legal system

After examining Israel's compliance with its obligations to investigate violations of international law, including war crimes and possibly crimes against humanity during the War on Gaza, the Goldstone Mission concluded that, "there are serious doubts about **the willingness of Israel** to carry out genuine investigations in an impartial, independent, prompt and effective way as required by international law." (para. 122; emphasis added) The Goldstone Mission further found that, "**the Israeli legal system overall presents inherently discriminatory features** that make the pursuit of justice for Palestinian victims [from the OPT] very difficult" (para. 122; emphasis added), and concluded that, "in the circumstances, there is little potential for accountability for serious violations of international humanitarian and human rights law through domestic institutions in Israel and even less in Gaza" (para. 1761).

II. THE STATUS OF ISRAELI MILITARY OPERATIONAL PROBES AND INVESTIGATIONS

a. Military operational probes and investigations conducted to date

According to the Israeli Ministry of Foreign Affairs (MFA), as of 5 November 2009 Israel had conducted "examinations" into 128 incidents.¹⁹ According to five military probes published on 22 April 2009, the army "acted during the fighting in accordance with international law and maintained a high professional and ethical level," and the killing of civilians resulted from errors and operational mishaps.²⁰

At least 48 incidents were closed on the ground that "there was no basis for suspecting any violation of the law." Of an additional 55 incidents, 28 are being examined, and criminal investigations have been opened into 27 incidents (10 of the 36 of which were examined by the Goldstone Mission). **Only one criminal investigation has thus far led to prosecution and conviction, in the case of a soldier who stole a credit card from a home in northern Gaza.** As all of these inquiries are internal military processes, they do not meet the requirements of effectiveness, independence and transparency (see below).

b. Specific complaints filed by Adalah, Al Mezan and Al Haq

Following the cessation of hostilities, Adalah, Al Mezan and Al Haq sent complaints against the Israeli military and demanded that Israel open independent, impartial and prompt investigations into 10 separate incidents that occurred during the war, including suspected war crimes. To the best of Adalah's knowledge, the Israeli military has so far opened military police investigations into 9 of the 10 incidents. In parallel, 3 of these incidents were investigated by the Goldstone Mission, which reported grave factual and legal findings in each case, including the commission of war crimes. A summary of each complaint and the status of the military police investigations and specific findings of the Goldstone Mission appear in Appendix I.

c. Military investigations alone do not meet the requirements of international law

The Duty to Investigate: Requirements of international law

According to UN international standards, proper investigations into suspected violations of international law must be **independent, effective, transparent and prompt**.²¹

In addition, there is a body of caselaw from the **European Court of Human Rights (ECHR)** on the failure to carry out proper investigations into wrongful deaths by the security forces. The most articulate discussion of the duty to investigate was set forth by the ECHR in 2003 in the case of *Finucane v The United Kingdom*.²² In July 2003, the ECHR ruled that “the proceedings following the death of [the Irish lawyer] Patrick Finucane failed to provide a prompt and effective investigation into the allegations of collusion by [UK] security personnel.” The most important statements of standards established by the court (in paras. 68-71) were:

1. It is necessary that “the persons responsible for and carrying out the investigation are **independent** from those implicated in the events,” and that independence entails not only a hierarchical or institutional connection but also a “practical independence.”
2. “The investigation must also be **effective** in the sense that it is capable of leading to a determination of whether the force used was or was not justified in the circumstances and to the identification and punishment of those responsible... the authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident.”
3. “A **prompt** response by the authorities in investigating a use of lethal force may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts.”
4. “There must be a sufficient element of **public scrutiny** of the investigation or its results to secure accountability in practice as well as in theory.”

The *Finucane* ruling built on a series of previous rulings delivered by the ECHR that found violations of Article 2 of the *European Convention of Human Rights* concerning the right to life, and also held the UK government liable for failing to carry out proper investigations into these deaths. These cases included *Hugh Jordan v. UK* (No.24746/94); *McKerr v. UK* (No. 28883/95); *Shanaghan v. UK* (No.37715/97); and *Kelley and Others v. UK* (No. 30054/96). The ECHR further considered the duty to investigate in the case killings by the Bulgarian military police in *Nachova et al. v. Bulgaria*.²³ In its ruling of 6 July 2005, the court found the investigation to be flawed in part because the investigation had operated under the assumption that the regulations and the planning of the operation were not flawed. The court further held that due to serious doubts over the objectivity and impartiality of the investigators and prosecutors involved, Bulgaria had failed to conduct a proper investigation.

The ECHR has also considered the **duty to investigate in situations of armed conflict**, including in cases from Chechnya. In numerous judgments the ECHR found that Russia had failed to effectively investigate suspicions of official involvement in human rights violations. In the case of *Isayeva v. Russia*, in 2005 the court found two military commanders responsible for the aerial and artillery bombardment of a Chechen village that resulted in the deaths of at least 46 civilians in 2000, and that the operation had involved the “massive use of indiscriminate weapons.” The court also found the investigation into the operation inadequate, and that the government’s decision to close the investigation, based on the conclusion of a military experts’ report that the operational command corps’ actions had been legitimate and proportionate, to be inconsistent with the evidence.²⁴

The fact that **Palestinian victims in Gaza have no access to a parallel regional court like the ECHR** for wrongful deaths and other violations by international humanitarian and human rights law by

the Israeli military and security forces makes the EU's calls for proper investigations and accountability all the more critical.

Israel's internal military probes fail to meet international requirements

Operational military probes suffer from **institutional and structural deficiencies**,²⁵ primarily their lack of independence, effectiveness and transparency: they are conducted by members of the army itself and rely exclusively on Israeli officers and soldiers; they are not designed to identify criminal behavior or liability but to evaluate military activity with the aim of learning lessons for improved future performance; and their findings are confidential.²⁶ Military police investigations also lack promptness: these investigations generally follow the conclusions of a probe, and thus are not prompt and do not have access to much of the evidence; they are conducted by a body that is internal to the army itself, typically by officers who are inexperienced and unskilled;²⁷ and in the rare cases when the MAG issues an indictment against a soldier the punishment does not reflect the gravity of the crime committed. Thus these investigations are not independent or effective.²⁸

Moreover, military police investigations address **only the misconduct of individual soldiers**, and all complaints have thus far been treated as isolated incidents. To date, Israel has refused to investigate the wider context of the policies, strategies, procedures, regulations and objectives of the military operation, or the continuing illegal closure of the Gaza Strip, contrary to the Goldstone Mission's explicit recommendations.

Israeli media reports state that the Israeli government is considering the appointment of a **committee of examination** (COE) tasked with examining a limited number of issues relating to the War on Gaza. A COE is nominated by the government and has limited powers;²⁹ it is the weakest kind of investigatory body that can be established under Israeli law: it has no legal status and lacks authorities needed to conduct a criminal investigation. Unlike a statutory investigatory body, an official commission of inquiry whose members are appointed by the Chief Justice of the Israeli Supreme Court, a COE "is usually used as a tool to assist in examinations into the internal matters of the appointing authority."³⁰

Furthermore, under international criminal law genuine investigations of war crimes are criminal investigations that are conducted with the "intent to bring the person concerned to justice."³¹ **Non-prosecutorial mechanisms, such as those launched by Israel into the conduct of its military forces in the War on Gaza or a COE, are not considered "genuine" investigations as they do not involve criminal proceedings.** Some factors that may indicate that an investigation is not "genuine" include: (i) prosecuting only lower ranking soldiers;³² (ii) imposing lower sentences for crimes than typically ordered;³³ and (iii) presuming the legality of regulations and planning of military operations.³⁴ In relation to the necessity of prosecution, Judge Richard Goldstone argued that South Africa's Truth and Reconciliation Commission would not be acceptable in the age of the International Criminal Court.³⁵

3. UN HUMAN RIGHTS TREATY BODIES CALL FOR ACCOUNTABILITY

a. The Committee Against Torture (CAT) calls for independent investigation into War on Gaza

In its *Concluding Observations* of May 2009,³⁶ CAT directly addressed the use of force or violence during military operations (para.29). The CAT expressed concern over the "insufficient measures" taken by Israel to protect the civilian population of Gaza, the many hundreds of deaths of Palestinian civilians, including minors and medical workers (16 of whom were allegedly killed and 25 injured while on duty), and the "severe effects on civilians as a result of Israeli weaponry containing phosphorus" and its use in a densely-populated area. The Committee called on Israel to, "conduct an independent inquiry to

ensure a prompt, independent and full investigation into the responsibility of state and non-state authorities for the harmful impact on civilians, and to make the results public.”³⁷

b. The Human Rights Committee (the HRC) queries Israel about establishing an independent body to monitor the military forces

In its latest *List of Issues to Israel*, dated November 2009,³⁸ the HRC, which monitors the ICCPR, asked Israel about several aspects of its duty to comply with the fundamental requirement of distinguishing between civilian and military objectives when resorting to force. Specifically, the HRC asked Israel whether it, “envisages establishing an independent body to monitor the strict compliance of military forces with international human rights law,” and for information on the status of investigations into alleged violations of international law by the Israeli military resulting from the War on Gaza. The HRC also raised concerns with Israel allegations of: “(a) direct targeting of civilians and civilian objects with lethal outcomes despite the absence of any justifiable military objective; (b) the use of Palestinian civilians by the Israeli military forces as human shields, despite the 6 October 2005 ruling of the Israeli High Court on this practice; (c) the refusal of Israeli forces to allow the evacuation of the wounded and permit access to ambulances [...]”

4. RECOMMENDATIONS FOR ACTION

The EU and its 27 Member States not only have legal obligations as High Contracting Parties to the Geneva Conventions, but also must adhere to EU treaty obligations, which establish the consolidation of the rule of law and respect for human rights an EU foreign policy objective. Furthermore, given the EU’s key role in the Israeli-Palestinian conflict and membership in the Quartet, as well as its position as a major donor to the Palestinian people and close diplomatic and trade ties to Israel, Adalah calls on the EU and its Member States to:

1. **Fully endorse** the findings and recommendations of the Goldstone Mission report;
2. Use the legal and diplomatic tools at their disposal to **continue to urge Israel to conduct independent, impartial and credible investigations** that are in conformity with international standards into the serious violations of international human rights and humanitarian law reported by the Goldstone Mission;
3. **“Follow closely” the progress of the domestic investigations** and how they are being conducted;
4. **Issue statements** on the state of the investigations, describing what they think is happening on the local level and outlining what is missing;
5. **Support a new, balanced GA resolution** that would continue to put pressure on both sides to carry out independent, impartial investigations etc., with clear outlines of what is currently missing. As recommended by the Goldstone Mission, the resolution should also ask the Secretary General to establish an independent committee of experts in international humanitarian and human rights law to monitor and report on any domestic legal or other proceedings undertaken by the Government of Israel in relation to the investigations. Such a committee of experts should report at the end of the six-month period to the UN Security Council on its assessment of relevant domestic proceedings, including their progress, effectiveness and genuineness, so that the Security Council may assess whether appropriate action to ensure justice for victims and accountability for perpetrators has been or is being taken at the domestic level. The Security Council should request the committee to report to it at determined intervals, as may be necessary.

APPENDIX I

Status of complaints submitted to the Israeli authorities by Adalah, and Adalah, Al Mezan and Al Haq

Incident in Gaza	Date of Complaint	Status of Israeli military investigation
<i>A. Cases of killings, injuries, prevention of medical treatment, home demolitions</i>		
<p>1. Abed Rabbo Family</p> <ul style="list-style-type: none"> • On 7.1.2009, intentionally shooting at the family and killing two sisters (aged 3 and 9 years-old). Another sister (aged 5) and their grandmother (aged 54) were injured. The young girl is still being treated in Belgium. • Preventing an ambulance from evacuating the injured family. • Fatally shooting Adham Naseir (aged 37) on Al Quds Street on his way to help in evacuating the grandmother. • Demolishing houses in Eizbet Abed Rabo that were under the army's effective control, after they ordered the inhabitants to evacuate the area. All houses were totally destroyed. 	4 June 2009	The Israeli Military Police opened an investigation. They interviewed members of the Abed Rabbo family and Adham's relatives, who accompanied the victims at the time of the incidents. Adalah received requests from the Military Police for maps, pictures, aerial shots and medical documents. Adalah has also submitted affidavits of the witnesses who could not go to Erez.
<p>The findings of the Goldstone Mission in this case included the following:</p> <p><u>(i) Factual findings</u> (Para. 777-779)</p> <ul style="list-style-type: none"> • Witnesses are credible and reliable and testimonies are consistent. • A man, a young and elderly woman and 3 small girls, some with white flags, stepped out of the house and waited for instructions for several minutes. • There was no reasonable ground for the soldier shooting to assume that any of the members of the group were directly participating in the hostilities. • The soldier deliberately directed lethal fire at Souad, Samar and Amal Abd Rabbo and at their grandmother, Hajja Souad Abd Rabbo. <p><u>(ii) Legal findings</u> (Para. 809-821)</p> <ul style="list-style-type: none"> • Israeli armed forces[s] carried out direct intentional strikes against civilians. • There was no reasonable ground for the Israeli armed forces to assume that the civilians attacked were in fact taking part in the hostilities and thus had lost impunity against direct attacks. • Forces had violated the prohibition under international law... that the civilian population as such will not be the object of attack. • Israeli armed forces denied medical emergency services access to the wounded civilians. • The State of Israel would be responsible under international law for these intentionally wrongful actions carried out by its agents. • The conduct of the Israeli armed forces amounted to violations of the right to life where it resulted in death, and to a violation of the right to physical integrity, and to cruel and inhuman treatment in other cases. 		
<p>2. Salha Family</p> <p>Israeli air strike against the Salha family home in Beit Lahiya, in the early hours of 09.01.09. As a result, six family members were killed after "a knock on the roof" attack; house totally destroyed.</p>	27 October 2009	No response received to date
<p>3. Abu Eisha Family</p> <ul style="list-style-type: none"> • Shelling of the family's home in the Al-Naser neighborhood in Gaza City, in the middle of the night on 05.01.09. 	22 November 2009	Adalah received a letter from the AG's Office dated 22.11.2009 informing that the complaint is under examination.

<ul style="list-style-type: none"> • At the time of the shelling, 26 family members were in the house. As a result of the bombing, five people were killed and the remainder wounded. • The bombing destroyed completely the house, and damaged many neighboring homes and injured many of their inhabitants. 		
<p>4. Said Siam Family</p> <ul style="list-style-type: none"> • Assassination of former Interior Minister in Gaza, Said Siam, on 15.01.09. • Israeli war planes shelled a house where the minister's family lived, which resulted in the killing the minister and four family members. • The attack also resulted in the deaths of six civilians in neighboring buildings, and the injury and maiming of dozens of others, in addition to the wanton destruction of many buildings 	22 November 2009	Adalah received a letter from the AG's Office dated 11.1.2010, notifying that the complaint was referred to the MAG for his examination.
<i>B. Cases of Palestinian civilians, including minors, being used as Human Shields</i>		
<p>1. Abbas Ahmad Ibrahim Halaweh, from Beit Lahiya</p> <p>On 05.01.2009, he was captured, ordered to strip, then handcuffed and blindfolded. He was used as a human shield during his detention for a week, from 05.01.09 to 12.01.09.</p>	8 April 2009	The Military Police opened an investigation and interviewed the victim. They requested maps and aerial shots showing the places that the victim searched for the army when he was used as human shield.
<p>2. Majdi ElAbed Ahmad Abed Rabbo, from Eizbet Abed Rabbo, Jabalia</p> <p>On 05.01.2009, the victim was captured, ordered to strip, handcuffed and blindfolded. He was used as a human shield for more than 24 hours.</p>	8 April 2009	The Military Police opened an investigation and interviewed the victim. They also summoned other witnesses mentioned in his testimony, to testify, some of whom were also used as human shields. Some of the witnesses refused to cooperate with the army out of fear and lack of trust. The MP requested medical reports.
<p>The findings of the Goldstone Mission in the cases of Abbas Ahmad Ibrahim Halaweh and Majdi ElAbed Ahmad Abed Rabbo included the following:</p> <p><u>(i) Factual findings</u> (Para. 1090- 1095)</p> <ul style="list-style-type: none"> • Witnesses are credible and reliable. • The Israeli armed forces captured these individuals and in some cases their families, and forced them at gunpoint to search house together with the Israeli armed forces. • They were all subject to cruel, inhuman and degrading treatment during their captivity. <p><u>(ii) Legal findings</u> (Para 1096- 1107)</p> <ul style="list-style-type: none"> • The use of the “neighbour procedure” [a method of using civilians as human shields] constitutes a violation of fundamental human rights norms. It puts the right to life of the civilians concerned at risk in an arbitrary and unlawful way • The anguish to which civilians are forced at gunpoint to enter houses which might be booby-trapped or harbour combatants who might open fire on them, can only be described as cruel and inhuman treatment. • The intentional use as human shields in these cases qualifies as inhuman treatment of and wilfully causing great suffering to protected persons under the Fourth Geneva Convention. As such, the Mission considers the conduct of the Israeli armed forces in relation to such persons to amount to grave breaches of the said Convention. The use of human shields is also a war crime. 		

<p>3. Raji Mesbah Abdallah Abed Rabo from Eizbet Abed Rabo, Jabalia</p> <p>On the 05.01.2009, immediately after his arrest, the victim was forced to sit in a rigid position for 20 minutes with a gun pointed to his head. He was used as a human shield for 3 days from 05.01.09 to 07.01.2009.</p>	8 April 2009	The Military Police opened an investigation,, interviewed the victim and summoned witnesses mentioned in his testimony, to testify. The Military Police requested medical documents.
<p>4. Alaa Mohammad Ali Al-Aatar and his brothers, Ali and Nafiz - all under the age of 16 - from Al-Atatra Neighborhood (3 brothers – minors)</p> <p>On 05.01.2009 the victims were captured and used as human shields for 3 days. One of the victims was beaten, blindfolded and ill-treated and was held with around 100 other detainees in a man-made pit for 4 days in inhuman conditions.</p>	8 April 2009	The Military Police opened an investigation and requested maps, aerial shots, the locations where they were used as human shields and the location of the pit. They also requested medical documents.
<p>5. Abd El Karim Mostofa Salah and his minor son, Ameen (aged 14), from Eizbet Abed Rabo, Jabalia</p> <p>The victims were handcuffed continuously and used as human shields for a period of 10 days. After that they were ill-treated, blindfolded and beaten with soldiers’ helmets on their way to Israel. The son, Ameen, was released after five days in detention and the father was detained as an ‘unlawful combatant’. (still??) no he was released.</p>	18 June 2009	The Military Police opened an investigation, interviewed the victim and summoned witnesses mentioned in his testimony to testify. The Military Police requested medical documents.
<p>6. Mohammad Alatar and his minor son (aged 10), from Beit Lahiya</p> <p>On 05.01.2009 the victims were used as human shields, blindfolded, handcuffed, and held in a man-made pit surrounded with barb-wired, with 70 others for three days.</p>	6 July 2009	No military police investigation was opened yet. Adalah is in the process of inquiring about the status of the complaint.

APPENDIX II

Letter sent to Prime Minister Benjamin Netanyahu by human rights organizations based in Israel calling for an independent and impartial investigation mechanism by Israel

ADALAH -- THE LEGAL CENTER FOR ARAB MINORITY RIGHTS IN ISRAEL | **ASSOCIATION FOR CIVIL RIGHTS IN ISRAEL** | **B'TSELEM** - THE ISRAELI INFORMATION CENTER FOR HUMAN RIGHTS IN THE OCCUPIED TERRITORIES | **GISHA** - LEGAL CENTER FOR FREEDOM OF MOVEMENT | **HAMOKED** - CENTER FOR DEFENCE OF THE INDIVIDUAL | **PHYSICIANS FOR HUMAN RIGHTS - ISRAEL** | **PUBLIC COMMITTEE AGAINST TORTURE IN ISRAEL** | **YESH DIN** - VOLUNTEERS FOR HUMAN RIGHTS

January 25, 2010

To:
Mr Benjamin Netanyahu
Prime Minister
Jerusalem

As human rights organizations in Israel, we reissue our call to the Government of Israel to establish, without delay, an independent and impartial investigation mechanism to thoroughly examine the allegations raised regarding violations of international law during Operation Cast Lead. We do so once again, despite the negative responses we have received to date, because we believe this is an essential issue at the heart of Israeli society. A year has passed since the conclusion of the military operation, and soon deliberations will begin in UN institutions regarding implementation, by both parties, of the recommendations of the Goldstone Commission Report. One of the primary recommendations was for an independent Israeli investigation of the allegations regarding violations of international law.

Recently, the Military Advocate-General stated that to date 27 investigations have been opened by the Criminal Investigation Division of the Military Police regarding different incidents. The rest of the allegations are being investigated through "operational debriefings."

However, these debriefings and Military Police investigations do not fulfill Israel's investigative duty nor do they achieve its goals. Firstly, criminal investigations by the Military Police examine deviations from orders issued. As such, they are only suitable for cases where the allegation is that acts were committed that contravened military orders. On the other hand, significant information has come to light thus far, including through research conducted by Israeli and international organizations, alleging that most of the harm to civilians, property and civilian buildings during Operation Cast Lead was a result of policies determined at the senior government and army levels, with the approval of the Military Advocate-General. Therefore, the investigation must include an examination of the orders and instructions given prior to the operation and throughout its duration. In order to investigate the allegations that illegal orders were given, or that the combat strategy violated international humanitarian law, it is necessary to appoint someone or some mechanism that is not subordinate to decision-makers and which was not involved in the formulation of the orders and instructions prior to the launch of the offensive.

Secondly, most of the allegations are being investigated, as noted, through “operational debriefings” only. This refers to debriefings conducted by senior officers, which are forwarded to the Military Advocate-General for review. This system of inquiry is flawed in three major ways:

1. **Lack of Independence** – It involves inquiries conducted by “interested parties” who are not impartial but rather are the people whose decisions and actions are supposed to be under investigation. This is particularly the case when the Military Advocate-General, who was involved in making the decisions prior to the launch of the operation and throughout its duration, is the same official who is now the primary adjudicator on the matter;
2. **Lack of Transparency** – Operational debriefings are closed matters and there is no possibility of monitoring them. As a consequence, as an investigative process there is no real way to supervise them for credibility or seriousness;
3. **Lack of Effectiveness** – Those conducting the debriefings are not professional investigators, and the goal of the investigations is not to uncover violations of the law but rather to identify operational failures. Therefore, in addition to the fact this process is not independent and not transparent, it is clear that the investigation process via these debriefings cannot lead to objective findings regarding accountability for actions in any reasonable manner.

Indeed, the UN Commission headed by Justice Goldstone noted the inadequacy of the operational debriefings and Military Police investigations as a tool for appropriate investigation. It emphasized the State of Israel's obligation to facilitate an independent and effective inquiry, which would not have the flaws of these two investigative mechanisms.

Because the investigative proceedings initiated by Israel subsequent to the publication of the Goldstone Commission Report are no different from those that preceded its publication, we understand that the problems noted by the UN Commission remain unaddressed today.

In light of the above, we call on you to establish, without further delay, an impartial investigative body which will conduct independent and effective investigations of incidents regarding which allegations have been raised that Israel violated the provisions of international law during Operation Cast Lead. We believe that a foreign expert on international humanitarian law, who will add credibility and weight to the investigation, should be a part of this process. The investigation should examine Israel's conduct during Operation Cast Lead, including an examination of accountability on the political and command level. Likewise, the investigative body should be charged with preparing the legal groundwork for future military conduct to ensure that orders and instructions given will be consistent with Israel's obligations under international law.

We are approaching the deadline set by the Goldstone Commission Report for both sides to hold independent investigations, before the investigation of the allegations is transferred to international and foreign forums. The State of Israel's refusal to hold an independent investigation will expose military officers and members of the previous government to investigation and legal proceedings likely to take place outside Israel.

The extent of damage to the civilian population during the operation was unprecedented. This population is still subject to the closure policy and collective punishment, which is preventing reconstruction and normal life even after the fighting ended. The allegations

raised regarding the army's conduct are serious and grave. The Israeli public has the right to an explanation of the actions taken in its name in the Gaza Strip.

Signed:

Hagai El-Ad
Executive Director
The Association for Civil *Rights* in *Israel*

Jessica Montell
Executive Director
B'Tselem

Adv. Sari Bashi
Executive Director
Gisha - Legal Center for Freedom of Movement

Dr. Ishai Menuchin
Executive Director
Public Committee Against Torture in Israel

Roi Maor
Executive Director
Yesh Din

Dalia Kerstein
Executive Director
HaMoked: Center for the Defence of the Individual

Adv. Hassan Jabareen
General Director
Adalah: The Legal Center for Arab Minority Rights in Israel

Hadas Ziv
Executive Director
Physicians for Human Rights – Israel

Rabbi Arik W. Ascherman
Executive Director
Rabbis for Human Rights

APPENDIX III

Letters sent to President Mahmoud Abbas and Prime Minister Ismail Haniyeh by Palestinian human rights organizations calling for internal investigations by the Palestinian Authority and Hamas

His Excellency President Mahmoud Abbas*

RE. Calling for immediate commencement of internal investigations in compliance with UN GA Resolution A/RES/64/10

Your Excellency,

On 25 September 2009, the UN Fact-Finding Mission on the Gaza Conflict released its comprehensive, contextual, professional and impartial report. The Report detailed violations of human rights and of the laws and norms of war, which amounted to war crimes and possible crimes against humanity, committed during last winter's 23-day aerial and ground offensive in the Gaza Strip by the Israeli Occupation Forces. Whereas the bulk of the Report addressed violations by Israel, the Occupying Power, it also considered violations by Palestinian armed groups and the Palestinian authorities in Gaza and the West Bank.

The responsible Palestinian authorities have endorsed the Report by the Fact-Finding Mission, and have furthermore successfully tabled draft resolutions before the UN Human Rights Council and the UN General Assembly with the full support of the Palestinian people. On 5 November 2009, the General Assembly adopted Resolution A/RES/64/10 urging the Palestinian side to undertake internal, independent and credible investigations in conformity with international standards into the serious violations of international human rights and humanitarian law in the occupied Palestinian territory in order to ensure justice and accountability for civilian victims to the conflict, and hold accountable those who perpetrated the violations. Similarly, it called upon Israel to also carry out its own internal investigations.

As Palestinian non-governmental human rights organisations, we recognize the efforts already made by the Palestinian side in seeking to achieve justice for the Palestinian people. In order to ensure that the work of the PLO on guaranteeing endorsement of the Report at the UN level, is of lasting value further steps must now be taken to implement its recommendations and the above mentioned GA Resolution.

On 5 February 2010, the UN Secretary-General is expected to submit his report on the implementation of the General Assembly Resolution. As Palestinian and international non-governmental organisations, we urge both the Palestinian authorities in the West Bank and Gaza to immediately commence credible internal investigations in compliance with international standards and in accordance with the Report by the Fact-Finding Mission on the Gaza Conflict.

It is imperative to assert that the responsible domestic authorities are under an obligation to implement the recommendations of the Fact Finding Mission's Report in their entirety and

* A similar letter was sent by the organizations to Prime Minister Ismail Haniyeh

without delay. Each of the responsible Palestinian authorities have already indicated its intention and willingness to satisfy the international community's demand that the conflict parties initiate credible internal investigations. As the deadline for the submission of the UN Secretary-General's report approaches, we urge you to immediately take clear and public steps toward holding all those who prove to be responsible for the violations detailed in the Report to account.

International law relating to armed conflict makes a clear distinction between justifiable criteria for initiating an armed conflict, and the limits to acceptable conduct of hostilities during armed conflict. In the immediate case, we wish to assert that we are concerned only with the conduct of hostilities during armed conflict.

Israel has continued to reject the rule of law and their international humanitarian and human rights obligations by continuing its illegal practices, including the blockade of the Gaza Strip, and by condemning the Report of the Fact Finding Mission and rejecting its well-based findings on Israel's violations. For the Palestinians to continue to effectively struggle for their legitimate rights as a people, it is crucial that their leaders and representatives adopt an approach, centered on the rule of law and respect for human rights.

We look forward to learning of your positive steps to take the necessary domestic measures to investigate violations of international human rights and humanitarian law and, where appropriate, to hold accountable those who prove to have committed these violations and to prosecute and punish them as recommended by the UN Fact Finding Mission.

We wish to direct your attention to that a similar letter has been sent to the Prime Minister of the Government in Gaza, Mr. Ismail Haniyeh.

Sincerely,

Hassan Jabareen
General Director
Adalah

Sahar Francis
General Director
Addameer

Khalil Abu Shammala
General Director
Al Dameer Association for Human Rights

Shawan Jabarin
General Director
Al-Haq

Issam Younis
General Director
Al Mezan Centre for Human Rights

Ingrid Jaradat Gassner
General Director
**Badil Resource Center for Palestinian Residency
and Refugee Rights**

Rifat Kassis
General Director
Defence for Children International -Palestine Section

Mohammad Zeidan
General Director
Arab Association for Human Rights

Shawqi Issa
General Director
Ensan Center for Human Rights and Democracy

Issam Arouri
General Director
Jerusalem Legal Aid Center

Maha Abu Dayieh
General Director
Women's Center for Legal Aid and Counseling

ENDNOTES

¹ The Goldstone Mission report is available at:

<http://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-48.pdf>. See para. 1969.

² UN GA Resolution A/RES/64/10, available at:

<http://unispal.un.org/UNISPAL.NSF/0/C00AAE566F6F9D7485257664004CFF12>

³ Statement of the European Union at the ninth meeting of the EU-Israel Association Council, Luxembourg, 15 June 2009, p. 4; available at:

http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/gena/108500.pdf. See also:

http://www.swedenabroad.com/Page_98069.aspx;

http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/gena/108500.pdf

⁴ HCJ 9594/03, *B'Tselem v. The Military Advocate General* (case pending).

⁵ See The State of Israel, "The Operation in Gaza, 27 December 2008 – 18 January 2009: Factual and Legal Aspects," July 2009 available at: <http://www.webcitation.org/SiiU39oGM> and the state's response to HCJ 9594/03, *B'Tselem, et al. v. The Military Advocate General* (case pending).

⁶ For Israeli law, see S.Z. Feller, *Elements of Criminal Law*, Vol. A, 1984, p.516; see also sections 20(A)(1),(2) and 20(B) of the Penal Code, 1977. For international law, see G. Werle and F. Jessberger, *Principles of International Criminal Law*, Cambridge University Press, 2005, p. 115; K. Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court, Sources and Commentary*, ICRC, 2003.

⁷ HCJ 8794/03, *Hess v. The Military Advocate General* (decision delivered on 23 December 2008).

⁸ HCJ 3292/07, *Adalah, Al Haq and PCHR et al. v. Attorney General* (case pending). The state responded that the case should be dismissed as its arguments were general and it was brought too long after the end of military operations.

⁹ HCJ 5523/07, *Adalah, et al. v. The Prime Minister, et al.* (petition withdrawn in October 2007).

¹⁰ HCJ 5429/07, *Physicians for Human Rights-Israel, et al. v. The Minister of Defense* (decision delivered 28 June 2007).

¹¹ HCJ 9657/07, *Garboa' v. IDF Commander in the West Bank*, Takdin Elon, 2008(3) 2362 (2008).

¹² HCJ 8731/09, *Berlanty Jiryis Boulous Azzam and Gisha v. The Regional Commander of the West Bank* (decision delivered 9 December 2009).

¹³ HCJ 9132/07, *Jaber Al-Basyouni Ahmed v. The Prime Minister* (decision delivered 30 January 2008), available in English at: http://elyon1.court.gov.il/files_eng/07/320/091/n25/07091320.n25.htm

¹⁴ HCJ 5399/08, *Adalah et al. v. The Defense Minister et al.* (decision delivered 9 December 2009), available in English at:

<http://www.adalah.org/features/prisoners/Isr%20Sup%20Ct%20decision%20No%20family%20visits%20Gaza%20prisoners%20English.doc>.

¹⁵ See *Al-Basyouni* above, the state's response of 7 November 2007, para. 25. on file with Adalah.

¹⁶ See Yotam Feldman and [Uri Blau](#), "How IDF legal experts legitimized strikes involving Gaza civilians," *Haaretz*, 23 January 2009, available at: <http://www.haaretz.com/hasen/spages/1057648.html>. See also, "The Government Declares Full Legal Protection to IDF Soldiers," YNET, 23 January 2009. During the campaign it became known that the Offices of the MAG and the AG were providing a legal framework for the military attacks. They were also preparing the grounds for refuting the legal challenges expected in the aftermath of Israel's military campaign. Furthermore, and to make such legal challenges more difficult to litigate, it was decided to place a ban on the publication of the names of the soldiers who participated in the operation, from the bottom to the top of the military hierarchy.

¹⁷ See The State of Israel, "The Operation in Gaza", endnote 5 above.

¹⁸ See the government's decision, available at:

http://www.mfa.gov.il/MFA/Government/Communiques/2009/Cabinet_communique_25-Jan-2009.htm

¹⁹ The Israeli Ministry of Foreign Affairs, *Status of IDF investigations of Gaza incidents*, 5 November 2009.

available at:

http://www.mfa.gov.il/MFA/Government/Law/Legal+Issues+and+Rulings/Examination_allegations_by_IDF_Oct_2009.htm

²⁰ *Cast Lead' Investigations: The IDF Maintained a High Ethical and Professional Level*. See:

http://dover.idf.il/IDF/News_Channels/today/09/04/2202.htm (Hebrew) and Israeli Ministry of Foreign Affairs, "IDF: Conclusions of investigations into central claims and issues in Operation Cast Lead", 22 April 2009. Cited in http://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A%20HRC%2012%2037_AEV.pdf

²¹ See UN Principles on the Effective Prevention and Investigation of Extra Legal, Arbitrary and Summary Executions; UN 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. See

also the Concluding Observations of the Committee against Torture of May 2009, para. 29, CAT/C/ISR/CO/4; General Comment 31 of the Human Rights Committee, CCPR/C/21/Rev.1/Add.13.

²² *Finucane v. The United Kingdom* (Application No. 29178/95) Judgment, Strasbourg, 1 July 2003.

²³ *Nachova and Others v Bulgaria* (Application no. 43577/98) and 43579/98) (Judgment delivered 6 July 2005).

²⁴ *Isayeva v. Russia*, (App. 57950/00), para. 223-4 (decision delivered on 24 February 2005). Cited in Human Rights Watch, *Who Will Tell Me What Happened to My Son?* September 2009, available at:

<http://www.hrw.org/en/node/85743/section/1>

²⁵ Human Rights Watch, Promoting Impunity, The Israeli Military's Failure to Investigate Wrongdoing, June 2005, available at: <http://www.hrw.org/en/reports/2005/06/21/promoting-impunity>

²⁶ See article 539A of the Military Justice Law – 1955. See also HCJ 2366/05, *Al-Nebari v. The Chief of Staff of the Israeli Army* (decision delivered on 29 June 2008), paras. 6-10 of Justice Arbel's ruling: "The factual examination is the main role of the investigatory bodies – the Military Police, the Inspecting Officer, and the Investigatory Judge – and its purpose is to reveal the truth in order to do justice and bring those responsible to justice. Conversely, the factual examination that is undertaken within the framework of an operational probe, while it is an essential and extremely important step in conducting the probe, it is not its purpose; rather it comes to serve the main purpose of the operational probe, which is to draw conclusions and lessons in order to prevent future failures and errors [...] There is, therefore, a substantial difference between an operational probe and a criminal investigation, both at the level of purpose and at the operational level."

²⁷ See the Military Justice Law – 1955 and Human Rights Watch, "Promoting Impunity" report, endnote 25 above.

²⁸ See Yesh Din report: Exceptions, Prosecution of IDF soldiers during and after the Second Intifada, 2000-2007, available at: <http://yesh-din.org/sys/images/File/Exceptions%5BEng%5D%5B1%5D.pdf>

²⁹ See, e.g., Amos Harel, Israel mulls internal probe of Gaza war, Haaretz English Edition, 26 January 2007, available at: <http://www.haaretz.com/hasen/spages/1145196.html>

³⁰ HCJ 6001/97, *Amitai v. The Prime Minister* (decision delivered on 22 October 1997).

³¹ See Articles 17 and 53(1)(b) of the Rome Statue of the ICC.

³² William W. Burke-White & Scott Kaplan, Shaping the Contours of Domestic Justice: The International Criminal Court and an Admissibility Challenge in the Uganda Situation, Public Law and Legal Theory Research Paper Series Research Paper No. #08-13, p. 12.

³³ *Ibid.*, p. 19 & 36.

³⁴ *Nachova and Others v Bulgaria*, para 139.

³⁵ See Lydiah Kemunto Bosire, Misconceptions I – The ICC and the Truth Justice and Reconciliation Commission, 21 August 2009, Oxford Transitional Justice Research, working research papers.

³⁶ See CAT/C/ISR/CO/4 available at:

<http://www2.ohchr.org/english/bodies/cat/cats42.htm>

³⁷ Similarly, CAT found a parallel lack of accountability regarding torture by the ISA. Although Israel argued that "every claim regarding the use of allegedly impermissible means of interrogation is examined by the Inspector for Complaints," the Committee voiced its concern in para. 21 that "none of the over 600 complaints of ill-treatment by ISA interrogators received by the Inspector of Complaints between 2001 and 2008 has resulted in a criminal investigation." The Committee also criticized the fact that the Inspector is an ISA employee and under the supervision of the AG, and therefore the investigations are not independent or impartial. The Committee concluded, as it did regarding complaints into harm caused to civilians in Gaza, that Israel should, **"duly investigate all allegations of torture and ill-treatment by creating a fully independent and impartial mechanism outside ISA."**

³⁸ See CCPR/C/ISR/Q/3, 17 November 2009, paras. 10 and 11, available at:

<http://www2.ohchr.org/english/bodies/hrc/docs/AdvanceDocs/CCPR-C-ISR-Q3.doc>