

Adalah The Legal Center for Arab Minority Rights in Israel

عدالة المركز القانوني لحقوق الاقلية العربية في اسرائيل

עזאלה המרכז המשפטי לזכויות המיעוט הערבי בישראל



**Challenging the Israeli Attorney General's
Conception of Sovereignty: The Issue of Jurisdiction
concerning the 'Situation of Palestine' before
The International Criminal Court**

**A Report by Adalah – The Legal Center for Arab
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EXECUTIVE SUMMARY

In this report, Adalah – The Legal Center for Arab Minority Rights in Israel responds to the Israeli Attorney General’s (AG) memorandum opposing the International Criminal Court’s (ICC) exercise of jurisdiction on the ‘Situation in Palestine’, dated 20 December 2019. Adalah is a leading human rights organization in Israel that has litigated numerous of cases before the Israeli Supreme Court (ISC) regarding the protection of the Palestinian civilian population in the Occupied Palestinian Territories (OPTs). Adalah exposes the flaws in the AG’s position that the ICC cannot exercise jurisdiction in this case, which is based on an outmoded, formalistic interpretation of State sovereignty. Adalah finds both that the AG’s position is not in line with current developments of international legal practice, and also that it contradicts positions that the AG himself has put forward before the ISC, as well as ISC caselaw.

This report is organized as follows. Adalah explains in **Part One** that the main arguments presented in the AG’s memorandum are indicative of an outdated and increasingly irrelevant understanding of the definition of state sovereignty. For the AG, the definition of the term ‘State’ is that which is commonly accepted and recognized in general international law: that of a sovereign state. This conception of sovereignty leads the AG to claim that the exercise of the ICC’s jurisdiction in this case would violate the classical state-sovereignty principle of ‘non-intervention’.

International human rights law, however, is not concerned with the old, formalistic understanding of sovereignty and states’ rights, but rather follows a functional approach that examines how a state exercises its power over the population living within its jurisdiction or under its effective control. Significantly, the AG’s memorandum mentions no matter pertaining to the Palestinian population, and fails even to attempt to challenge or to discuss the ICC Prosecutor’s arguments regarding the *prima facie* war crimes committed by the State of Israel against the Palestinians. It does not discuss the State of Israel’s ‘Responsibility to Protect’ the population. Instead, it narrowly addresses the rights of a sovereign state, but without discussing the corresponding duties of a sovereign power towards the population. In other words, for the AG, claims of sovereignty precede claims of criminality.

The main goal of international legal practice today is the defense of victims, regardless of whether the actor suspected of causing them harm is a sovereign state or a quasi-state. Hence international tribunals and courts have accepted an expanded range of actors including entities that do not enjoy the status of a *de jure* State, or even the characteristics of a quasi-State. The AG's claims regarding sovereignty are moreover irrelevant to the purpose of the Rome Statute, which defines criminal offenses for which individuals, and not states, can be prosecuted, and does not determine issues of sovereignty.

Adalah explains that Article 12(3) of the Rome Statute should lead to the interpretation of the term "State" as including a quasi-State when: (1) this entity is a party to the Statute; (2) enjoys a recognized international status; and (3) the case raises matters of impunity. Such an interpretation is especially relevant if the case involves a legal 'black hole', which arises when legality is suspended, eliminating access to justice, civil remedies, effective prosecution, penalty, and accountability for illegal killings and other serious crimes.

This contemporary interpretation fills a vacuum in protection for victims, and has nothing to do with determining whether or not Palestine is a sovereign state. It is additionally consistent with the ICC's purpose of ending impunity. Adalah concludes herein that Articles 19 and 53 of the Rome Statute further support the position that the ICC must exercise jurisdiction on the basis of "the interests of victims" and "the interests of justice" to end impunity. The main cases of impunity concern the Gaza Strip.

Part Two of the report begins by setting the stage with background information about Israel's Disengagement from Gaza in 2005, and its declaration in 2007 of Gaza as a "hostile territory", and subsequent closure of the Strip. Following these moves, the Israel Supreme Court (ISC) redefined the legal status of Gaza in the *Al-Bassiouni* case, effectively declaring an end to Israel's Occupation, and ruling that Israel's only obligations towards Gaza's residents were to ensure "essential humanitarian needs". The report then reviews major ISC cases litigated between 2007 and the present concerning the denial of the right to an effective remedy in civil law for Gaza residents. These cases include attempts by the State of Israel to exempt itself from paying tort damages to Palestinians injured by the Israeli military, and the denial of entry to Gaza residents into Israel in order to pursue court cases. These cases have resulted in Israel's full immunity from civil compensation and damages, as a result of which the victims have been left without recourse to a civil remedy.

The second section of Part Two examines in detail Israeli military probes into "exceptional incidents" during the 2014 Gaza War, codenamed "Operation Protective Edge" (OPE). Adalah and Al Mezan filed criminal complaints into 28 incidents to the Military Advocate General (MAG) and the Attorney General (AG) concerning suspected criminal violations committed by Israel against Palestinian civilians during OPE, and demanded independent investigations. These cases concern the killing and serious injury of scores of Palestinian civilians, including women and children, and the massive destruction of civilian objects. None of these cases resulted in any genuine investigations, indictments or criminal proceedings. The section also discusses chronic flaws in the Israel domestic investigatory system, some of which were identified by Israeli domestic commissions of inquiry and the State Comptroller's Office. It concludes that the Israeli investigatory system as a whole, which provides near blanket impunity to the Israeli military and denies remedies to the victims as a matter of routine, and has absolutely failed to provide accountability, is primarily geared towards protecting its armed forces.

The third section of Part Two analyzes the latest ISC decision regarding the open-fire regulations used by the Israeli military against Palestinian civilian protestors during the Great March of Return March (GMR). This open-fire policy, which included the use of snipers and live ammunition, resulted in the killing of 217 protestors and the wounding of 19,000 others, many of whom suffered catastrophic and otherwise life-altering injuries. Human rights organizations, including Adalah, petitioned the ISC against the Israeli military's response to the protests, arguing that their use of force was arbitrary and excessive, and violated the protestors' rights to life and bodily integrity. In May 2018, the ISC unanimously rejected the petition, fully adopting the state's position in the case, and afforded the military full discretion in its lethal, excessive actions to quash the protests. The ISC further held that the scope of its own intervention was very limited and narrow, and that decisions were subject to the discretion of commanders on the ground. By contrast, the UN Commission of Inquiry, which examined these events, concluded in 2019 that in the tens of cases it had examined, none of the protestors were armed or posed an imminent threat to life or limb, and thus that the use of force was unjustified.

The cases and the caselaw examined in the report show that the Israeli legal system has made Gaza into a legal "black hole" by suspending the applicability of IHL norms and mainly, Article 43 of the Hague Regulations. In addition, as shown in the report, the ISC suspends the applicability of Israeli constitutional law, including its criminal law. By this, a vacuum is

created which provides a wide space of impunity that allows for the killing of Palestinians without any legal responsibility. This main feature of the status of Gaza, which has developed since the Disengagement Plan in 2005, was totally avoided by the AG in his memorandum.

These findings lead to the conclusion that, contrary to the AG's position in his memorandum, the ICC must exercise jurisdiction in defense of victims in this case, who have been left by Israel in a legal 'black hole' with no domestic legal recourse or remedy, civil or criminal. Thus, based on ISC caselaw, and the total discretion that the Court grants to the Israeli military, a system of impunity and lack of accountability prevails both in civil tort law and in criminal law.

PART ONE

On 20 December 2019, the Prosecutor of the International Criminal Court (hereinafter: ‘ICC’) announced that the preliminary examination into the ‘Situation in Palestine’ had concluded with the determination that, “all of the statutory criteria under the Rome Statute for an opening of an investigation have been met.”¹ She further noted that war crimes had been or were being committed in the West Bank, including East Jerusalem, and the Gaza Strip; that potential cases would be admissible; and that an investigation would serve the interests of justice.

Notwithstanding these findings, the Prosecutor requested a ruling from the Pre-Trial Chamber on the scope of the ICC’s territorial jurisdiction prior to commencing an investigation. Specifically, she sought confirmation that, “the ‘territory’ over which the Court may exercise its jurisdiction ... comprises the West Bank, including East Jerusalem, and Gaza.”

The Prosecutor argues that the Court has territorial jurisdiction over the territory of Palestine, as Palestine is a State Party to the Rome Statute, and that the scope of its jurisdiction comprises the West Bank, including East Jerusalem, and the Gaza Strip. The Prosecutor bases her views on the position of Palestine before the ICC,² resolutions issued by the UN General Assembly and the UN Security Council,³ and pronouncements of the International Court of Justice (ICJ)⁴ and the UN Human Rights Council.⁵ The Prosecutor reaffirmed her views in a response document dated 30 April 2020, which she submitted to the Pre-Trial Chamber (PTC) of the ICC.⁶ The question of territorial jurisdiction is currently pending before the PTC.

¹ ICC, Office of the Prosecutor, *Statement of ICC Prosecutor, Fatou Bensouda, on the conclusion of the preliminary examination of the Situation in Palestine, and seeking a ruling on the scope of the Court’s territorial jurisdiction*, 20 December 2020, available at: <https://www.icc-cpi.int/Pages/item.aspx?name=20191220-otp-statement-palestine>

² ICC, Office of the Prosecutor, *Prosecution request pursuant to article 19(3) for a ruling on the Court’s territorial jurisdiction in Palestine*, para. 7, 20 January 2020, available at: https://www.icc-cpi.int/CourtRecords/CR2020_00161.PDF

³ *Ibid.*, paras. 12 and 14.

⁴ *Ibid.*, para. 15.

⁵ *Ibid.*, para. 17.

⁶ ICC, Office of the Prosecutor, *Prosecution Response to the Observations of Amici Curiae, Legal Representatives of Victims, and States*, 30 April 2020, available at: https://www.icc-cpi.int/CourtRecords/CR2020_01746.PDF

A few hours before the Prosecutor's Request was made public, the Office of the Attorney General for the State of Israel released a memorandum ('the AG's Memorandum') challenging the ICC's jurisdiction over the "so-called Situation in Palestine."⁷

In this response, Adalah challenges the main arguments raised by Israel's Attorney General (AG) in his memorandum. The unique contribution of this response is that it relies upon Israeli domestic law and Israeli Supreme Court (ISC) decisions pertaining to relevant matters pending before the ICC; notably, the AG did not make reference to these sources of law within his memorandum. In addition, Adalah will show that, to a great extent, there is a clash between the AG's representations in his memorandum and both relevant provisions of Israeli law and the AG's own positions as articulated before the ISC.

Sovereignty and Defending the Victims

The main arguments presented in the AG's memorandum are indicative of an outdated understanding of the definition of state sovereignty. For the AG, although "the term 'State' is not defined in the Rome Statute, there can be no doubt that its meaning is that commonly used in general international law: that of a sovereign state.⁸ Accordingly, the ICC's exercise of jurisdiction, in his view, must refer only to relations between two sovereign states, where sovereignty means that "the state has over it no other authority than that of international law."⁹ For the AG, this sovereignty must control "all the lands, internal waters and territorial sea, and the airspace above them".¹⁰ This conception of sovereignty further leads the AG to claim that the exercise of the ICC's jurisdiction in this case would violate the classical state-sovereignty principle of 'non-intervention'. Accordingly, since the State of Israel has legitimate claims of sovereignty over the West Bank, Jerusalem and the Gaza Strip, he argues, and since it exercises effective control over these territories as a sovereign state, it is the State of Israel that should decide, through consent and negotiation, on the political future of these territories. Therefore, the ICC's intervention would be political and not legal in nature, as it would violate the political will of the State of Israel. As he states in the memorandum, "Any delimitation by the Court of the territory concerned would anyhow require it to act in contravention of binding Israeli-Palestinian agreements that expressly leave such matters to

⁷ The State of Israel, Office of the Attorney General, *The International Criminal Court's Lack of Jurisdiction over the So-Called "Situation in Palestine,"* 20 December 2019, available at: <https://assets.documentcloud.org/documents/6589835/Israel-AG-Brief-on-ICC-Jurisdiction-in-Palestine.pdf>

⁸ *Ibid.*, para. 9.

⁹ *Ibid.*, para. 10.

¹⁰ *Ibid.*, para. 12.

direct negotiation between the parties, and to make determinations that are wholly unsuitable for an international court.”¹¹

For the AG, it is sufficient that the question before the Pre-Trial Chamber is not between sovereign states, and that the State of Israel has claims of sovereignty, to conclude that the ICC has no jurisdiction. The AG’s memorandum fails to mention any matter pertaining to the Palestinian population, and does not even attempt to challenge or to discuss the Prosecutor’s arguments regarding the *prima facie* war crimes committed by the State of Israel against the Palestinians. In other words, claims of sovereignty precede claims of criminality and accountability.

The AG’s conception of the sovereign state reflects a notion that was widely accepted before the end of the Second World War, one which relied on the principle of non-intervention in a state’s exercise of power *vis-à-vis* the population living within its jurisdiction.¹² International human rights law is not concerned with the old, formalistic understanding of sovereignty and states’ rights, but rather follows a functional approach that examines how a state exercises its power over the population living within its jurisdiction or under its effective control. This latter approach shifted the question from what the State *is* to what the State *does* towards its population. The Nuremburg Trial was the first proceeding to challenge the classical understanding of state sovereignty, which at the time acted as a shield from any external intervention in domestic matters. The UN Charter, UN Declaration of Human Rights, and thereafter the various UN human rights covenants reflect this shift, putting emphasis on dignity of persons rather than on the sovereign. As Judith Resnik and Julie Suk argue:

We think it useful to focus instead on sovereignty’s plasticity, no longer signaling total power nor predicated only on physical boundaries but continuing to mark significant amounts of authority and status. Whatever prerogatives governments once had, they cannot--as a legal matter (see human rights law) and as a political matter (see preemptive military strikes beyond one’s national borders)--treat human beings with utter disregard and assert sovereignty as an absolute defense to their actions. The rise of dignity (*inter alia*) has changed the meaning of sovereignty.¹³

They add:

¹¹ *Ibid.*, para. 7

¹² It is no wonder that the AG refers, in footnote 14 of his memorandum, to an old case decided before the Nuremburg Trial to support his definition of sovereignty: Customs Regimes between Germany and Austria, Advisory Opinion, 1931 P.C.I.J (Ser. A/B) No. 14, at 55, 57 (5 September 1931) (Individual Opinion by M. Anzilotti).

¹³ Judith Resnik and Julie Suk, “Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty,” 55 (5) *Stanford Law Review* 1925 (2003).

As these phrases from many legal documents illustrate, the law of dignity defines it as an attribute of all persons, not only those who claim loyalties to a specific nation. Thus dignity becomes a transportable aspect of personhood, responsive to the practical and political import of globalization. The law of dignity dovetails with a range of political theories of the changing relations between states and their citizenry and the obligations of political actors more generally. For functioning democracies, all participants must partake in conversation, accounting for their actions and views in order to legitimate them.¹⁴

The main goal of international criminal law practice today is the defense of victims, regardless of whether the actor is a sovereign State or quasi-State. As Yuval Shany explains, this practice has, on numerous occasions, treated quasi-State entities as if they were states for certain purposes, especially when the differences with *de jure* states are deemed irrelevant to the purpose of the institution.¹⁵ Indeed, the AG's claims are irrelevant to the purpose of the Rome Statute, which determines charges for the criminal wrongdoing of persons and not states, and does not determine claims of sovereignty. This principle of the defense of victims appears in the caselaw of many different international courts that follow the purpose of the trial.¹⁶ For example, the International Criminal Tribunal for the Former Yugoslavia (ICTY) emphasized that international law had developed significantly from the time of the Nuremberg Trials and had moved on to encompass an expanded range of actors that undoubtedly includes entities that do not enjoy the status of a *de jure* State, or even the characteristics of a quasi-State.¹⁷ In addition, in the *Katanga* case, the ICC upheld this view based on an interpretation that was guided by the purpose and objective of the Rome Statute.¹⁸ The ICC affirmed that a restrictive interpretation limited to actors possessing quasi-State characteristics "would not further the Statute's goal of prosecuting the most serious crimes".¹⁹

In addition, the ICJ in its Advisory Opinion on the Wall adopted the functional approach regarding the provisions of its Statute towards the participation of states and international organizations in advisory proceedings.²⁰ The ICJ decided that Palestine was entitled to participate "in light of the General Assembly Resolution ARES/ES-10114 and the report of the Secretary-General transmitted to the Court with the request, and taking into account the

¹⁴ *Ibid.*, p. 1932.

¹⁵ Yuval Shany, "In Defence of Functional Interpretation of Article 12(3) of the Rome Statute", *Journal of International Criminal Justice* 8, Oxford University Press, 2010, p. 336.

¹⁶ See the examples in Ernst Dijkhoorn, *Quasi – State Entities and International Court* (Routledge, 2017).

¹⁷ ICTY, *Tadić* Trial Judgment, IT-94-1-T, 7 May 1997, para. 654.

¹⁸ ICC, Trial Chamber II, Situation in the Democratic Republic of the Congo, *The Prosecutor v. Germain Katanga*, ICC-01/04-01/07, 7 March 2014.

¹⁹ *Ibid.*, para. 1122.

²⁰ Statute of the International Court of Justice (Annex to UN Charter), Art. 66(2).

fact that the General Assembly has granted Palestine a special status of observer and that the latter is co-sponsor of the draft resolution requesting the advisory opinion.”²¹

These developments support the principle that with ‘effective control’ comes the ‘Responsibility to Protect’ civilians. This principle was articulated in the 2005 World Summit Outcome, as agreed upon by all UN members in the General Assembly, that every state “has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity.” It also declared that, if “national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity, the international community, through the United Nations, has the responsibility to protect populations.”²²

The functional approach is the dominant method of examining the occupying power, and the interest of the population is its main focus. Under this approach, defending the rights of the population precedes claims of sovereignty. As Martti Koskenniemi states, “Such a functional notion of sovereignty is nowhere more visible than in the application of human rights under military occupation... Whatever the origin of the power, the main thing is that it is exercised in *the interests of the population*.”²³ Indeed, the main concern of Regulation 43 of the Hague Regulations, the *Grundnorm* (basic norm) of the exercise of power by the occupying power, is the protection of the population living under Occupation and not the source of the power.²⁴ In its Advisory Opinion on the Wall, the ICJ rejected the claim that its intervention was political in character and that the matter should be resolved through the Oslo Accords between the State of Israel and the Palestinian Liberation Organization (PLO). Rather, the ICJ focused on the human rights of the Palestinian population, based on the provisions of Article 43 of the Hague Regulations, and on the idea that peoplehood (rights of a population) precedes statehood (claims of sovereignty).²⁵

²¹ ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 2003, ICJ 428.

²² See the references at Ernst Dijkhoorn, *Quasi – State Entities and International Court* (Routledge, 2017), p. 27.

²³ Martti Koskenniemi, “What Use for Sovereignty Today?” *Asian Journal of International Law*, 1 (2011) 61,64.

²⁴ The Israeli Supreme Court has previously ruled that Regulation 43 of the Hague Regulations is the “basic norm” applicable to military rule in the West Bank. See, e.g., HCJ 69/81, *Abu ‘Aita et al. v. The Regional Commander of the Judea and Samaria Area et al.*, PD 37 (2) 197, p. 227-228 (1981); HCJ 3103/06, *Valero et al. v. State of Israel et al.*, para. 36; HCJ 2150/07, *Abu Safiya, Beit Sira Village Council Head et al. v. Minister of Defense et al.*, PD 63 (3) 331, p. 348-349 (2009); HCJ 2164/09 *Yesh Din – Human Rights Volunteers v. IDF Commander in the West Bank et al.*, para. 8 (decision delivered 26 December 2011).

²⁵ ICJ, *Advisory opinion of the International Court of Justice on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 9 July 2004, paras. 41 and 118 (hereinafter: ICJ Advisory opinion).

The logic of the AG's memorandum is derived from the outdated conception of the sovereign state. Firstly, the AG denies the fact that the West Bank, including Jerusalem, and the Gaza Strip are occupied territory, since, according to the AG, the Jewish people have a historical connection to Palestine and "indigenous rights to the land", and the 1967 War was a "just war".²⁶ Thus, the AG claims, "nor can any reliance be made on such terms as 'the occupied Palestinian territory' ... [which] is made in strictly political terms and without prejudice to the fundamentally legal question of sovereign title."²⁷ Secondly, the AG claims that the fact that Israel and the PLO agreed to "settle their competing claims" through the Interim Agreement in 1995 does not change the status of West Bank and Gaza Strip, which should be a matter for negotiation, and therefore that "sovereignty over the West Bank and Gaza Strip thus remains in abeyance to the present day."²⁸

Thus, the memorandum clearly focuses on the origin of power and not on how this power is exercised over the Palestinian population. It discusses the occupation of the territory through "a just war", as the AG put it, and not whether Israel is or is not in compliance with Article 43 of the Hague Regulations. It concerns the sovereignty of a state that exercises absolute effective control over the territories, but does not discuss the 'Responsibility to Protect' the population. It addresses the rights of a sovereign power, but not the duties of a sovereign power towards the population. It relates to the fact that the State of Israel has jurisdiction over all the territories via the application of its legal system to them, although the AG fails to provide a citation to a single case of how the Israeli Supreme Court exercises this jurisdiction.

Since the AG focuses on claims of sovereignty, his memorandum makes no reference to any protections for the Palestinian population, which has lived under Israeli effective military control since 1967. In accordance with the AG's simplistic conception of sovereignty, these significant matters became domestic affairs under Israeli sovereignty. However, as Koskeniemi put it, if a country raises 'sovereignty claims' to prohibit international intervention, "we are inclined to think of this as an effort by its leaders to hide from well-founded international criticism."²⁹

The AG's assertions in his memorandum are radical, even in comparison with opinions that he himself has advocated before the ISC, as well as with established ISC caselaw. First, contrary

²⁶ AG's Memorandum, paras. 26-32.

²⁷ *Ibid.*, para. 50

²⁸ *Ibid.*, para. 31

²⁹ Koskeniemi, p. 61.

to claims made in the memorandum, in a recent case before the ISC, the AG rejected claims of Israeli sovereignty over the West Bank made by the Israeli Government. The case challenged the constitutionality of the Law for the Regularization of Settlement in Judea and Samaria (2017), which sought to legalize Jewish Israeli settlements and the confiscation of private Palestinian land in the West Bank for the further development of the settlements.³⁰ The Israeli government argued – through a private lawyer – that, since the West Bank is part of the historical land of the Jewish People, the Israeli Parliament, as the representative of the sovereign Jewish people, is entitled to regulate such a law. The AG rejected the government’s claims, and, in a rare and exceptional act, refused to represent the government’s position in this case before the ISC. Based on the principles of Article 43 of the Hague Regulations and the functional approach, the AG emphasized that the government’s claims were in conflict with IHL. The AG wrote in his opinion to the ISC that:

“Since the beginning, with the entry of IDF forces into Judea and Samaria in 1967, the territories of the area are governed by the laws of belligerent occupation [...] the emphasis is on the existence of a separate system by the occupying power for the purpose of exercising its powers and obligations under the laws of belligerent perception.”³¹

Thus, this position directly contradicts the opinion that the AG himself articulated in his memorandum. Moreover, in its final judgement on petitions against the Law for the Regularization of Settlement in Judea and Samaria (2017), the ISC accepted the AG's position as argued before the ISC, a position that contradicts that set out in the memorandum. The Court issued its judgment on 9 June 2020, deciding in an 8-1 ruling to annul the law.³² In its decision, the Court found that international law and the non-sovereignty principle did indeed apply to the West Bank. The decision stresses that since June 1967, the laws that apply in the West Bank are the laws of “belligerent occupation”, supplemented by international human rights law, and that “the practical implication is that the law of the State of Israel does not

³⁰ See the AG’s response dated 22 November 2017 in HCJ 1308/17, *The Silwad Municipality, et al. v. The Knesset, et al.* (case pending) in Hebrew, available at:

https://www.adalah.org/uploads/uploads/AG_response_Settlement_Law_22112017.pdf

³¹ *Ibid.*, paras. 11 and 12.

³² HCJ 1308/17, *Silwad Municipality, et al. v. The Knesset, et. al* (petition accepted 9 June 2020) (joined by the court with HCJ 2055/17, *The Head of Ein Yabrud Village v. The Knesset*). Two petitions were filed against the law. HCJ 1308/07 was filed by Adalah – The Legal Center for Arab Minority Rights in Israel, in cooperation with the Jerusalem Legal Aid Center (JLAC) and Al Mezan Center for Human Rights on behalf of 17 local councils in the West Bank. HCJ 2055/17 was filed by Yesh Din and 12 human rights organizations, 23 council heads of Palestinian villages and four landowners. The judgment is available in Hebrew at:

<https://supremedecisions.court.gov.il/Home/Download?path=HebrewVerdicts\17\080\013\v48&fileName=17013080.V48&type=4>

apply in the region.”³³ Consequently, the Military Commander in the West Bank is not the sovereign and his authority in the area is temporary in nature:

“In spite of his control over an area under belligerent occupation, the Military Commander is not the sovereign there and the accepted approach is that the concept of possession in the territory does not [...] also transfer the sovereignty in the territory held from the previous sovereign to the military commander” and “as a result, the Military Commander’s authority is inherently temporary in the sense that it has been withdrawn for the duration of the effective holding of the territory by the military government.”³⁴

The court further ruled that the “law contradicts the principle of territorial sovereignty and is exceptional in the landscape of Israeli legislation since the Knesset has enacted primary legislation that will apply to Palestinians in the area and to land located in the area.”³⁵ It added that:

“Given the Israeli successive government’s approach for decades that the military commander has legislative powers in the area, there is great difficulty in changing the basic norm practiced regarding the identity of the authorized legislator in the area indirectly and in the way of establishing individual arrangements.” [Further] “under these circumstances, the issue of the Knesset’s authority to enact laws that are directly applicable in the region, as well as the question of the Knesset’s imposition of such legislation on the rules of international law applicable in belligerent occupation, raise considerable difficulties.”³⁶

Secondly, the AG’s memorandum also contradicts established ISC caselaw. In the Gaza Disengagement case in 2005, Israeli settlers argued that the dismantlement of the settlements in Gaza was illegal, as Gaza was part of ‘*Eretz Israel*’ (The Land of Israel) and thus belonged to the Jewish People. The ISC accepted the AG’s opinion and ruled, by an expanded panel of 8-1 Justices, that the occupation was temporary under IHL, and thus that the Government was entitled to dismantle the settlements. The ISC emphasized in its decision that:

“This court has ruled in a long list of judgments that Judea, Samaria and the Gaza Strip are under belligerent occupation of the state [of Israel]. They are not part of the State of Israel...Since the end of the Six-Day War and to this day, Israeli governments have changed, but the legal position regarding the status of Judea, Samaria and the Gaza Area as an area under belligerent occupation has not changed.”³⁷

Regarding the nature of belligerent occupation as temporary:

³³ See para. 2 of Chief Justice Hayut’s ruling.

³⁴ *Id.* para. 3.

³⁵ *Id.* para. 32.

³⁶ *Id.*

³⁷ H CJ 1661/05 *Gaza Coast Regional Council v. The Israeli Knesset* (2005), paras. 76-77.

“We cannot say that the probability of realizing the political, social and security benefits the Disengagement Plan seeks to achieve is not balanced against the violation of the rights of Israelis, which takes into account the nature of the belligerent seizure (occupation) as temporary and the compensation provided to them.”³⁸

The following section sets forth how this case led to Gaza being transformed into a legal ‘black hole’, where the State of Israel exercises its effective control but fails to take ‘Responsibility to Protect’. Recent Israeli caselaw declared Gaza to be an ‘enemy entity’, and designated its population ‘enemy aliens’.

Third, regarding the AG’s claims in the memorandum about the Oslo Accords signed between the PLO and Israel, the ISC has consistently ruled that these agreements have no effect on the applicability of legal norms in the West Bank. In numerous legal cases, Palestinian petitioners have attempted to use the Oslo Accords to defend their rights, but had their arguments rejected by the ISC, which ruled:

“The interim agreement does not have a higher status or greater validity than the agreement concluded between the State of Israel and another. In other words, the interim agreement does not, in itself, constitute part of the law applicable in Israel or part of the law applicable in Judea and Samaria [...] in order to give effect to the Interim Agreement as part of the law applicable in Judea and Samaria, an order by the military commander in the area is required.”³⁹

In another case, the ISC ruled that, “The Interim Agreement did not change the normative situation regarding land registration in Area C, and the military commander, through the Civil Administration, continues to exercise his powers in this matter as he did before the agreement was signed.”^{40, 41}

³⁸ *Ibid.*, para. 118. See also H CJ 302/72 *Abu Hilu v. The Government of Israel* (1973); H CJ 390/79 *Dweikat v. The Government of Israel* (1979); H CJ 69/81 *Abu ‘Eita v. Judea and Samaria Area Commander* (1981); H CJ 2150/07 *Abu Safiyyah v. The Defence Minister* (2009); H CJ 2164/09 *Yesh Din v. Judea and Samaria Area Commander* (2011).

³⁹ H CJ 2717/96 *Wafa v. The Defence Minister* (1996), para. 3.

⁴⁰ H CJ 5324/10 *Malka v. The Civil Administration in Judea and Samaria* (2011) para. 18. In another case, the ISC ruled that the interim agreement does not change the legal status of the West Bank: H CJ 5290/14 *Qawasmeh, et al. v. Military Commander of the West Bank* (2014), para. 28.

⁴¹ The ICJ concurred that the Oslo Accords, as well as other measures taken by Israel, such as the illegal annexation of East Jerusalem, and the Israel-Jordan Peace Treaty signed on 26 October 1994, do not affect the status of the OPT as occupied territories or the applicability of international law to these areas. The ICJ found that the OPT was occupied territory under customary international law, and therefore that Israel had the status of occupying power, and that subsequent events, including the Oslo Agreement, “have done nothing to alter this situation. All these territories (including East Jerusalem) remain occupied territories and Israel has continued to have the status of the occupying power”. See ICJ Advisory Opinion, §78. The ICJ further confirmed that the Hague Regulations are part of customary law (§89) and that the Fourth Geneva Convention is applicable in the OPT (§101).

The AG's memorandum is replete with inconsistencies and contradictions. The memorandum refers to the West Bank and Gaza Strip as disputed territories over which Israel raises claims of sovereignty, and argues that it should therefore be a matter for negotiation. However, ISC caselaw refers to these territories as existing under temporary occupation. The AG disregards the fact that through Israeli law – primarily the Basic Law: Jerusalem, Capital of Israel, and the Basic Law: Israel as the Nation-State of the Jewish People – Israel has unilaterally annexed Jerusalem, which it considers to have the status of sovereign Israeli territory in perpetuity, and not to be subject to negotiation.

In conclusion, the claims made by the AG in the memorandum are irrelevant to international human rights law, which centers the rights of the population and victims. International tribunals and courts have accepted participants such as quasi-states, be they on the side of the perpetrators of atrocities or the victims. In terms of the current proceedings before the ICC, the AG's claims are irrelevant to the ICC's purpose, which is to charge and bring to trial responsible individuals and not states, and not to rule on claims of sovereignty such as borders, waters or territoriality. In addition, the claims made in the AG's memorandum are so radical as to negate IHL, as the AG himself argued before the ISC, and contradict ISC caselaw.

Impunity and the Jurisdiction of the ICC

This section demonstrates how the emergence of the principle of defending the victims has led to changes in the older conception of State sovereignty based on the principle of 'effective control', which includes the 'Responsibility to Protect' the population. As articulated in the Preamble to the Rome Statute, the ICC is, "Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes."

The purpose of ending impunity has serious implications for the interpretation of the Rome Statute. Firstly, the Preamble is the main source delineating the ICC's purpose from which any interpretation of the provisions of the Rome Statute must follow. As Schabas notes, the Preamble articulates the fundamental ideas that guide the entire Statute.⁴² As the ICC stated in

⁴² William A. Schabas, 'Preamble' in William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2nd Edition).

the *Congo* case, interpretation of the Statute's provisions should follow "its purposes from the wider aims of the law as may be gathered *from its preamble and general tenor* of the treaty."⁴³ Secondly, interpretation of the Rome Statute should follow the Vienna Convention on the Law of the Treaties (VCLT), Art. 31(1) of which requires interpreting a treaty's terms "in their context and in the light of its object and purpose."⁴⁴ Indeed, the ICC has stated on numerous occasions that interpretation of the provisions of the Rome Statute is to follow the purpose of the Statute, as required by Art. 31(1) of VCLT.⁴⁵

Thirdly, interpretation of the Rome Statute must follow the principles of international human rights law. Art. 21(3) of the Rome Statute states that, "the application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights".⁴⁶ The Appeals Chamber in the *Lubanga* case clarified the status of this Article, stating that it "makes the interpretation as well as the application of the law applicable under the Statute subject to internationally recognized human rights."⁴⁷

Based on these principles of interpretation, the Court must consider the question of impunity as its main purpose when it interprets provisions of the Rome Statute that are relevant to the question of jurisdiction.

⁴³ ICC, Appeals Chamber, Situation in the Democratic Republic of the Congo, *Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal*, ICC-01/04, emphasis added.

⁴⁴ VCLT, Art. 31

⁴⁵ ICC, Trial Chamber I, Situation in the Democratic Republic of the Congo in the case of *the Prosecutor v. Thomas Lubanga Dyilo*, 14 March 2012; supported by the Court of Appeals in several pronouncements, such as: "Situation in the Democratic Republic of the Congo, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal", 13 July 2006, ICC-01/04-168, para. 33; *The Prosecutor v. Katanga and Ngudjolo*, Judgment on the appeal of Mr. Germain Katanga against the decision of Pre-Trial Chamber I entitled "Decision on the Defence Request Concerning Languages", 27 May 2008, ICC-01/04-01/07-522, paras 38 and 39; Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled "Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008", 21 October 2008, ICC-01/04-01/06-1486, para. 40; *The Prosecutor v. Bemba*, Judgment on the appeal of Mr. Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 28 July 2010 entitled "Decision on the review of the detention of Mr. Jean-Pierre Bemba Gombo pursuant to Rule 118(2) of the Rules of Procedure and Evidence", 19 November 2010, ICC-01/05-01/08-1019, footnote 74.

⁴⁶ For comprehensive argumentation on the application of human rights law in the interpretation of the Rome Statute, see ICC, Situation in the Republic of Afghanistan, *Amicus Curiae Observations by Kate Mackintosh and Göran Sluiter*, 15 November 2019, ICC-02/17.

⁴⁷ ICC, Appeals Chamber, *Prosecutor v. Lubanga*, *Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19(2)(a)*, 14 December 2006, para.36-37, ICC-01/04-01/06-772.

Adalah's interpretation of Article 12: Jurisdiction

Article 12(3) of Rome Statute appears under the section of jurisdiction, and it allows a State Party to delegate criminal jurisdiction to the ICC. What, then, is the scope of the term "State" under this Article, given that the Rome Statute itself does not define this term?

Adalah contends that the term 'State' under Article 12(3) of the Rome Statute also refers to a state that does not have the full features of a sovereign state (in its classical, formalistic sense), including a quasi-state, when this entity: (1) is a party to the Rome Statute; (2) enjoys a recognized international status; and (3) the case raises matters of impunity.

Firstly, this interpretation of the term 'State' affords serious weight to the ICC's purpose of ending impunity, as set forth in the preamble to the Rome Statute. Although Article 12(3) falls within the jurisdiction section of the Statute, it does not refer to any claims of sovereignty such as borders, waters, or territoriality. Rather, the criminal proceeding before the ICC, resulting from its jurisdiction, is brought against individuals and not states; it refers to specific acts of atrocity that occurred at a specific time and place, without judging or intervening in diplomatic matters. The AG's formalistic, outmoded interpretation of the term 'State' under Article 12(3) would lead to the total abrogation of the primary purpose of the ICC, by rendering the question of impunity irrelevant.

Secondly, our interpretation of Article 12(3) gives serious weight to the purpose of defending victims, as articulated in the preamble to the Rome Statute with the words, "Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity." In addition, the Statute refers to reparations for the victims, and most importantly to their participation in the proceedings, including the process of deciding on the question of jurisdiction. As Schabas noted, "The emphasis on the victims is often cited as one of the great innovations of the Rome Statute."⁴⁸ Thus, interpreting the term 'State' in a formalistic manner based on an old conception of state-sovereignty, as the AG does in his memorandum, disregards the ICC's core purpose of defending victims and ending impunity, and renders victims' participation in the proceedings on the question of jurisdiction meaningless.

⁴⁸ See Schabas above under the section: victims.

Thirdly, our interpretation follows Article 21(3) of Rome Statute, which provides that any interpretation of the law “must be consistent with internationally recognized human rights.” The issue of impunity refers directly to questions of access to justice and the right to an effective remedy, which are guaranteed by the Universal Declaration of Human Rights,⁴⁹ the International Covenant on Civil and Political Rights,⁵⁰ all other relevant UN Conventions,⁵¹ as well as by the fundamental provisions of IHL,⁵² and the Rome Statute itself.⁵³ In this regard, the Appeals Chamber in the *Lubanga* case found that Article 21(3) was also relevant to the question of jurisdiction:

“Human rights underpin the Statute; every aspect of it, **including the exercise of the jurisdiction of the Court**. Its provisions must be interpreted and more importantly applied in accordance with internationally recognized human rights.”⁵⁴ (Emphasis added.)

By contrast, the AG’s interpretation of the term ‘State’, which relies only on claims of sovereignty, negates the applicability of Article 21(3) of the Rome Statute.

Fourthly, raising the question of impunity resolves the question of the legal ‘black hole’. A legal ‘black hole’ is created when a state exercises control over the lives of the population within it, but fails to take responsibility or legal obligation. In such a case, it is the responsibility of the ICC to fill this gap in legality.

Introducing the issue of impunity to the discussion of jurisdiction is the response to any claim of sovereignty, since there is no sovereignty without the attendant responsibility to protect, and there is no effective control without accompanying legal obligations. Further, in the case of Occupation, the scope of effective control is constrained by Article 43 of the Hague Regulations. Denying the applicability of Article 43 eviscerates the meaning of ‘effective control’, as, without legality, Occupation becomes purely militaristic and crimes may be committed with impunity against the Occupied population in the absence of responsibility or accountability.

⁴⁹ Universal Declaration of Human Rights, art. 8.

⁵⁰ International Covenant on Civil and Political Rights, art. 2(3).

⁵¹ CERD, art. 6; CAT, art. 14; and CRC, art. 39

⁵² The Hague Convention respecting the Laws and Customs of War on Land, art. 3; the Protocol Additional to the Geneva Conventions relating to the Protection of Victims of International Armed Conflicts, art. 91.

⁵³ Rome Statute, Arts. 68 and 75.

⁵⁴ See *Lubanga*, *Ibidem*.

Thus, any interpretation of Article 12(3) of the Rome Statute that does not give serious consideration to the issue of impunity, when the other aforementioned conditions are fulfilled, risks leaving the legal ‘black hole’ intact, and victims without any legal recourse, in direct contradiction of the Preamble to the Rome Statute.

For the AG, the only relevant question is that the Palestinian Authority cannot delegate jurisdiction to the ICC because there is no sovereign Palestine state in the classical sense of a sovereign-state. (This view disregards the fact that Palestine is a signatory to the Rome Statute, that its accession was approved, and that it has received international recognition as a state.)

Our broader interpretation of Article 12(3) of the Rome Statute is in line with new developments concerning the conception of state-sovereignty that prioritize the protection of populations and remedies for victims. It fulfils the Rome Statute’s main purpose of bringing an end to impunity based on the conception of state-sovereignty as a shield for committing crimes against populations. Likewise, Articles 19 and 53 of the Rome Statute support our interpretation that the ICC has jurisdiction on the basis of “the interests of victims” and “the interests of justice” to end impunity.

Shany concurs that limiting the interpretation of Article 12(3) of the Rome Statute to sovereign-states, as advocated by the AG in his memorandum, and disallowing the Palestinian Authority from delegating criminal jurisdiction, “would compromise the Court’s ‘ending impunity’ mission and prevent it from exercising jurisdiction over a situation where serious crimes may have occurred.” For Shany, such a case “might create a number of ‘legal black holes’, where no other State would be able to delegate jurisdiction”, as no sovereign-state claims sovereignty over it. In this regard, Shany cites Gaza as an example of the creation of a ‘legal black hole’, since no state – including Israel – claims its sovereignty over it.⁵⁵

⁵⁵ Shany, p. 337.

PART TWO: IMPUNITY AND GAZA

This section opens with background about the Disengagement Plan and the closure of Gaza, and reviews major ISC cases litigated between 2007 and the present concerning Gaza. In direct contradiction of the AG's memorandum, these cases indicate that the Gaza Strip has become a legal 'black hole' via the non-application of both IHL, including Article 43 of the Hague Regulations, and of Israeli domestic law. The current section shows that, based on the Israeli caselaw, and contrary to the AG's memorandum, the State of Israel does *not* claim sovereignty over Gaza. However, the State of Israel continues to exercise effective control over Gaza, without fulfilling its duties towards the population, and has left it beyond the reach of the law.

In August 2005, the Israeli Government implemented its decision to “disengage” from Gaza, which included the withdrawal of the Israeli army and the dismantling of all Israeli settlements in the Strip.⁵⁶ In January 2006, Hamas won a majority in the Palestinian Legislative Council elections, and in June 2007 took control of the Gaza Strip, following which the Israeli Government began implementing closures of the border crossings between Israel and Gaza. Three months later, on 19 September 2007, the Israeli Cabinet officially declared Gaza a “hostile territory”, and decided that “additional sanctions will be placed on the Hamas regime in order to restrict the passage of various goods to the Gaza Strip and reduce the supply of fuel and electricity. Restrictions will also be placed on the movement of people to and from the Gaza Strip.”⁵⁷

The ISC affirmed the Israeli Government's position regarding its unilateral “Disengagement Plan” for Gaza, and later took the next step of confirming the closure and legal status of Gaza in 2008, via a declaration that Israel was not responsible for Gaza as an occupied territory, and that Gaza was an “enemy territory”. As the following review of the caselaw reveals, this declaration paved the way for Israel to exempt itself from paying any civil compensation for wrongs committed by the Israeli military against civilians in Gaza, resulting in the denial of an effective remedy.

⁵⁶ See Israel's Ministry of Foreign Affairs, “Special Update: Disengagement-August 2005”, 15 August 2015, available at: <https://mfa.gov.il/MFA/AboutIsrael/History/Pages/Disengagement%20-%20August%202005.aspx>

⁵⁷ See Israel's Ministry of Foreign Affairs, “Security Cabinet declares Gaza hostile territory”, 19 September 2007, available at: <https://mfa.gov.il/mfa/pressroom/2007/pages/security%20cabinet%20declares%20gaza%20hostile%20territory%2019-sep-2007.aspx>

Concerning criminal cases, the Israeli army continues to kill Palestinian civilians without legal limitation, a genuine investigatory system, or criminal responsibility. In the absence of the ISC's intervention and the total discretion that it grants to the Israeli military, a policy of total impunity and lack of accountability prevails both in civil tort law and in criminal law.

The Legal Status of Gaza

The question of the legal status of Gaza was first brought before the Israeli Supreme Court (ISC) in a case that challenged Israel's move to cut fuel supplies and electricity to Gaza. On 28 October 2007, ten Israeli and Palestinian human rights organizations filed a petition to the Israeli Supreme Court (ISC) in response to the cuts, which formed part of an Israeli Cabinet Decision from September 2007 calling for punitive measures.⁵⁸ The petitioners argued that this move violated international law: it constituted illegal collective punishment because it punished the civilian population for acts taken by militants; it deliberately targeted civilians; and Israel had a positive duty to Gazans to facilitate the proper functioning of civilian institutions in the Strip, which it did not perform. The fuel cuts severely disrupted the functioning of vital humanitarian services, including hospitals, water distribution and sewage pumps. The Court dismissed the petition and adopted the legal positions advanced by the state. The state argued that the fuel cuts were economic sanctions; that Gaza was no longer occupied, and that, even if it were, only minimal obligations were owed by it to the civilian population, such as a duty to avoid a humanitarian crisis; and that sufficient fuel and electricity were being provided by Israel to meet basic humanitarian needs.

This case marked the first time that the ISC had discussed the question of Gaza's legal status following Israel's 2005 Disengagement. In paragraph 12 of its decision, the Court effectively declared an end to Israel's occupation of Gaza, and ruled that Israel's only obligations towards Gaza's residents were those arising from: Israel's continued control of border crossings between Israel and Gaza; Gaza's dependence on electricity supplied by Israel; and adherence to international humanitarian law (IHL). According to the ISC:

⁵⁸ See HCJ 9132/07, *Al-Bassiouni, et al. v. The Prime Minister, et al.* (decision delivered on 30 January 2008). Gisha and Adalah submitted the petition on behalf of the organizations. The decision in English translation is available at: https://supremedecisions.court.gov.il/Home/Download?path=EnglishVerdicts%5C07%5C320%5C091%5Cn25&fileName=07091320_n25.txt&type=4

“... We should point out in this context that since September 2005 Israel no longer has effective control over what happens in the Gaza Strip. Military rule that applied in the past in this territory came to an end by a decision of the government, and Israeli soldiers are no longer stationed in the territory on a permanent basis, nor are they in charge of what happens there. In these circumstances, the State of Israel does not have a general duty to ensure the welfare of the residents of the Gaza Strip or to maintain public order in the Gaza Strip according to the laws of belligerent occupation in international law. Neither does Israel have any effective capability, in its present position, of enforcing order and managing civilian life in the Gaza Strip.”⁵⁹

As to which law applies to Gaza, the ISC adopted the concept of “essential humanitarian needs”, as asserted by the state:

“The duty of the State of Israel derives from the essential humanitarian needs of the inhabitants of the Gaza Strip. The respondents are required to discharge their obligations under international humanitarian law, which requires them to allow the Gaza Strip to receive only what is needed in order to provide the essential humanitarian needs of the civilian population.”⁶⁰

The ISC did not identify the legal source of these “essential humanitarian needs” or determine from what they are derived. The Court did not specify Israel’s obligations or their scope. It ultimately decided that the state was monitoring the situation in Gaza, and “allowing the supply of the amount of fuel and electricity needed for the essential humanitarian needs in the region.”

The decision marks a dramatic departure from the ISC’s precedent of applying IHL, based on Article 43 of the Hague Regulations, to Gaza and the West Bank, with little discussion of the test under international law for the existence of a state of occupation, or of what these vague “essential humanitarian needs”⁶¹ obligations consist, or how and when they should be applied.

No Right to an Effective Remedy

Amendment #7 to Civil Wrongs Law exempting the State of Israel from paying tort damages to Palestinians – 2005

In July 2005, immediately before the Disengagement Plan was implemented, the Israeli Parliament amended *The Civil Wrongs (Liability of the State) Law* (Amendment # 7). The new amendment sweepingly denied Palestinian residents of the Occupied Palestinian Territory

⁵⁹ *Al-Bassiouni*, para. 12 of the ruling of President D. Beinisch.

⁶⁰ *Ibid.*, para. 11.

⁶¹ *Ibid.*, para. 19.

(OPT) the right to compensation from the State of Israel for damages inflicted on them by the Israeli military, including damages incurred outside the context of a military operation (with some minor exceptions).⁶² The amendment was written to operate retroactively to cases of damages sustained since the beginning of the Second Intifada in September 2000.

In September 2005, soon after the law's enactment, nine Palestinian and Israeli human rights organizations petitioned the ISC to demand its annulment on the grounds that it grossly violated IHL and international human rights law (IHRL), and was also in breach of basic rights guaranteed in Israel's Basic Law: Human Dignity and Liberty, and therefore unconstitutional under Israeli domestic law.⁶³

In December 2006, the ISC, in a unanimous ruling delivered by nine justices, decided that the State of Israel could not prevent Palestinians in the West Bank and Gaza who have been harmed by the Israeli military from accessing the Israeli courts. The Court determined that residents of the OPT had the right to submit tort lawsuits against Israeli forces to Israeli courts as part of their constitutional rights to life, physical integrity and property, which are stipulated in Israel's Basic Law: Human Dignity and Liberty. The ISC consequently annulled the relevant provision of the amendment. However, other provisions of the 2005 amendment imposing strict restrictions on the filing of tort lawsuits by Palestinians were left in place.

Denial of entry to Gaza residents, no access to Israeli courts from 2007

Amendment #7 to the Civil Wrongs Law introduced a new, abbreviated two-year statute of limitations on the submission of claims (to replace the previous seven-year statute of limitations).⁶⁴ It additionally required plaintiffs to prove that their injuries were not sustained in an act of war, for which the state is exempted from liability.⁶⁵

In addition to these new restrictions, Israeli courts have imposed high, and in most cases prohibitive, financial guarantees on plaintiffs from Gaza seeking to bring such lawsuits. In civil cases, the State requires the court to obtain the deposit of a guarantee from the plaintiff,

⁶² An English translation of the law is available at:

<https://www.adalah.org/uploads/oldfiles/features/compensation/law-e.pdf>

⁶³ *HCJ 8276/05, Adalah, et al. v. The Minister of Defense, et al. (decision delivered 12 December 2006)*. An English translation of the decision is available at:

https://supremedecisions.court.gov.il/Home/Download?path=EnglishVerdicts\05\760\082\A13&fileName=05082760_a13.txt&type=4

⁶⁴ Section 5A(3) of the Civil Wrongs Law, as amended 2005.

⁶⁵ See Article 5C of the Civil Wrongs Law, as amended 2005.

in order to cover the expenses if the action fails;⁶⁶ if the guarantee is not deposited, the petition is dismissed without discussion on the merits. While the courts have discretion in determining the amount required of the plaintiff, in practice they have set them at levels that the vast majority of Gazans are unable to pay, resulting in the denial of access to justice.⁶⁷

Gaza residents who succeeded in overcoming all of these obstacles encountered a further, physical, barrier to a legal remedy in the form of Israel's policy of denial of entry. From 2010 to 2012, Adalah corresponded with several Israeli ministries regarding the state's policy of denying entry permits to plaintiffs and their witnesses from Gaza and its refusal to grant Israeli attorneys permits to enter Gaza. The correspondence revealed that the state would grant entry into Israel for Palestinians from Gaza for the purpose of court litigation only for exceptional humanitarian reasons, without further clarification.⁶⁸

On 27 September 2012, human rights organizations submitted a petition to the ISC on behalf of Gaza residents injured by Israeli forces. These victims submitted tort lawsuits before Israeli courts and were subsequently denied entry to Israel for purposes of pursuing their legal cases. The petitioners argued that this policy, together with the multiple other aforementioned barriers to their access to the Israeli courts, amounted in effect to a full, sweeping exemption of Israel from liability for damages caused to residents of Gaza, in contradiction of the ISC's 2006 ruling in the *Adalah* case.⁶⁹ The petition emphasized that the policy of denying entry constituted a severe violation of IHL, which clearly specifies that persons injured in an armed conflict are entitled to receive compensation as part of their right to an effective remedy. Further, Israel's policy contradicted statements made by the State of Israel in international

⁶⁶ According to Regulation 519 of the Civil Procedures Rules – 1984, the court may order the plaintiff to deposit a guarantee to ensure the payment of the respondent's expenses.

⁶⁷ See Adalah Briefing Paper, "Obstacles for Palestinians in Seeking Civil Remedies for Damages before Israeli Courts", May 2013, p. 4, available at: <https://www.adalah.org/uploads/oldfiles/Public/files/English/Publications/Articles/2013/Obstacles-Palestinians-Court-Fatmeh-ElAjou-05-13.pdf>

⁶⁸ See e.g., Adalah's letter to several ministries dated 14 October 2010 (on file with Adalah). Attorney Ruth Bar, Assistant to the Minister of Defense, replied to Adalah by letter dated 25 October 2010, stating that at the time, for obvious political and security reasons, the entry of Gaza residents into the State of Israel was not permitted with the exception of humanitarian cases, and that the complainants did not give sufficient weight to the overall relevant circumstances including the nature of the current regime in the Gaza Strip. Due to the lack of written criteria for meeting the "humanitarian grounds", on 25 May 2011, Adalah requested that the Ministers of Defense and Interior issue guidelines to the regional commanders granting permits for a temporary stay to litigants and their witnesses from the Gaza Strip. By letter dated 19 June 2011, Attorney Shai Nitzan, Deputy to the State Attorney (Special Tasks) replied to Adalah stressing that Gaza residents did not have a right to enter Israel for any purpose whatsoever, and that the authorized bodies were not obliged by law to permit their entry.

⁶⁹ H CJ 7042/12, *Abu Daqqa, et al. v. Interior Minister, et al.* (decision delivered 16 December 2014).

fora and in other national courts, most notably that Gazans were able to submit claims for a legal remedy to Israel's domestic courts.

In October 2014, the Israeli State Attorney's Office informed the ISC that it had adopted new regulations entitled "Instructions for Addressing Complaints Submitted by Gaza Residents in the context of [military operation] 'Cast Lead'".⁷⁰ These regulations were supposed to govern the process of handling applications made by Gazan residents for the purpose of entering Israel to pursue their lawsuits. However, the regulations, which did not change the situation regarding the general ban on entry other than in "humanitarian cases", established onerous procedures that strongly favored the state, including the stipulation that they would apply only on condition that they "do not create real harm to the State's ability to defend itself."⁷¹ This stipulation is open to broad interpretation, and can potentially be applied to all residents of Gaza, as an "enemy" or "hostile" territory. Notably, during the course of the litigation, the Attorney General was unable to provide a single example of an individual who had successfully obtained a permit to enter Israel under these regulations.

On 16 December 2014, the ISC dismissed the petition, ruling that the Gazan plaintiffs should continue to apply for permission to enter Israel in accordance with the criteria set forth in the regulations. However, the Court noted in its ruling the state's conflict of interest in such cases, arising from the fact that the state occupies the position of both respondent before the court in the tort lawsuits, and the authority that determines who can and who cannot enter Israel in order to access the courts in the same cases. As Justice Elyakim Rubinstein stated in the decision, "The state simultaneously wears two hats, that of the party responsible for security on the one hand, and that of the respondent on the other, and it must take care, as far as possible, not to confuse between the two."⁷²

The Court's judgment effectively denies Gaza residents access to the courts in Israel, and it endorses a set of illegal regulations that violate the complainants' rights to an effective remedy and constitute a serious breach of Israel's obligations under international law.⁷³ As a

⁷⁰ According to the State's representations to the Supreme Court, these Regulations also apply to lawsuits in other contexts and they regulate the procedures to be adopted and considered by state attorneys in dealing with lawsuits submitted by Gaza residents.

⁷¹ Articles 11 and 14 of the Regulations.

⁷² H CJ 7042/12 *Abu Daqqa, et al. v. The Interior Minister, et al.* (decision delivered 16 December 2014).

⁷³ See Article 3 of the Hague Regulations 1907; Article 148 of the Fourth Geneva Convention of 1949 and the regulations set in Article 91 of the First Protocol to the Geneva Conventions of 1977. See also Article 2 of the ICCPR and Article 14 of CAT. In addition, in 2005, the UN General Assembly adopted a document entitled, "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of

consequence of this case and the other aforementioned barriers to justice, Israeli courts have repeatedly dismissed tort lawsuits brought by Gazans on the grounds that the complainants and/or their witnesses failed to attend court hearings.

New law exempting the State of Israel from paying tort damages to Palestinians in Gaza - 2012

In contradiction of the 2006 Supreme Court ruling in the *Adalah* case, in 2012 the Knesset enacted Amendment #8 to the Civil Wrongs Law (1952).⁷⁴ This amendment banned residents of an “enemy territory”, as declared by the Israeli government, from seeking compensation from Israel for damages that resulted from both “military actions” and “non-military actions”.

Based on this amendment, on 7 October 2014, the Israeli Government issued an order declaring the Gaza Strip an “enemy territory”, applicable retroactively from 7 July 2014.⁷⁵ The order applied to all Gazans wounded or killed by the Israeli military during the 2014 War on Gaza, codenamed “Operation Protective Edge” (OPE) (July-August 2014). As a result of this order, all Palestinians in Gaza were prohibited from submitting lawsuits for damages that resulted from actions of the Israeli army.

Almost three months after OPE, on 16 November 2014, Israeli forces opened fire on 15-year-old Attiya Fathi al-Nabaheen in the yard of his family’s house near Al-Bureij in the Gaza Strip, just 500 meters from the fence between Israel and Gaza. As a result of the shooting, Nabaheen was left a quadriplegic, expected to be confined to a wheelchair for life.⁷⁶ Nabaheen filed a lawsuit for damages to the Beer Sheva District Court, in response to which the State invoked Amendment # 8 of the Civil Wrongs Law to argue that he was not eligible for damages, in the first use of this claim by the State. In response, Nabaheen argued that Amendment # 8 of the Civil Wrongs Law was unconstitutional and in violation of international law, since it denies an effective remedy to all Gaza residents solely because they

International Human Rights Law and Serious Violations of International Humanitarian Law.” See UN General Assembly Resolution 60/147, 16 December 2005, available at:

<https://www.ohchr.org/en/professionalinterest/pages/remedyandrepairation.aspx>

States were required to ensure, through legislation and other administrative means, the rights of victims to remedy, due process and access to justice (article 12(b)). Article 12 of the guidelines determines that states will ensure in their laws the rights of victims to access the courts and the right to independent due process.

⁷⁴ See: <http://www.hamoked.org/Document.aspx?dID=Updates1460>

⁷⁵ See: Civil Wrongs Order (State Liability) (Declaration of Enemy Territory – Gaza Strip), 2014, available in English at: http://www.hamoked.org/files/2015/1159680_eng.pdf

⁷⁶ Al Mezan Center for Human Rights, “IOF Opens Fire East of Al Bureij Refugee Camp”, 16 November 2014, available at: <http://www.mezan.org/en/post/19712/IOF+Opens+Fire+East+of+Al+Bureij+Refugee+Camp>

live in Gaza.⁷⁷ The State argued that Nabaheen was ineligible for compensation because Gaza was declared an “enemy territory”. On 4 November 2018, the District Court accepted the State’s arguments.

The District Court ruled that, in light of the state of war between Israel and Hamas, there could be no distinction drawn between civilians and combatants, and that the State could not distinguish between lawsuits submitted by these two groups of Gaza residents. This fact, the District Court reasoned, created difficulties in terms of collecting and examining the evidence, and lawsuits would most probably be brought by enemy aliens to Israeli courts in bad faith.

The Israeli Government’s declaration of Gaza as an “enemy territory” based on Amendment #8 to the Civil Wrongs was the third time that the government designated Gaza an “enemy territory”. In 2007, and as part of an amendment to Israel’s Citizenship Law, which bans the entry of Palestinians from the OPT to Israel for the purpose of family unification, it declared Gaza as “enemy territory”, and accordingly imposed a blanket ban on all Gaza residents from entering Israel, dismissing individual examinations of the applications for family unification. The ISC held that the state of war and enemy relations between Israel and the Palestinians in the West Bank and Gaza justified the total ban on entry.⁷⁸ The District Court in *Nabaheen* relied upon this case in its judgment.⁷⁹

As a result of the decision to uphold the constitutionality of Amendment #8 of the Civil Wrongs Law, all Gaza residents are now banned from redress and remedy in Israel, regardless of the circumstances, the severity of the injury, or the damages claimed. The District Court’s refusal to hear such cases violates the rights of residents of Gaza to exercise their right to an effective legal remedy.⁸⁰ It allows Israel to absolve itself of its responsibilities, as a state, to

⁷⁷ C.C. (Beer Sheva) 45043-05-16 A.N. (*minor*) et al. v. *The State of Israel* (decision delivered 4 November 2018).

⁷⁸ HCJ 7052/03 - Adalah - The Legal Center for Arab Minority Rights in Israel et al. v. The Minister of Interior et al. (decision delivered 14 May 2006).

⁷⁹ HCJ 7042/12 *Abu Daqqa, et al. v. the Interior Minister, et al.* (decision delivered 16 December 2014).

⁸⁰ See Rule 149, Customary IHL Database (A State is responsible for violations of IHL attributable to it, including those committed by its armed forces); Rule 150, Customary IHL Database (A State responsible for violations of IHL is required to make full reparation for the loss or injury caused); International Covenant on Civil and Political Rights, art. 2§3 (applies also in emergency situations, as recalled by the UN Human Rights Committee, General Comment n. 29, article 4 (2001)); The Hague Convention IV, art. 3 (A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.); Additional Protocol (I) to the Geneva Conventions, art. 91 (A Party to the conflict which violates the provisions of the Conventions or of this Protocol shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.); UN General Assembly, *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*, 21 March 2006, A/RES/60/147.

investigate, prevent, and take responsibility for violations by its armed forces. The ruling grants comprehensive immunity to the Israeli military and the State of Israel for illegal and even criminal actions taken during the course of military and non-military operations alike in occupied territories, including Gaza, and leaves their victims without any recourse to remedy or compensation from Israel. This case is currently on appeal before the ISC.⁸¹

In its report of March 2019, the independent international Commission of inquiry on the protests in the Occupied Palestinian Territory (COI) concluded in regard to this case that:

“The [District] Court dismissed the petitioner’s claim without an examination of the merits, avoiding claims that the law is unconstitutional and violates international law ... The ruling, and the law on which it is based, excludes Gazan residents from eligibility for compensation under the law, without examining the harm itself. In doing so, Gazan victims of violations are denied the main avenue to fulfil their right to ‘effective legal remedy’ from Israel that is guaranteed to them under international law. The Commission is unaware of any alternative mechanism employed by Israel to compensate Palestinian victims for damage caused unlawfully by the security forces. The importance of this ruling is thus difficult to overstate.”⁸²

⁸¹ (Supreme Court) Civil Appeal 993/19, *Nabaheen v. Israeli Defense Ministry* (case pending).

⁸² See: Report of the detailed findings of the independent international Commission of inquiry on the protests in the Occupied Palestinian Territory, A/HRC/40/CRP.2, 18 March 2019, para. 160-161, available at: https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session40/Documents/A_HRC_40_74_CRP2.pdf (hereafter “COI 2018 Protests Report”).

Impunity: Israeli Military Probes into Suspected IHL/ICL Violations during 2014 Gaza War

The Rome Statute of the International Criminal Court states the determination “to put an end to impunity” for the perpetrators of the most serious crimes of concern to the international community, “and thus to contribute to the prevention of such crimes”, affirming that such crimes “must not go unpunished”.⁸³ Israel has demonstrated a comprehensive, systemic failure to exercise its domestic criminal jurisdiction over those responsible for the violation of such serious crimes. The lack of a sound, functional domestic investigatory system in Israel that abides by international standards upholds the culture of impunity that permeates all echelons of Israel’s military and civilian apparatus, which determines policy and conduct towards Gaza. The failed policies, practices and investigatory mechanisms of the State of Israel in relation to the actions of its military are evident from its actions following the 2014 Gaza War (July-August 2014), codenamed Operation Protective Edge (OPE).⁸⁴

According to official UN reports, Israel’s attacks during the 51 days of OPE resulted in the killings of 2,251 Palestinians, the vast majority of whom were civilians, including 299 women and 551 children, and the destruction of 18,000 homes and other civilian property, including hospitals and vital infrastructure.⁸⁵

The Aftermath of Operation Protective Edge: Impunity over Accountability

In the State of Israel, the Military Attorney General (MAG) is charged with overseeing the military prosecution system. According to information released by the MAG Corps, it

⁸³ Preamble to the Rome Statute of the International Criminal Court, paras. 4 and 5.

⁸⁴ The UN Fact-Finding Mission on the Gaza Conflict (“the Goldstone Mission”) came to the same conclusion in 2009 in relation to an earlier Israeli military offensive against Gaza, code-named “Operation Cast Lead” (2008-2009). During the three-week offensive, 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. 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). It 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), and concluded that, “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). These events and findings, while highly relevant to the subject at hand, are not discussed at length in this report because the jurisdiction of the ICC is limited to an examination of events that took place from mid-June 2014 onwards. Report of the United Nations Fact Finding Mission on the Gaza Conflict, A/HRC/12/48, 25 September 2009, available at:

<https://www.ohchr.org/EN/HRBodies/HRC/SpecialSessions/Session9/Pages/FactFindingMission.aspx>

⁸⁵ OCHA, “Key figures on the 2014 hostilities”, 23 June 2015, available at: <https://www.ochaopt.org/content/key-figures-2014-hostilities>.

received 500 complaints relating to around 360 exceptional incidents alleged to have occurred during OPE.⁸⁶

On 15 August 2018, the MAG published its Update #6,⁸⁷ which contains the most recent public information released by the MAG on the status of the complaints received and the decisions subsequently taken concerning OPE incidents. This section details the status of complaints into 28 specific incidents submitted by Adalah and Al Mezan to the MAG and the Israeli Attorney General (AG). It reveals Israel's chronic failure to take appropriate measures in these grave cases⁸⁸ and its unwillingness to prosecute those responsible for the alleged crimes in question.⁸⁹

The data provided by the MAG in Update #6 clearly indicates that Israel is not conducting any effective investigations or prosecuting perpetrators for grave ICL or IHL violations. As detailed below, most cases were closed without any investigation being conducted at all into incidents that resulted in the deaths of civilians and the massive destruction of civilian objects. Moreover, in the very few cases in which the MAG did order an investigation, there is no evidence that steps were taken with regard to any suspects in accordance with international law standards.

The data provided in the MAG's Update #6 indicate the following facts:

- The MAG Corps investigated just 8.6% (31 of 360) of the “exceptional incidents” brought before it.
- Only one case led to an indictment, and this case concerned a looting.
- No cases of gravity, involving civilian casualties or the destruction of civilian objects, led to any kind of criminal or even disciplinary proceedings against those involved.
- Almost 77% (276 of 360) of the “exceptional incidents” did not lead to any investigation or any action against those potentially implicated in IHL/ICL violations.

⁸⁶ “Decisions of the IDF Military Advocate General Regarding Exceptional Incidents that Allegedly Occurred During Operation ‘Protective Edge’ – Update No. 6”, 15 August 2018, available at: <https://www.idf.il/en/minisites/wars-and-operations/mag-corps-press-release-update-6/> (hereinafter: MAG Update #6).

⁸⁷ MAG Update #6.

⁸⁸ For analysis of the gravity requirement contained in Article 17(1)(d) of the Rome Statute, see ICC-OTP, *Situation on Registered Vessels of Comoros, Greece and Cambodia, Article 53(1) Report* (6 November 2014).

⁸⁹ For an analysis of the concept of “unwillingness to prosecute”, see Appeals Chamber, *Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case*, TCC-01/04- 01/07-1497, para. 78.

- Over four years after the end of OPE, almost 15% (53 of 360) of the “exceptional incidents” were still undergoing examination by the Fact-Finding Assessment Mechanism (FFAM).⁹⁰
- Thus, over **91%** of the “exceptional incidents” received by the MAG Corps involving alleged IHL violations have not been investigated, and **in no incidents** was any commander or soldier prosecuted for grave violations of IHL or ICL.

Criminal complaints filed by Adalah and Al Mezan

Between July and September 2014, human rights organizations Adalah and Al Mezan filed complaints to the MAG and the AG concerning 28 incidents of suspected IHL violations committed during OPE. The organizations demanded that the Israeli authorities open independent investigations into each of the cases and hold anyone found responsible to account. These cases concerned events that resulted in the killing and serious injury of scores of Palestinian civilians, including women and children, and the massive destruction of civilian objects. The evidence in these cases suggested that the attacks were carried out in violation of the principles of distinction and proportionality, and in incidents that could amount to grave breaches of IHL. These cases concern incidents of:

- Direct attacks on homes causing many civilian deaths and injuries;
- Direct attacks on children;
- Direct attacks on five UNRWA schools that were sheltering civilians;
- The bombing of mosques, hospitals and a shelter for people with severe disabilities;
- Attacks on civilian infrastructure and municipal workers working on infrastructural repairs.

As Adalah presented to the UN COI in November 2018, the status of these 28 complaints based on the MAG’s responses is summarized below: ⁹¹

- No investigation opened: 13 (46%);
- No response received to the complaint: 5 (17%);

⁹⁰ The Fact-Finding Assessment Mechanism (FFAM) was established after the 2014 Gaza War (OPE), as part of the state’s limited efforts to implement the Turkel Commission’s recommendations. The purpose of the FFAM, in this instance, is to gather information about “exceptional incidents” that took place during OPE, where the MAG has determined that “additional information is required”. See Adalah’s Report to the United Nations Independent Commission of Inquiry on the 2018 Protests in the Occupied Palestinian Territory, 22 November 2018, p. 20, available at:

https://www.adalah.org/uploads/uploads/Adalah_Report_to_COI_2018_Gaza_22.11.%202018_FINAL.pdf (hereinafter: Adalah’s COI Report).

⁹¹ Adalah’s COI Report, pp. 25-40.

- Investigation opened: 3 (11%); 2 closed and 1 pending;
- Complaints still under examination (by the FFAM): 7 (25%).

Thus, no investigations whatsoever have been pursued in 89% of these cases (25 of 28 incidents), as of the end of 2018, which entail suspected grave violations of IHL.

Below, Adalah details two examples of appeals filed to the AG by itself and Al Mezan after the MAG closed the case files concerning their complaints.

Case Example 1: UNRWA school in Rafah: 15 people killed, including 8 children, and 25 injured: No investigation opened by the MAG and the Israeli AG has failed to issue a decision, three and a half years after an appeal by Adalah and Al Mezan in October 2016

In 2014, in the aftermath of OPE, the UN established a Board of Inquiry (BOI) to review and investigate incidents affecting or involving UN personnel and premises. The Israeli Government cooperated with the UN BOI, in contrast to its refusal to cooperate with the United Nations Independent Commission of Inquiry into the 2014 Gaza Conflict (hereinafter: the UN COI 2015).⁹²

The BOI concluded that Israel was responsible for striking seven UNRWA sites used as civilian shelters, in which 44 Palestinians were killed and 227 others injured. The UN Secretary-General condemned the attacks, stating, “It is a matter of the utmost gravity that those who looked to them for protection and who sought and were granted shelter there had their hopes and trust denied.”⁹³ In response, the Israeli Government stated that the UNRWA incidents had been subject to thorough examinations, and criminal investigations had been launched where relevant.⁹⁴

Adalah and Al Mezan submitted complaints demanding criminal investigations in five cases of attacks on UNRWA schools in Gaza. To date, almost six years after these incidents:

⁹² Mandate of the United Nations Commission of Inquiry on the 2018 protests in the Occupied Palestinian Territory, available at: <https://www.ohchr.org/EN/HRBodies/HRC/CoIOPT/Pages/OPT.aspx>.

⁹³ See Summary by Secretary-General of the Report of the UN Headquarters Board of Inquiry into certain incidents that occurred in the Gaza Strip between 8 July 2014 and 26 August 2014, S/2015/286, 27 April 2015.

⁹⁴ See Israel Ministry of Foreign Affairs, “Israel receives summary of UN report on Gaza conflict,” 27 April 2015, available at: <http://mfa.gov.il/MFA/PressRoom/2015/Pages/Israel-receives-summary-of-UN-report-on-Gaza-conflict-27-Apr-2015.aspx>.

- No investigations have been opened in two of these cases: the UNRWA schools in Deir al-Balah and Rafah.
- There is still no decision about whether to open an investigation into the case of the school in Al Zaytoun neighborhood of Gaza City.
- Investigations were opened in two cases: (i) the school in Beit Hanoun, which was closed without further action being taken, according to MAG Update #6; and (ii) the school in Jabaliya – remains “under investigation” by the Military Police Criminal Investigation Division (MPCID).

The MAG closed the case concerning an attack in the vicinity of an UNRWA school in Rafah, southern Gaza, after the activation of the illegal “Hannibal Directive”.⁹⁵ 15 people were killed in the incident, including eight children, and at least 25 people were wounded.⁹⁶

Approximately 3,000 people were taking shelter in the school at the time. The military announced that it was aware of the fact that the school was serving as a shelter for civilians. However, it claimed that it was targeting three military operatives riding on a motorcycle, and that at the time of firing against the motorcycle, it was “not able to discern in real-time the group of civilians that were outside the school”, and that “it was not possible to divert the munitions” after the motorcycle began to travel along the road bordering the wall surrounding the school.⁹⁷ The MAG found the process of targeting the operatives to be in accordance with both international law and Israeli domestic law, and thus concluded that there was no reasonable suspicion of criminal conduct.⁹⁸

In October 2016, Adalah and Al Mezan appealed against the MAG’s decision not to open an investigation, arguing that the Israeli military had committed serious violations of IHL amounting to war crimes.⁹⁹ Almost three and a half years later, the appeal remains pending

⁹⁵ The Hannibal Directive, is a military operational order ostensibly used to thwart the abduction of a captured Israeli soldier. Adalah’s COI Report, p. 8.

⁹⁶ Report of the detailed findings of the Commission of Inquiry on the 2014 Gaza Conflict, 24 June 2015 (hereinafter: UN COI 2015 Report), para. 440, available at: [ohchr.org/EN/HRBodies/HRC/CoIGazaConflict/Pages/ReportCoIGaza.aspx](https://www.ohchr.org/EN/HRBodies/HRC/CoIGazaConflict/Pages/ReportCoIGaza.aspx).

⁹⁷ “Decisions of the IDF Military Advocate General Regarding Exceptional Incidents that Allegedly Occurred During Operation ‘Protective Edge’ – Update No. 5”, 24 August 2016, available at: <https://www.idf.il/en/minisites/wars-and-operations/mag-corps-press-release-update-5-august-2016/> (hereinafter: MAG Update #5).

⁹⁸ MAG Update #5.

⁹⁹ Adalah and Al Mezan, Press Release, “Adalah and Al Mezan Appeal Israeli Military’s Decision not to Investigate Civilian Killings near UNRWA School in Gaza in 2014”, 27 October 2016, available at: [adalah.org/en/content/view/8942](https://www.adalah.org/en/content/view/8942).

with no response from the AG. The UN COI 2015 also examined this case and found that imprecise weapons had been used, concluding that:

“The use of such weapons in the immediate vicinity of an UNRWA school sheltering civilians is highly likely to constitute **an indiscriminate attack which, depending on the circumstances, may qualify as a direct attack against civilians**,¹⁰⁰ **and may therefore amount to a war crime.**”¹⁰¹ (Emphasis added.)

The COI 2015 further stated that, “Even though the attack against the UNRWA schools may not have been deliberate, the IDF is bound by the obligation of precautionary measures and verification of targets to avoid attacks directed by negligence at civilians or civilian objects.”¹⁰² Human Rights Watch, which also carried out extensive documentation and investigation of three UNRWA school attacks, found that the type of munitions used by the Israeli military in this attack in fact allowed the operator to view the target, even after the missile has been launched, and to divert it mid-course.¹⁰³ Al Mezan, which has also documented this case, identified the two people (and not three as stated by the Israeli authorities) on the motorcycles as civilians and not combatants.

The gravity and complexity of this case – in which findings reached by the UN and international and local human rights organizations differ radically from those drawn by the Israeli military – clearly call for a more thorough and transparent investigation, and not for the closure of the case without investigation. The findings suggest that this incident may constitute an unlawful, indiscriminate and disproportionate attack. However, the FFAM and MAG merely made assertions about the targets, the timing of the firing of the munitions by Israeli military forces, and the selection of ammunition, and subsequently came to the conclusion that the military’s decisions were sound, and that lessons had been learned.

Further, the lack of decision by the AG, almost three and a half years after the filing of the appeal, woefully fails to satisfy the basic principles of promptness and effectiveness. The appeals process is not governed by clear or transparent procedures and no timeframe for a decision is set. While the AG’s guideline from April 2015 sets a deadline of 60 days for

¹⁰⁰ See also International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Galic*, case no. IT-98-29-T, Judgement, 5 December 2003, para. 57.

¹⁰¹ UN COI 2015 Report, para. 446.

¹⁰² UN COI 2015 Report, para. 447.

¹⁰³ See Human Rights Watch, “In-Depth Look at Gaza School Attacks”, 11 September 2014, available at: <https://www.hrw.org/news/2014/09/11/israel-depth-look-gaza-school-attacks>.

submitting appeals against a decision by the MAG, it contains no provision establishing a timeline for the AG to issue his decision on the appeal.¹⁰⁴

Case Example 2: The Bakr Boys' case: four young boys killed by a drone strike while running on the beach; case closed by the MAG and the AG, criticized by the UN COI 2015

A case in which the MAG did decide to open an investigation involved the killing of four juvenile boys from the Bakr family while they were playing on the beach in Gaza. The case garnered extensive attention from the international media and public, heightened due to its occurrence in the proximity of a hotel where a large number of foreign journalists were staying. The MAG closed the investigatory file in June 2015, contending that the area in which the boys were killed constituted a legitimate military target.¹⁰⁵ The COI 2015 was deeply disturbed by the closure of this case, stating that there were “strong indications that the actions of the IDF were not in conformity with international humanitarian law and that the investigation does not appear to have been carried out in a thorough manner.”¹⁰⁶

In August 2015, Adalah and Al Mezan, and the Palestinian Center for Human Rights (PCHR) filed appeals against the MAG's decision to close the file. Despite providing the military with additional case materials, sending several reminder letters, and requesting access to the military's investigatory materials, the groups were unable to obtain any response from the Israeli authorities regarding this case.¹⁰⁷

The organizations submitted the appeals, in accordance with the 60-day deadline required by the AG's guideline, despite being denied access to the investigatory materials. After numerous reminder letters and a telephone call, the State Attorney's Office, in a very exceptional step, informed the organizations by letter on 4 May 2016, i.e. nine months after the submission of the appeal, that the MAG was willing to disclose certain materials from the investigatory file, and that the groups should resubmit their appeals based on these materials. The three organizations gained access to these documents in December 2017, after sending the State

¹⁰⁴ See Attorney General Directive No. 4.5003, “Appealing the decisions of the MAG regarding the investigation of incidents in which a person was killed during operational activity of the Israel Defense Forces when it was alleged that this was a serious violation of the rules of customary international law,” April 2015.

¹⁰⁵ Adalah and Al Mezan, Press Release, “Israeli military closes investigation into killing of four children on Gaza beach,” 15 June 2015: adalah.org/en/content/view/8581. See also Peter Beaumont, “Gaza beach killings: no justice in Israeli exoneration, says victim's father,” *The Guardian*, 15 June 2015: theguardian.com/world/2015/jun/12/gaza-beach-killings-no-justice-in-israeli-exoneration-says-victims-father.

¹⁰⁶ UN COI 2015 report, para. 663.

¹⁰⁷ Information provided by Mohammed al-Alami, a lawyer from PCHR, on July 2017. Case on file with PCHR.

Attorney's Office a pre-petition notice because of the unreasonable delay in the handling of the appeal.

On 28 January 2018, the three human rights organizations submitted additional arguments to the AG after reviewing the heavily-redacted investigatory materials. The materials included testimonies provided only by military personnel, which were taken over four months after the incident. The investigators, themselves members of the Israeli military, did not gather testimonies from Palestinian eyewitnesses or from any of the large numbers of foreign journalists who personally witnessed the attack. The soldiers' testimonies indicated that the Israeli military personnel involved in the incident were indifferent to the risk of harming civilians, including children, as they decided to attack twice on the basis of unverified assumptions.¹⁰⁸ They operated based on the assumption that anyone entering what they defined as a "military area" was not a civilian and therefore that they could be directly attacked. There was no indication that any action was taken to verify the identities of the individuals attacked: they were, in fact, children (between the ages of 9 and 11) at play, and not militants. The attack amounts to a gross violation of the principle of distinction in IHL. Moreover, the Israeli strike was not carried out due to urgent military necessity: there were no Israeli soldiers in the area and there was no immediate danger posed to anyone. The military forces could have obtained further intelligence on the nature of the targets in order to determine whether they were combatants or not.

Four years after the submission of the appeal, the AG dismissed it on 9 September 2019. The AG did not criticize or question the actions of the military investigatory apparatus in the case and adopted its arguments for dismissing the complaint. Through these actions, the AG effectively granted full discretion to the military authorities.

This case provides a solid example of a situation in which there are strong indications of IHL violations, but in which the state demonstrates unwillingness to conduct a genuine investigation. Significantly, the mere assertion by the State of Israel that an investigation was conducted is insufficient; it must be supported by concrete steps that demonstrate ongoing

¹⁰⁸ See, also, Robert Mackey, "Secret Israeli Report Reveals Armed Drone Killed Four Boys Playing on Gaza Beach in 2014," *The Intercept*, 11 August 2018, available at: <https://theintercept.com/2018/08/11/israel-palestine-drone-strike-operation-protective-edge/>.

investigations against those suspected of violating IHL.¹⁰⁹ The alleged examinations and investigations did not comply with these requirements for, *inter alia*, the following reasons:

- No non-military witnesses were interviewed about the events. In conducting its investigation, the Israeli military did not collect testimonies from Palestinian witnesses or the many international journalists who were on site at the time of the killing.¹¹⁰
- The investigatory materials received indicate that the MAG Corps did not refer to anyone involved in the incident as a suspect of misconduct. Adalah, Al-Mezan and PCHR were not provided with any information about whether suspects were actually questioned or not, and if so, under which specific charges.
- No forensic examinations were conducted and no evidence was collected from the scene, even though such examinations are regarded as crucial investigative steps.

Unwillingness: Israel does not have the genuine will to try the crimes of OPE

The chronic flaws inherent in the Israeli domestic accountability system are clearly manifested in the manner in which it deals with complaints filed to it by Palestinians harmed by Israeli military actions, as the outcomes of complaints into incidents that occurred during OPE (as demonstrated in the preceding section), clearly attest.

To date, complaints have resulted in no acknowledgement by any domestic body, be it the MAG, the AG, or the judiciary, of any violation of IHL on the part of the Israeli military, and not one indictment has been issued for the killing and injuring of Palestinian civilians or the targeting of civilian objects during OPE. No cases involving civilian casualties or the destruction of civilian objects led to any kind of criminal – or even disciplinary – proceedings. The outcome of the OPE complaints is not an exception but the fully anticipated result of the Israeli domestic investigatory system, which provides near-blanket impunity to the Israeli military and denies remedies to its victims as a matter of routine. In a report submitted by Adalah to the United Nations Independent Commission of Inquiry on the 2018 Protests in the

¹⁰⁹ See “Appeals Chamber Judgment on the Appeal of Mr Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case”, ICC-01/04-01/07 OA 8-1497, 25 September 2009; “Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19 (2) (b) of the Statute”, ICC-01/09-02/11-96, 30 May 2011. See also decisions by the European Court of Human Rights that have clarified that a national investigation must be “effective” in that authorities must, *inter alia*, take all reasonable steps to ensure the independence of the investigators. See, e.g., *Al-Skeini et al v. UK*, 55721/07, GC, Judgment, 7 July 2011, paras. 163-167. *Nachova et al v. Bulgaria*, Applications Nos. 43577/98 and 43579/98, Judgment, 6 July 2005, paras. 113-117.

¹¹⁰ See, e.g., Peter Beaumont, “Witness to a shelling: First-hand account of deadly strike on Gaza Port”, *The Guardian*, 14 July 2014, available at: <https://www.theguardian.com/world/2014/jul/16/witness-gaza-shelling-first-hand-account>.

Occupied Palestinian Territory¹¹¹ (hereinafter: Adalah's COI Report), Adalah analyzes key recommendations and other findings made by three Israeli domestic bodies, the Turkel Commission (2013),¹¹² the Ciechanover Team (2015),¹¹³ and the State Comptroller's Office (2018), which reviewed the recommendations of the latter bodies, and the extent of their implementation.¹¹⁴ All these bodies have consecutively reviewed and produced findings about the state's investigatory mechanisms, and all of them identified multiple grave flaws within that system. For six years, they have issued reports and recommendations for improvements to the investigatory system, all of which have fallen short of the requirements of international law and remain ink on paper, in what appears to be an empty exercise designed to present a façade of action and good intentions. Although the Government of Israel has officially approved all three reports, it has failed to implement the vast majority of the inadequate recommendations made. The result is the preservation of the *status quo*: an investigatory system that is unfit for purpose, that falls far short of compliance with international standards, and that allows illegal conduct by agents of the Israeli military to continue with a wide margin of impunity.

The evidence provided by the three domestic review bodies analyzed in Adalah's report clearly demonstrates that Israel's system is unwilling to conduct genuine investigations into alleged IHL violations by Israeli military forces that meet the minimal international standards. Their consecutive inquiries have all revealed central, fundamental flaws in an investigatory system that falls far short of compliance with international standards of independence, impartiality, effectiveness, promptness and transparency, and does not function in a manner

¹¹¹ Adalah's Report to the United Nations Independent Commission of Inquiry on the 2018 Protests in the Occupied Palestinian Territory, 22 November 2018, available at: https://www.adalah.org/uploads/uploads/Adalah_Report_to_COI_2018_Gaza_22.11.%202018_FINAL.pdf (hereinafter: Adalah's COI Report).

¹¹² Turkel Commission, *Second Report: Israel's Mechanisms for Examining and Investigating Complaints and Claims of Violations of the Laws of Armed Conflict According to International Law*, February 2013, available at: <http://www.turkel-committee.gov.il/files/newDoc3/The%20Turkel%20Report%20for%20website.pdf> (hereinafter: Turkel Report II).

¹¹³ *Report of the Team for the Review and Implementation of the Second Report of the Public Commission for the Examination of the Maritime Incident of May 31st 2010 Regarding Israel's Mechanisms for Examining and Investigating Complaints and Claims of Violations of the Law of Armed Conflict According to International Law*, August 2015, available at: <http://www.pmo.gov.il/Documents/ReportEng.pdf> (hereinafter: The Ciechanover Report).

¹¹⁴ The State Comptroller and Ombudsman, *Operation Protective Edge – IDF Activity from the Perspective of International Law, Particularly with Regard to Mechanisms of Examination and Oversight of Civilian and Military Echelons*, 14 March 2018, available at: <http://www.mevaker.gov.il/En/publication/Articles/Pages/2018.03.14-international.aspx?AspxAutoDetectCookieSupport=1> (hereinafter: The State Comptroller's Report).

conducive to the prosecution of those allegedly responsible for IHL violations and grave crimes, as required by international law.¹¹⁵

Since OPE, the strongest measure that Israel has taken is to issue recommendations to the military, via the MAG, to conduct an operational lesson-learning process, “in order to assist with mitigating the risk of similar such incidents in the future.”¹¹⁶ However, this step was taken as an alternative to examining individual incidents with explicit reference to the identity of the subject being examined that is liable to bear criminal liability.¹¹⁷ The “lesson-learning” approach is, however, woefully inadequate as a response to incidents concerning major loss of civilian life and crippling damage to civilian infrastructure, and given the lack, exposed by the Israeli State Comptroller,¹¹⁸ of the adoption of basic principles of IHL, including the basic principles of distinction and proportionality, at any stage of the planning and execution of military operations, as detailed above.

Israel has been in belligerent military occupation of Palestinian land since 1967, and remains in effective control of Gaza. Over the ensuing decades, Israel has launched several major military operations in Gaza and the wider OPT, including during the past decade. It is therefore unreasonable and disingenuous for Israel to continue to claim, as it has claimed before, that it remains in a perpetual state of learning lessons. Moreover, there are no operative systems in place to ensure that such “lessons learned” are, in fact, effectively integrated into military procedures and decision-making processes. Even these lessons are therefore unlikely to produce concrete improvements on the ground.

It is therefore difficult to avoid the conclusion that the Israeli investigatory system as a whole, which has absolutely failed to provide accountability, is primarily geared towards protecting its armed forces.

¹¹⁵ See General Assembly Resolution A/RES/60/147 of 16 December 2005, which adopted the *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*.

¹¹⁶ MAG Update #6.

¹¹⁷ State Comptroller’s Report, p. 128.

¹¹⁸ Adalah’s COI Report, p.7.

The Great March of Return: Israeli Military's Killing of Palestinian Civilian Protesters

On 30 March 2018, Palestinians living under closure in the Gaza Strip began a series of weekly protests known as “The Great March of Return” (GMR), which took place for almost two years. The protesters’ main demands included the return of the Palestinian refugees and their descendants, living in Gaza and elsewhere, to their towns and villages of origin in Israel, and an end to Israel’s closure of Gaza. The GMR’s organizers published a set of ‘General Principles’ that emphasize its status as a popular movement inclusive of all sections of Palestinian society, and its peaceful, unarmed nature.¹¹⁹ However, from the first week onwards, the Israeli military responded to these peaceful, civilian protests with excessive, often lethal force. From the outset of the GMR, 217 Palestinians were killed at the protests, including 48 children and two women, and over 19,000 persons were wounded, including 4,966 children and 867 women, and 9,515 persons by live fire.¹²⁰

Human rights organizations submitted two urgent petitions to the Israeli Supreme Court (ISC) in April 2018, demanding that the Court order the Israeli military to cease using snipers and live ammunition to disperse the GMR protesters.¹²¹ The petitioners argued that the rules of engagement (ROE) employed by the Israeli military, which authorize the deadly open-fire policy against the protesters, were patently excessive and illegal, as evidenced by the high number of resultant deaths and injuries. At the time of the filing of the petition (by Adalah and Al Mezan) – a month after the demonstrations started – Israeli soldiers had killed 34 Palestinian protesters with live ammunition, 94% of whom were shot in the upper body. 56% of the 2,882 people wounded during the protests – 1,607 people – were hit by live ammunition. 523 children and 97 women were among the wounded.

The petitioners argued that the Israeli military’s response to the protests constituted arbitrary use of force for the purpose of punishing and deterring protesters, in violation of both international law and Israeli constitutional law. They further contended that the appropriate normative framework applicable to civilian demonstrations is that of ‘law enforcement’,

¹¹⁹ See General Principles of the Great Return March available at: “Great Return March”, *Facebook*, 27 March 2018, The International Coordination Committee of the GRM, www.facebook.com/419786505141841/posts/general-principles-of-the-great-return-march-grmintroduction-the-palestinian-ref/422561971530961/

¹²⁰ See, Al Mezan Center For Human Rights, Statistics of the victims of the Great March Of Return from the 30 March 2018 until 31 March 2020 (in Arabic), available at: <http://mezan.org/posts/67/%D9%85%D8%B3%D9%8A%D8%B1%D8%A7%D8%AA+%D8%A7%D9%84%D8%B9%D9%88%D8%AF%D8%A9>

¹²¹ H CJ 3003/18 *Yesh Din, et. al v. IDF Chief of Staff et al.* and H CJ 3250/18, *Adalah, et. al v. IDF Chief of Staff, et al.* (case dismissed 24 May 2018).

governed by international human rights law, a framework that has also been adopted in Israeli law, and not the framework of the laws of war, or international humanitarian law (IHL). The petitioners additionally argued that policy adopted by Israel towards the Gaza protesters violated their rights to life and bodily integrity, as protected by Israel's Basic Law: Human Dignity and Liberty.

On 24 May 2018, the ISC unanimously rejected the petitions, thereby sanctioning the Israel military's continued use of snipers and live fire against Palestinian GMR protesters.¹²² The ISC failed to interfere in the military's discretion, and thus to provide legal accountability or any other remedy to the victims. The Court neither ordered the military to re-examine its ROE, nor to open a criminal investigation into any of the killings or injuries. Rather, the Court fully adopted the state/military's position, as advanced during the legal proceedings. The court thereby created a legal 'black hole' wherein the law was suspended at three discrete levels.

Firstly, the ISC adopted in full the state's position, which centered on the newly-invented paradigm of "law enforcement within IHL/hostilities". The Court concurred with the state that there was an ongoing armed conflict between Israel and Hamas in Gaza to which the international law of armed conflict applied.¹²³ According to the ISC, "The international law of armed conflict delineates two different paradigms for the use of force in the course of an armed conflict: The first is the conduct of hostilities paradigm and the second is the law enforcement paradigm."¹²⁴ *De facto*, "both of the paradigms are relevant at all times, and in order to know which paradigm is applicable, it is necessary to examine the circumstances behind the concrete exercise of force."¹²⁵

The paradigm of "law enforcement within IHL/hostilities" is not a recognized category of international law, but was purposely contrived by Israel in an attempt to justify the lethal and illegal conduct of its armed forces. Crucially, this invented paradigm gives Israel's armed forces greater leeway to use lethal fire when compared to the conventional paradigm of law enforcement. Its use in this case is an attempt to circumvent even the limitations imposed by

¹²² The decision is available in English at: <https://supremedecisions.court.gov.il/Home/Download?path=EnglishVerdicts%5C18%5C030%5C030%5Ck08&fileName=18030030.K08&type=4>

¹²³ Justice Melcer's opinion in the case, para. 38.

¹²⁴ *Ibid.*, para. 39.

¹²⁵ *Ibid.*, para. 39; Justice Hayut's opinion in the case, paras. 3-4, and 7.

IHL on the exercise of force via the customary distinction between combatants and civilians during armed conflicts.¹²⁶

Based on this analysis, the Court legitimized the targeting of so-called “key rioters” and “key inciters”, even though the judges were aware that these categories were not “grounded in international law.”¹²⁷ The use of lethal weapons against “key rioters” or “key inciters” is not in accordance with IHL, since the protesters are civilians and thus not legitimate targets. It is also not in line with the paradigm of law enforcement, since the protestors did not pose any imminent threat to life.

This assessment was accepted by the independent international Commission of inquiry on the protests in the Occupied Palestinian Territory (COI). In its report of March 2019, the COI examined a document entitled “Gaza Border Events: Questions & Answers”, which was published by the Israeli military in February 2019, and which explains how the ROE were implemented on the ground. The COI concluded in this regard that:

“In the law enforcement paradigm, none of the above listed activities can in themselves be lawfully met with lethal force – unless the person simultaneously poses an imminent threat to life or limb by, for instance, being armed and attacking.”¹²⁸

In addition to making findings about the aforementioned published by the Israeli military after the Court’s decision, the COI also analyzed the Government’s submissions to the Supreme Court and concluded that, “It is clear that the ‘imminent threat to life’ standard – as applied in the rules of engagement – was too far removed from the criteria as understood in international law.”¹²⁹ Furthermore, the ISC’s decision allows for the military to take preventative measures against protestors based even on an individual’s interaction with a group of other individuals without any assessment that the individual poses any serious or imminent danger.¹³⁰

¹²⁶ See Adalah and Al Mezan, “Briefing Paper on Israeli Supreme Court petition challenging the Israeli military’s use of lethal force against Gaza protesters and the State of Israel’s response,” 15 May 2018 available at: https://www.adalah.org/uploads/uploads/Summary_Snipers_petition_and_state's_response_15_May_2018_FINAL.pdf

¹²⁷ Justice Hayut’s opinion, para. 12.

¹²⁸ See: Report of the detailed findings of the independent international Commission of inquiry on the protests in the Occupied Palestinian Territory, A/HRC/40/CRP.2, 18 March 2019, para. 316, available at: https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session40/Documents/A_HRC_40_74_CRP2.pdf (hereafter “COI 2018 Protests Report”).

¹²⁹ See: COI 2018 Protests Report, para. 324.

¹³⁰ See also: Hannes Jobstl, “Lost Between Law Enforcement and Active Hostilities: A First Glance at the Israeli Supreme Court Judgment on the Use of Lethal Force During the Gaza Border Demonstrations,” 15 June 2018,

Secondly, the ISC failed to relate to evidence brought before it by the petitioners, including testimonies given by protesters, emergency medical workers, journalists and doctors, in addition to video documentation, and reports and statements made by the UN and international human rights organizations. This information included evidence of the civilian character of the protests, the arbitrary use of lethal force by the Israeli military against unarmed demonstrators, and the fatal and other serious injuries sustained by the protesters. The ISC rejected the petitioners' motion to allow the submission of video evidences via USB,¹³¹ and failed to address any of the civilian witness statements in its decision; instead, it accepted in full the state's version of the events.

In its response, the State of Israel did not dispute the facts raised by the petitioners, but rather attempted to justify the killings and injuries inflicted. Deputy Supreme Court President Hanan Melcer found that:

“... [T]he existing factual foundation does not, at this time, allow any intervention whatsoever, in accordance to that which is requested in the petitions. This is due to the fact that we do not possess any concrete information regarding: the identity of the central activist and inciters; the nature of their actions; their organizational affiliation and their involvement in terrorist activity, or in any other prohibited hostile activity; and whether and in what manner they posed an actual and imminent danger, which – as a last resort – necessitated fire.”¹³²

The Justices fully adopted the State's position regarding the nature of the events, finding that, “The incidents that are described do not address a popular, ordinary, or spontaneous protest...,”¹³³ since:

“[T]he intentions of the rioters who are the subject of these petitions, their huge number, the means at their disposal and the violence they exercised – *prima facie*, on a factual level, distinguish the mass events we are discussing from mere demonstrations and from ordinary ‘civilian’ protests [...] the incidents that are described do not address a popular, ordinary, or spontaneous protest [...] The violent riots were organized, coordinated and directed by Hamas, which is a terrorist organization that is in an armed conflict with Israel”.¹³⁴

available at: <https://www.ejiltalk.org/lost-between-law-enforcement-and-active-hostilities-a-first-glance-at-the-israeli-supreme-court-judgment-on-the-use-of-lethal-force-during-the-gaza-border-demonstrations/>

See also: COI 2018 Protests Report, paras. 313-326.

¹³¹ Adalah and Al Mezan submitted the motion, which was rejected by the Court on 26 April 2018.

¹³² Justice Melcer's opinion, para. 62.

¹³³ *Ibid.*, para. 54.

¹³⁴ *Ibid.*, paras. 53-54.

Thus, the ISC conceived of the participants in the GMR as a collective group and not as individuals. The individual protesters were not judged on the basis of their own acts or role in the protests, or even on the basis of the alleged risk they posed, but rather as part of a collective enemy whose very presence made the protests dangerous and rendered all the individuals in the march legitimate targets.

Thirdly, and most importantly, the ISC afforded the military full discretion. Given that the ROE are classified, the petitioners argued that, irrespective of their specific content, the facts on the ground demonstrate their illegality. In response to this argument, the three justices found that, “The range of the Court’s intervention in decisions that are based on operational considerations is very limited and narrow”.¹³⁵ As Deputy President Melcer elaborated:

“Given that the Rules of Engagement, as such, comply with the required criteria, the decision as to how they are implemented is subject to the discretion of the commanders on the ground. In contrast, our role as the Court is limited to judicial review of compliance with the rules of Israeli and international law that bind Israel, and by which the Respondents have declared that the State abides.”¹³⁶

This conclusion, according to Melcer, is justified “especially in the circumstances of this matter, when the review is requested with respect to the implementation of operational policy that is occurring in real time.”¹³⁷ ISC President Justice Esther Hayut added that:

“As opposed to the examination of the legality of the Rules of Engagement, with which the Court is entrusted, there is doubt whether the Court possesses the tools to perform the examination of the manner in which these Rules are implemented, as it relates to professional aspects – particularly when the events are still taking place.”¹³⁸

Here, Justice Hayut is of the opinion that, “Operational and other debriefings[...] which are held and shall continue to be held retroactively with respect to the implementation of the Rules are the appropriate venue for examining the allegations raised regarding harm to those who belong to the category of central rioters and central inciters”.¹³⁹

Ultimately, the Court decided to reject the petitions based on the assumption that, “the Respondents will continue to comply with their declaration [...] that they and the soldiers have [acted] and will act in accordance with the binding rules of international law and the

¹³⁵ *Ibid.*, para. 60.

¹³⁶ *Ibid.*, para. 61.

¹³⁷ *Ibid.*, para. 64.

¹³⁸ Justice Hayut’s opinion in the case, para. 13.

¹³⁹ *Ibid.*

local Israeli law and honor the humanitarian obligations that are imposed upon them by virtue of the Law of Armed Conflict.”¹⁴⁰

The COI criticized the ISC’s position towards the limitation of its authority to intervene during an ongoing event, and for its reliance on the Israel’s military system of investigation afterwards:

“Serious misgivings were occasioned by the record of the internal investigation into incidents arising out of Operation Protective Edge. In its judgment on the RoE, the Israeli Supreme Court nevertheless praised the system and deferred to it. Justice Melcer and Chief Justice Hayut were both of the view that this kind of review can only occur after the fact and that it is not the place of the Court to make an assessment of the application of the RoE in the midst of fighting, without a developed factual record. While the Court rejected the government’s argument that the issue at hand was non-justiciable per se, it adopted the position that the Court’s authority to intervene on operational matters is limited.”

Based on the findings publicly released to date, it is difficult to conclude that the few cases currently under review by the Military Advocate General (MAG) Corps entailed the “in-depth inquiry” that the Court assumed the Israeli military would undertake into the casualties resulting from its soldiers’ actions.¹⁴¹

The ISC’s decision in the snipers case clearly demonstrates that the Court grants full discretion to the Israeli military in its operations in Gaza, and has assumed a strongly anti-interventionist stance towards the military’s actions. Firstly, the ISC interpreted and implemented international law in a spurious and overly-‘creative’ manner through which it sought to preserve the impunity granted to the Israeli military for its actions in Gaza. Secondly, the ISC adopted the factual basis put forward by the State, and refused even to address the facts and evidence submitted by Adalah and Al Mezan, as petitioners. Thirdly, and most importantly, the ISC conferred full professional discretion on the Israeli military authorities, and thereby relegated all operational questions to the army’s own internal review mechanisms. The legal ‘black hole’ that the ISC created through its decisions effectively sanctioned the continued unlawful killing of Palestinian civilian protestors, while upholding impunity to the Israeli military. The direct result of this court-endorsed impunity is the heavy tolls of Palestinian civilian deaths and injuries during the GMR.

¹⁴⁰ Justice Melcer’s opinion, para. 66.

¹⁴¹ See, COI 2018 Protests Report, paras. 740-741.

CONCLUSION

As this report demonstrates, the Israeli Attorney General's conception of state sovereignty, as set out in his memorandum, is based on an outdated and increasingly irrelevant understanding that leads him to claim that the exercise of the ICC's jurisdiction in this case would violate the classical state-sovereignty principle of 'non-intervention'. This report suggests a contemporary interpretation of jurisdiction that is in line with current developments of international legal practice and adopts a functional approach that examines how a state exercises its power over the population living within its jurisdiction or under its effective control. This interpretation is consistent with the ICC's purpose, which is to defend victims and end impunity. The report argues that Article 12(3) of the Rome Statute should lead to the interpretation of the term "State" as including a quasi-State when: (1) this entity is a party to the Statute; (2) enjoys a recognized international status; and (3) the case raises matters of impunity. Such an interpretation is especially relevant if the case involves a legal 'black hole', which arises when legality is suspended, eliminating access to justice, civil remedies, effective prosecution, penalty, and accountability for illegal killings and other serious crimes, as we have shown the case to be in Gaza. The report has demonstrated that Palestinian victims of Israeli military actions in Gaza have systematically been denied an effective remedy in civil compensation cases; that Israel conducts no genuine criminal investigations into these actions or prosecutions of perpetrators; and that the Israeli Supreme Court, in the latest case under its review, afforded the Israeli military full discretion in its lethal, excessive actions to quell the Great March of Return protests. These findings lead to the conclusion that, contrary to the position put forward by the AG, the ICC must exercise jurisdiction in defense of victims in this case, who have been left by Israel in a legal 'black hole' with no domestic legal recourse.