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Gaza 2 Years On: Impunity over Accountability

Israel's unwillingness to investigate violations of international law in the Gaza Strip

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Between 7 July 2014 and 26 August 2014, for almost 51 days, Israel launched a military offensive in the Gaza Strip codenamed "Operation Protective Edge" (OPE). The operation killed 2,251 Palestinians, the vast majority of them civilians, and of whom 299 were women and 551 were children. The operation also caused massive destruction to 18,000 homes and other civilian property, including hospitals and vital infrastructure.¹

Adalah, together with the Al Mezan Center for Human Rights (Al Mezan), filed a series of complaints to the Israeli Military Advocate General (MAG) and the Israeli Attorney General (AG) demanding independent investigations into suspected violations of international humanitarian law (IHL), international human rights law (IHRL) and international criminal law (ICL) during the 2014 operation, and the criminal prosecutions of perpetrators.

However, two years after OPE, the handling of these complaints by the Israeli authorities has proven what previous experience with the Israeli system has long made clear: Israel is unwilling to conduct genuine, independent investigations into suspected war crimes, and does not hold those responsible to account, as required by international law.² This situation continues to be the case even after the Israeli military established its FFAM following OPE, which was supposed to improve its investigative processes.

The UN Commission of Inquiry (CoI) on the 2014 Gaza conflict, which released a report of its findings in June 2015, extensively documented and investigated numerous allegations of widespread and systematic violations of international law during the 2014 operation, and raised serious concerns that certain attacks by the Israeli military may amount to war crimes.³ The CoI also raised serious questions regarding the thoroughness of Israel's investigative mechanisms.⁴

On March 2016, the UN High Commissioner for Human Rights (HCHR) released an initial report on the implementation of the CoI's recommendations on the 2014 Gaza conflict. In light of the information presented to the HCHR regarding Israel's handling of investigations, the HCHR reiterated

¹ OCHA, "Key figures on the 2014" hostilities: gaza.ochaopt.org/2015/06/key-figures-on-the-2014-hostilities/. Four Palestinian NGOs that documented the impacts of OPE and verified the field research afterwards reported that 2,219 people were killed, of whom 299 were women and 556 children. See 'Operation Protective Edge in Numbers', available online at <http://mezan.org/en/post/21255>, page 15.

² See Adalah's submission to the United Nations Independent Commission of Inquiry on the 2014 Gaza Conflict (CoI), January 2015: <http://www.adalah.org/en/content/view/8417>.

³ See report of UN CoI on 2014 Gaza Conflict, June 2015: <http://www.ohchr.org/EN/HRBodies/HRC/ColGazaConflict/Pages/ReportColGaza.aspx>.

⁴ UN CoI report, para. 633.

"serious concerns regarding the lack of accountability related to past cycles of violence and escalation in Gaza and to incidents in the West Bank, including East Jerusalem, and in the access-restricted areas of the Gaza Strip".⁵ He asserted that, "the situation continues to deteriorate" and urged all parties to urgently implement all recommendations made by the Col.⁶

Also in March 2016, the UN Human Rights Council (HRC) adopted a resolution on ensuring accountability and justice for all violations of international law in the OPT.⁷ The HRC welcomed the Col report and stressed its alarm at Israel's "long-standing systematic impunity for international law violations [that] has allowed for recurrence of grave violations without consequence" (page 2). The HRC further emphasized "the need to ensure that all those responsible for violations of international humanitarian law and international human rights law are held to account through appropriate fair and independent national or international criminal justice mechanisms" (para. 4). The HRC also called upon the parties "to cooperate fully with the preliminary examination of the International Criminal Court and with any subsequent investigation that may be opened" (para. 5). Finally the HRC requested that the HCHR "conduct a comprehensive review detailing the status of implementation of the recommendations addressed to all parties since 2009 by the relevant Human Rights Council mechanisms, namely previous fact-finding missions, the commission of inquiry and special procedures, as well as by United Nations treaty bodies, by the Office of the High Commissioner and by the Secretary-General in his reports to the Human Rights Council, and to identify patterns of non-compliance, non-implementation and non-cooperation, to propose follow-up measures to ensure implementation, and to present a report to the Council at its thirty-fifth session" (para. 8).

Complaints filed to the MAG and AG

Between July and September 2014, Adalah and Al Mezan filed complaints jointly to the MAG and the AG regarding 27 incidents of suspected IHL and IHRL violations during OPE, demanding that the authorities open independent criminal investigations into each of the cases and to prosecute and hold to account those found to be responsible.

The cases concerned severe events that resulted in the killing and serious injury of Palestinian civilians, including women and children, and the massive destruction of civilian objects in attacks where the evidence suggests that they were carried out in violation of the principles of distinction and proportionality, which could amount to grave breaches of international humanitarian law. These cases mostly concerned incidents of:

- Direct attacks on residential buildings also causing many civilian deaths and injuries;
- Direct attacks on children (e.g. the four Bakr children playing on the beach and the Shuhaibar children feeding pigeons on a house rooftop);
- Direct attacks on five UNRWA schools that were sheltering civilians;
- Bombing of mosques, hospitals and a shelter for people with severe disabilities;
- Attacks on infrastructure and the municipality workers fixing them.

⁵ See Report of the United Nations High Commissioner for Human Rights, A/HRC/31/40, 7 March 2016, para.39.

⁶ Ibid, para. 96-99.

⁷ See Resolution of the United Nations Human Rights Council, A/HRC/31/L.38, 22 March 2016.

The table below summarizes the status of these complaints based on the responses of the MAG:⁸

Military's response	No investigation opened	Investigation closed	Still under examination (by the FFA mechanism)	Still under investigation by the Military Police	No response to date
Number of cases/incidents	11	1 (appeal pending)	7	2	6

In addition to the complaints submitted to the MAG and the AG jointly by Adalah and Al Mezan, Al Mezan filed another 107 complaints to MAG and the FFAM in relation to attacks during OPE.

In his report from March 2016, the HCHR emphasized the fact that no criminal indictments were issued based on any of the complaints filed or otherwise, including all of the cases submitted by Adalah, Al Mezan and other human rights organizations, except in one case of looting.⁹ The looting incident involved two soldiers who were accused of stealing NIS 2,420 (about US \$635) from a home in the Shuja'iya neighborhood, the same neighborhood where more than 55 civilians, including 19 children and 14 women, were killed on 19-20 July 2014 as a result of Israeli military action that also led to the destruction of and damage to over 1,800 houses. Referring to this case, the Col stated that no investigation was carried out by the military, even though it raises serious concerns about the military's conduct that may amount to war crimes.¹⁰

The Fact-Finding Assessment Mechanism

The results show that two years after the Gaza offensive, 48% of the complaints filed by Adalah and Al Mezan (13 of 27) still remain under examination by Israel's Fact-Finding Assessment Mechanism (FFAM) or have received no response.

Regarding the additional 107 complaints submitted by Al Mezan, the MAG and the FFAM confirmed receipt of 96 of them. They inquired into 62 cases, asking for additional, yet brief, information to be submitted, focusing on the times and locations of the incidents, and then informed Al Mezan by 26 August 2016, that these 62 cases were subject to preliminary examinations by the FFAM. In another 12 complaints, the Israeli military police investigations unit asked for witnesses to provide their statements at the Erez crossing; nine witnesses (8 men and one woman) gave their statements with support from Al Mezan.

On 24 August 2016, the MAG informed Al Mezan's lawyers that five cases were closed without further procedures or criminal investigations, raising the total number of closed cases to ten (of the 107). In response to reminder letters sent by Al Mezan to the MAG concerning the status of complaints, the MAG replied on 22 August 2016 that it had not received eight of the 107 complaints, despite having sent confirmation letters and numbers to Al Mezan regarding at least two of the eight complaints. While Al Mezan re-sent all eight complaints, which were first sent in early 2015, MAG's response raises serious questions about the management of the complaints.

⁸ See Adalah's updated detailed list of all complaints submitted to the MAG and AG and their status: http://www.adalah.org/uploads/uploads/Adalah_Gaza_Case_List_English_FINAL.pdf

⁹ HCHR, supra note 5, para. 38.

¹⁰ UN Col, para. 293-299.

In sum, Al Mezan was not informed of any investigations being opened by the MAG concerning any of the 107 cases so far. Notably, the only cases processed relatively swiftly by the MAG concern incidents of looting by Israeli military personnel and the abuse of civilians in military detention.

The FFAM, which was established after the 2014 operation, is purportedly the result of the state's efforts to implement the recommendations of a 2013 report by the Turkel Commission. The Israeli government formed the Turkel Commission in 2010, in part, to examine Israel's mechanisms for investigating IHL violations.¹¹

The FFAM's purpose is reportedly to collect information and relevant materials limited only to "exceptional incidents" that occurred during OPE, where the MAG has decided that "additional information is required".¹² These materials are then referred to the MAG, the body that determines whether or not to open a criminal investigation into the cases. In theory, the FFAM was supposed to work thoroughly and promptly, in as close a timeframe as possible to the date of the incident in question, in order to ensure that the investigation is prompt and effective.

In fact, most of the complaints filed are effectively frozen under the FFAM's purview. Among the Adalah and Al Mezan cases that are still under examination by the FFAM are 2 out of the 5 complaints regarding the Israeli military's attacks on UNRWA schools that were sheltering civilians during the operation.

The UN Board of Inquiry (BoI) was established after the 2014 OPE 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 UN CoI.

In the summary of its findings, the BoI concluded that Israel was responsible for striking 7 UNRWA sites used as civilian shelters, in which 44 Palestinians were killed and 227 others were injured. In a cover letter accompanying the summary, 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."¹³ Responding to the release of the BoI report, the Israeli government stated that the UNRWA incidents have been subject to thorough examinations, and criminal investigations have been launched where relevant.¹⁴ However, as noted, it appears that the FFAM is also still reviewing these cases, two years on.

On 24 August 2016, the MAG issued a press release with updates on a few cases under examination, in which it informed that it decided to close these cases without opening criminal investigations.¹⁵ One of those cases concerned the attack nearby a UNRWA school in Rafah, in which 15 people were killed, including 8 children, and wounding at least 25.¹⁶ About 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 served as a shelter for civilians. However, it claimed that it was targeting three military operatives riding on a

¹¹ Adalah Briefing Paper on the Turkel Report, Part II, by Adalah Attorney Fatmeh El-Ajou: adalah.org/uploads/oldfiles/Public/files/English/Publications/Articles/2013/BriefingPaper-Turkel-II-El-Ajou.pdf.

¹² UN CoI report, para. 612. The UN High Commissioner noted the limited scope of this mechanism. See HCRC, supra note 6, para. 32.

¹³ 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.

¹⁴ See Israel Ministry of Foreign Affairs, Israel receives summary of UN report on Gaza conflict, 27 April 2015: <http://mfa.gov.il/MFA/PressRoom/2015/Pages/Israel-receives-summary-of-UN-report-on-Gaza-conflict-27-Apr-2015.aspx>.

¹⁵ See "Decisions of the IDF MAG regarding Exceptional Incidents that Allegedly Occurred During Operation 'Protective Edge' – Update No. 5," 24 August 2016, available at: <http://www.law.idf.il/163-7596-en/Patzar.aspx>

¹⁶ UN CoI report, para. 440.

motorbike, and at the time of firing against the motorbike, 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 motorbike started to travel among the road bordering the wall, which surrounded the school. Thus, the MAG found that the targeting process accorded with international and domestic law, and thus, there was no reasonable suspicion of criminal conduct.

Israel also gave this version of events to the BoI, and the UN Col also examined this case. The Col found that imprecise weapons were used and concluded 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,¹⁷ and may therefore amount to a war crime¹⁸**"

Human Rights Watch (HRW), which also carried out an in-depth documentation and investigation of three UNRWA schools attacks, found that in this attack, the munitions used by the Israeli military in fact allows the operator to see the target even after the missile is launched and divert it in mid-course.¹⁹ Al Mezan, which has also documented this case, has identified the two people (and not three as stated by the Israeli authorities) on the motorbike as civilians and not combatants.

This case – which clearly indicates contrary findings by the UN and international and local human rights organizations from that of the Israeli military – also demonstrates the need for a more thorough and transparent investigation, and not a closure of the case file after two years without investigation. The findings show that this incident may be an unlawful, indiscriminate and disproportionate attack. However, the FFAM and MAG seem to merely make assertions about the targets, the timing of the munitions' firing, and the selection of ammunition, concluding that there was nothing wrong with any of these decisions, and that lessons were learned. Moreover, in the words of the Col, "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".²⁰

In many cases in which the MAG decided that no investigation would be opened - i.e. decided to close the file without further action - Adalah and Al Mezan requested the investigatory materials on which the MAG based its decision, including copies of witness statements and other testimonies collected. In summary, the MAG's responses to such cases were as follows:

- The materials collected by the FFAM and other intelligence materials cannot be revealed because they are classified;
- Certain incidents in question were undertaken based on military necessity (these arguments were written vaguely and did not include any supporting evidence);
- The FFAM did not find any need or use in taking testimonies from non-military witnesses.

¹⁷ See also International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Galic*, case No. IT-98-29-T, Judgement, 5 December 2003, para. 57.

¹⁸ UN Col report, para. 446.

¹⁹ See Human Rights Watch, In-Depth Look at Gaza School Attacks, 11 September 2014,

<https://www.hrw.org/news/2014/09/11/israel-depth-look-gaza-school-attacks>.

²⁰ UN Col, para. 447.

Appeal against Case Closure: The Bakr Boys Case

A high-profile case in which the MAG opened an investigation was the killing of four boys from the Bakr family while they were playing football on the beach. The case garnered extensive international media and public attention, especially due to its occurrence near a hotel where many foreign journalists were staying. In conducting its investigation, the Israeli military did not collect testimonies from these journalists or from Palestinian witnesses who were on site at the time of the killing. The MAG closed the file in June 2015, contending that the area in which the boys were killed amounted to a justified, military target.²¹

The Col 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."²²

In August 2015, Adalah and Al Mezan filed an appeal against the MAG's decision to close the file; one year later, the case is still pending before the AG. The appeal process itself has no clear or transparent procedures, nor a timeframe for a decision. Directives issued by the AG in April 2015 set a deadline of 60 days for submitting appeals against the MAG's decisions. However, the directives contain no provisions regarding a timeline for the AG to issue his decision on the appeal itself.

Prior to submitting the appeal, and following the MAG's decision to close the Bakr boys' case, Adalah and Al Mezan requested access to the materials on which the decision was made. One month later, the organizations did not receive any reply, and then submitted an appeal in accordance with the 60-day deadline as required by the AG's directives. After numerous reminder letters and a telephone call, nine months later, the State Attorney's office contended that the MAG is willing to disclose certain materials from the investigation file, and that the human rights organizations should resubmit our appeal based on these materials. Accordingly, Adalah and Al Mezan addressed the MAG and the military police requesting to have access to the materials and yet, more than two months after the State Attorney's statement, no reply has been received.

Obstacles to Investigations

International humanitarian law and international human rights law require states to investigate allegations of suspected violations committed during armed conflict. The duty to investigate requires that any investigation follow the international standards of **independence, impartiality, effectiveness, promptness and transparency** and to prosecute those allegedly responsible in accordance with domestic and international law.²³

Israel's investigations into "Operation Protective Edge" fall far short of these international standards. The handling of the complaints submitted by Adalah and Al Mezan clearly indicate the following:

- There is a lack of an independent and impartial investigatory mechanism, since the military is still the authorized body to investigate its own conduct. The MAG still performs a "dual role": It

²¹ 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

²² UN Col report, para. 663.

²³ 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*.

provides the military with legal advice prior to and during military operations and subsequently decides whether to initiate a criminal investigation. This dual role could lead to a situation in which the MAG would need to decide whether to investigate its own conduct or that of its subordinates. Such a situation would clearly violate the requirement of independence.

- The MAG dismisses complaints by providing vague arguments and explanations about the existence of military necessity and military targets;
- In many cases, the FFAM is not investigating non-military witnesses and has stated that there is no need for such investigations;
- The MAG is unwilling to disclose information on any investigative materials, witnesses and testimonies, which reinforces concerns about the lack of transparency;
- There is no timeframe for examinations and investigations;
- There is an unreasonable amount of time and stalling in the examination and investigation processes, and thus the process is not prompt, but unnecessarily lengthy;
- There are still no guidelines under which a criminal investigation should be opened in cases involving alleged IHL and IHRL violations.

These observations from OPE add to a longer experience of Adalah, Al Mezan and other human rights organizations with requests for investigation and litigation before the Supreme Court that shows:

- To date, the Israeli Supreme Court has never issued any order to the MAG to open a criminal investigation or to indict any individual regarding alleged suspicions of the commission of war crimes in Gaza. In the "Adalah case", which demanded investigations into the killings and injury of civilians and the extensive damage to homes in the Gaza Strip in 2004, the Court rejected the petition and reiterated its previous decisions in ruling in 2011 that intervention in the decisions of the chief military prosecutor is rare, and should occur only in very exceptional circumstances;²⁴
- There is still an absence of war crimes legislation in domestic Israeli law and there is no Israeli penal law imposing direct criminal liability on military commanders and political leaders for international law violations;
- The 2013 recommendations of the Turkel Commission do not fully comply with the international standards of the duty to investigate;
- Even with the flaws of the Turkel Commission's recommendations, Israel has implemented almost none of the recommendations;
- Israel refused to cooperate with international investigating bodies, most recently the UN Col into the 2014 war, and thus, UN investigators had no access to Israel and the OPT. This lack of cooperation thwarts attempts to gather information first-hand and view the scenes of relevant incidents in order to properly investigate violations of IHL and IHRL.

These findings clearly demonstrate Israel's unwillingness to genuinely investigate allegations of war crimes and other serious violations of international law, as well as its lack of intent to bring responsible perpetrators to justice. Even in the few cases where investigations have been conducted, it is clear that they are not done independently or impartially as required by international law, and in the end fail to produce any results that ensure accountability. The Israeli law enforcement system and its flawed investigative mechanisms instead appear primarily geared towards protecting its armed forces, thus allowing impunity to prevail.

²⁴ HCJ 3292/07, *Adalah – The Legal Center for Arab Minority Rights in Israel v. Attorney General* (decision delivered 1 December 2011).