



Update on accountability for reported violations of international law by Israel during the escalation of hostilities in Gaza and southern Israel between 14 and 21 November 2012

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This update is issued by the Office of the United Nations High Commissioner for Human Rights (OHCHR) as coordinator of the Protection Cluster in the occupied Palestinian territory (oPt), with the contributions of Protection Cluster members. This brief update raises initial concerns regarding lack of progress towards accountability and access to an effective remedy for victims of violations of international humanitarian law, six months after the end of the escalation of hostilities in Gaza and southern Israel from 14 to 21 November 2012. It is not intended as a legal analysis. The update focuses on compliance by Israel with its obligations and does not address accountability for violations of international humanitarian and human rights law by Palestinian armed groups in Gaza.¹

Introduction

Six months have passed since the 21 November 2012 agreement that ended the eight-day Israeli military operation ‘Pillar of Defence’ / ‘Pillar of Cloud’ and the escalation of hostilities in Gaza and southern Israel. However, accountability and an effective remedy for violations of international humanitarian and human rights law committed during the crisis remain elusive.

Between 14 and 21 November 2012, over 174 Palestinians were killed in Gaza, of whom 101 are believed to have been civilians, including 14 women and 36 children.² Another 1,046 Palestinians were injured, and 482 houses were destroyed or sustained major damage.³ Six Israelis, including four civilians, were killed.

Palestinian, Israeli and international human rights organisations working in Gaza have documented and submitted to the Israeli military justice system credible allegations of incidents in which Palestinians were killed, injured or their property was destroyed by Israeli forces in a manner contrary to international law. Some of these organisations are providing legal assistance to support victims in Gaza to pursue accountability through criminal investigations and to seek redress for harm suffered through the Israeli civil court system.

As highlighted in this document, there are serious concerns that Israel has yet to take adequate measures to investigate credible allegations of violations of international law, to ensure accountability for violations, and to provide an effective remedy to victims. Further undermining faith in the prospects for justice is the on-going impunity for violations of international law committed during previous military operations and escalations.

¹ For information on violations committed by all duty-bearers during the escalation of hostilities, see the Addendum to the Report of the UN High Commissioner for Human Rights (HRC/22/35/Add.1), March 2013 at: http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.35.Add.1_AV.pdf.

² Figures from the Protection Cluster database, which triangulated data from human rights organizations, with reference to Ministry of Health figures in Gaza. Most of the fatalities occurred during Israeli military attacks, although there is information to suggest that up to six of the civilian fatalities may have been caused by Palestinian rockets falling within Gaza.

³ Figures for injuries are from Al Mezan Center for Human Rights, and figures for house destruction and damage are from the Shelter Sector in Gaza.

Obligations under international law

The obligation of duty-bearers to respect and ensure implementation of international humanitarian and human rights law includes the duty to prevent violations, to investigate all credible allegations of violations, and to prosecute those responsible. Investigations must comply with the international standards of independence, impartiality, thoroughness, promptness and effectiveness.⁴ Transparency is also a key element of investigations, as information should be made available to enable public scrutiny of results.⁵

Duty-bearers are also obliged to provide victims with equal and effective access to justice and with remedies, including reparation. Reparation must be provided in full for all loss and injury caused by violations of international humanitarian law for which the duty-bearer is responsible.⁶

Lack of effective investigation of violations

Human rights organisations have investigated and documented incidents that occurred during the escalation of hostilities and raised concerns in specific cases, particularly in regard to lack of respect for the principles of distinction, proportionality and precautions in attack.⁷ Human rights organizations in Gaza have filed 96 complaints with the Israeli military justice system regarding alleged violations, calling for investigations.

The Military Advocate General (MAG) of the Israeli military is responsible for examining and investigating offences committed during the course of operational activities, including allegations of violations of international humanitarian law. Victims, or human rights organisations acting on their behalf, are among those who may submit a complaint, but complaints do not automatically trigger a criminal investigation. A preliminary inquiry is held within the military chain of command, and based on an assessment of the findings, the MAG makes a decision whether to open a criminal investigation.⁸

On 11 April 2013, the MAG issued a public document on its website, setting out the status of the examination of complaints of alleged violations of international humanitarian law during ‘Pillar of Defence’ / ‘Pillar of Cloud’.⁹ It notes that “the IDF forces involved in attacks carried out during Operation ‘Pillar of Defence’ generally acted with utmost professionalism, and consistently implemented the Law of Armed Conflict”. Following an examination of an unspecified number of cases, the MAG stated that it found no basis for opening a criminal investigation in relation to approximately 65 incidents. With respect to the approximately 15 remaining incidents, additional inquiries had been ordered and a decision was pending.¹⁰ In most cases, no information is provided to justify the decision to close the case without opening a criminal investigation. In the handful of cases where information is provided on specific incidents, this information is

⁴ See Rule 158, Customary International Humanitarian Law; Article 146, Fourth Geneva Convention; General Comment No. 31 on the International Covenant on Civil and Political Rights, paragraph 15; 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 (A/RES/60/147 adopted by the General Assembly on 16 December 2005).

⁵ See Report of the Committee of Independent Experts appointed to monitor and assess any domestic, legal or other proceedings undertaken in light of General Assembly resolution 64/254 (relating to Operation Cast Lead), (A/HRC/15/50, para. 21), September 2010 at: http://www2.ohchr.org/english/bodies/hrcouncil/docs/15session/A.HRC.15.50_en.pdf.

⁶ See Rule 150, Customary International Humanitarian Law; Article 8, Universal Declaration of Human Rights; Article 2, International Covenant on Civil and Political Rights.

⁷ See, for example, the Addendum to the Report of the UN High Commissioner to the Human Rights Council (A/HRC/22/35/Add), supra note 1; B’Tselem, *Human Rights Violations During Operation Pillar of Defense*, May 2013 at: http://www.btselem.org/download/201305_pillar_of_defense_operation_eng.pdf; Human Rights Watch, *Israel: Gaza Airstrikes Violated Laws of War*, February 2013 at <http://www.hrw.org/news/2013/02/12/israel-gaza-airstrikes-violated-laws-war>, Al Mezan Center for Human Rights, *Field Report on Israel’s Attacks on Gaza*, December 2012 at: http://www.mezan.org/en/details.php?id=15976&ddname=IOF&id2=7&id_dept=22&p=center.

⁸ For information on concerns in relation to the military justice system and the investigations of offences against Palestinians, see, for example, Yesh Din, *Alleged Investigation: The Failure of Investigations into Offenses Committed by IDF Soldiers Against Palestinians*, August 2011 at: <http://yesh-din.org/userfiles/file/Reports-English/Alleged%20Investigation%20%5BEnglish%5D.pdf>.

⁹ For the document in full, see: http://www.law.idf.il/SIP_STORAGE/files/4/1364.pdf.

¹⁰ The document also stated that the MAG had received ‘dozens’ of additional complaints in the past weeks which were still to be considered.

of a general nature and fails to provide meaningful explanations for the decision.

The MAG has also responded by letter to 25 of the complaints submitted by human rights organisations in Gaza, stating in 11 instances that the case was under review, and in 14 instances that there was no evidence to justify the opening of a criminal investigation. Again, the information provided was general and vague. It is not clear to what extent these responses refer to the same cases referred to in the MAG document.

The cases reviewed and closed without criminal investigation by the MAG include the airstrike targeting the Al-Dalou family home on 18 November 2012 that killed 12 people, including five children and four women. This is one of the few cases for which the MAG document provides some information regarding the basis of its decision, stating that the casualties were caused as a result of an attack against a ‘senior terrorist operative and several other terrorists’. Various precautions were said to have been taken in the attack, including with regard to the choice of ammunition used. Operation staff were alleged to not have foreseen the extent of civilian harm that ensued. However, the MAG response fails to provide any factual information or detail to support its claims. This information would be important, for example, to enable a review of the MAG assertion that the attack was targeting a high-level combatant; while not discounting this possibility, human rights organisations have uncovered little information to indicate that this was the case. Furthermore, given that the three-storey house totally collapsed, and that numerous adjacent houses sustained damage, it is hard to understand how the extent of civilian harm could not have been foreseen.

The MAG decision not to open a criminal investigation into any case raises serious concerns about the lack of accountability for violations of international law.

Barriers to seeking redress for harm suffered as a result of Israeli actions

Human rights organizations in Gaza have submitted complaints to the Ministry of Defence seeking compensation for victims in 298 cases of death, injury and property damage arising from possible violations during ‘Pillar of Defence’ / ‘Pillar of Cloud’.

In order to seek a remedy for harm suffered in the Israeli civil court system, Palestinian victims and their lawyers face a myriad of procedural requirements and legal obstacles that are becoming increasingly insurmountable.

Firstly, a complaint must be submitted to the Compensation Officer in the Israeli Ministry of Defence within 60 days of the incident, providing notice of intent to file a civil claim. Legal action must be initiated in the Israeli civil court system within two years of the incident. These time-frames may be especially onerous when a large number of incidents occur in a short space of time. A limited amount of extra time may be given only at the court’s discretion and with special reason.

Upon the filing of the civil case in an Israeli court, court guarantees are payable, that cost on average approximately NIS 30,000 (USD 8,000) per case. The court guarantees payable by claimants have increased since a court ruling in 2011 that fees must be paid for each individual claimant within a case. In a large case with numerous victims, these fees are often prohibitive: for example, in the case of the Al-Samouni family in which 21 civilians were killed and 41 others were injured in one incident during Operation Cast Lead, the

court imposed a cost for all 62 victims claiming compensation, amounting to approximately USD 330,000.¹¹ Where cases are dismissed, claimants are charged with the State's defence costs, which are taken from the court guarantee.

An additional procedural obstacle is the requirement, reaffirmed by an Israeli court in February 2013, that powers of attorney from Gazan clients to Israeli lawyers must be authenticated in a face-to-face meeting in Israel, or, if not in Israel, in the presence of an Israeli diplomatic representative, consul or notary. Given the access restrictions on Gazans entering Israel to meet with legal representatives, this requirement is impracticable.¹²

Further, a significant legal obstacle is the expanded application of the *Torts (State Liability) Law*, which exempts the State of Israel from any civil liability for "an act done in the course of a military operation by the IDF". Various legislative amendments and judicial rulings have expanded the definition of a military operation and the range of acts that would fall under its scope. Most recently, in July 2012, Amendment No. 8 was passed (with retroactive application to 12 September 2005), also giving courts the power to dismiss cases that occurred during a military operation at the preliminary stage, without the hearing of witnesses or consideration of evidence.¹³ In February 2013, the Israeli Southern Central Court in Be'er Sheva court ruled that even if the victim could substantiate a claim that damage was sustained as a result of a violation of international humanitarian law, this would not be relevant.¹⁴

Between 7 and 17 February 2013, the Israeli Southern Central Court in Be'er Sheva dismissed 15 civil cases filed by Gazan human rights organisations. These cases sought compensation and reparations for deaths, injuries, and material losses suffered by Palestinian civilians due to alleged violations of international humanitarian law committed during Israeli military attacks, in particular during 'Operation Cast Lead' in December 2008 and January 2009. In dismissing 12 of these cases, the court relied upon Amendment 8. The court dismissed the remaining three cases for non-compliance with the procedural norms relating to the power of attorney. The dismissal of these cases is a major setback to the right of victims to access an effective remedy and justice, as it sets judicial precedents for future claims, including in relation to 'Pillar of Defence' / 'Pillar of Cloud'.

These cumulative procedural and legal obstacles have prompted discussions among some human rights and legal organisations regarding the cost and value of continued engagement with the Israeli civil court system to seek compensation for victims of violations committed during hostilities in Gaza, including in relation to 'Pillar of Defence' / 'Pillar of Cloud'.¹⁵

¹¹ Palestinian Centre for Human Rights, *Penalizing the Victim*, April 2013 at:

http://www.pchrgaza.org/portal/en/index.php?option=com_content&view=article&id=9449:penalising-the-victim&catid=47:special-reports&Itemid=191.

¹² See the case of *The heirs of al-Maqadma v. State of Israel*.

¹³ The *Torts (State Liability) Law* (8th Amendment) of 2012 amends paragraph 5 (B) of the original law to read: The state is able to invoke the no liability defense when damages occur as a result of a military operation. Courts should now consider this argument and have the power to dismiss cases on this preliminary ground, even without hearing witnesses or considering evidence.

¹⁴ See the cases of *The heirs of Arafat Abdul Dayem v. State of Israel* and *Salha v. State of Israel*.

¹⁵ See a joint statement highlighting concerns regarding the increasing barriers to accessing the civil courts for compensation: <http://www.pchrgaza.org/files/2013/2013-04-25%20Malaga%20Statement.pdf>.

Conclusion

Six months following the end of hostilities, the failure to open a criminal investigation into any case of civilian death or injury, and the cumulative impact of substantive and procedural obstacles on victims seeking redress for harm suffered, raise serious concerns about the right to access justice and an effective remedy. Urgent action is required by Israeli authorities to address this situation, and ensure accountability for violations of international law and an effective remedy for victims.

Transparency in the investigation of alleged violations of international law must be ensured. In light of the numerous reports documenting credible allegations of violations, Israel should provide justification of decisions not to open criminal investigations in relation to these incidents. Failure to do so may raise questions with regard to the willingness of Israel to ensure justice and accountability for violations of international law.

Recommendations

1. Israel must conduct an effective investigation into each case where there is reasonable suspicion of the commission of a war crime. Investigations must comply with the standards of independence, impartiality, thoroughness, promptness, effectiveness and transparency.
 - a. Each decision of the MAG not to open a criminal investigation must state the reasoning for the decision in order to ensure transparency. A sufficient level of detail must be provided to enable the review and appeal of these decisions by those affected.
 - b. In light of the inadequacies of the MAG response and lack of information provided, further information must be provided regarding the incidents during 'Pillar of Defence' / 'Pillar of Cloud' that have been examined to date by the MAG, the cases in which the decision has been made not to open a criminal investigation, and the cases which remain under examination.
2. Substantive and procedural barriers that prevent Palestinians in Gaza from accessing an effective remedy in the Israeli civil court system must be removed. In particular, the law should be amended to ensure that victims of violations can seek redress for harm suffered, even during the course of a 'military operation'.
3. Access restrictions that prevent Palestinians in Gaza from meeting with their legal representatives and attending court in Israel, which also undermine the right to an effective remedy, should be lifted.

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