Palestinian Centre for Human Rights (PCHR)

The Principle and Practice of Universal Jurisdiction:

PCHR's Work in the occupied Palestinian territory

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EXECUTIVE SUMMARY

'The Principle and Practice of Universal Jurisdiction' is released by the Palestinian Centre for Human Rights (PCHR) at a time when world attention is focused on the Gaza Strip.

Israel's conduct of hostilities during 'Operation Cast Lead' (27 December 2008 – 18 January 2009) provoked global shock and outrage, and drew international condemnation, while the subsequent report of the UN Fact Finding Mission (the Goldstone Report) focused international attention. PCHR and numerous other human rights organizations have documented and publicized Israel's alleged violations of international humanitarian law (IHL); many of which amount to war crimes and grave breaches of the Geneva Conventions. The widespread and systematic nature of these violations raise suspicion that Israel committed crimes against humanity in the Gaza Strip; an allegation not lightly made.

Yet despite this level of international attention, the State of Israel and suspected Israeli war criminals have not been held to account. Regrettably, this lack of accountability, and the resultant climate of impunity, has been a long-standing feature of Israel's occupation of Palestinian territory. Since the occupation began in 1967, neither the State of Israel, nor individuals suspected of committing war crimes, have been brought before a court and prosecuted in accordance with the norms of international law. Israel has been allowed to act as a State above the law; a reality

illustrated by the reaction of powerful States – lead by the U.S. – to the publication of the Goldstone Report. PCHR firmly believe that this lack of accountability serves to encourage continued violations of international law and to undermine respect for the rule of law itself. It is Palestinian civilians – the protected persons of IHL – who pay the price for this impunity, as they continue to suffer at the hands of a brutal and illegal occupation.

Judicial regulation is an essential component in ensuring respect for the rule of law and protecting victims: in order for the law to be relevant, it must be enforced. Those accused of violating international law must be investigated and prosecuted. This judicial process is essential, both to ensure victims' rights to an effective judicial remedy, and to combat impunity and promote deterrence. However, there are limited judicial mechanisms available to Palestinian victims of Israeli violations of international law.

According to the terms of the 1995 Israel-Palestine Interim Agreement on the West Bank and the Gaza Strip, the Palestinian National Authority (PNA) does not have jurisdiction over Israelis. This explicitly removes Israeli citizens, and members of its armed forces, from the jurisdiction of the PNA; no Israeli may be brought before a Palestinian court. This legally binding restriction effectively removes the Palestinian judicial system from the ambit of legal options available to victims.

The State of Israel is legally bound to investigate and prosecute Israeli citizens accused of committing international crimes. To date, however, Israel's investigations have proved inadequate, while prosecutions – particularly at the command level – have not been forthcoming. In this respect, Israel must be regarded as shirking its legal obligations, and denying its victims effective judicial remedy. 'The Principle and Practice of Universal Jurisdiction' outlines the inadequacies of the Israeli judicial system. It is presented that this system – as it relates to Palestinian victims of Israeli violations – does not meet necessary international standards with respect to the effective administration of justice. The Israeli authorities' presumption that all Palestinians are 'enemy aliens' or 'potential terrorists' has evident implications regarding the impartiality of the judiciary, the presumption of innocence, and the right to a fair trial. The hierarchical nature of the military, the ineffective manner in which investigations are conducted, and the lack of civilian oversight – as epitomised by the wide margin of discretion awarded by the Israeli Supreme Court – all combine to fundamentally frustrate the pursuit of justice.

Justice for Palestinians is not attainable within this system.

In order to overcome the PNA's lack of jurisdiction, and the

State of Israel's unwillingness to genuinely investigate and prosecute individuals suspected of committing war crimes, PCHR has turned to the principle of universal jurisdiction.

Universal jurisdiction is a legal principle which has evolved in order to overcome jurisdictional gaps in the international legal order. It is intended to ensure that those responsible for international crimes – which include genocide, crimes against humanity, grave breaches of the Geneva Conventions, and torture – are brought to justice. Universal jurisdiction is primarily enacted when States with a more traditional jurisdictional nexus to the crime (related, inter alia, to the place of commission, or the perpetrator's nationality) prove unable or unwilling to genuinely investigate and prosecute: when their legal system is inadequate, or when it is used to shield the accused from justice. As such universal jurisdiction does not represent an attempt to interfere with the legitimate affairs of the State; it is enacted as a last resort. Significantly, it is the horrific nature of international crimes which establish the basis of universal jurisdiction.

These crimes are considered so grave that they offend the international community as a whole; as such, it is in the interest of each and every State that those accused of such crimes be investigated and prosecuted.

'The Principle and Practice of Universal Jurisdiction' traces the evolution of universal jurisdiction, analyzing its underlying motivation, and the relevant post-Second World War jurisprudence. It highlights the goals associated with international criminal prosecutions, particularly as these relate to combating impunity, promoting deterrence, and ensuring victims' rights to an effective judicial remedy. It is concluded that universal jurisdiction constitutes an essential, long-established component of international law. The underlying elements of those crimes which form the basis of universal jurisdiction are presented and analysed.

In light of the widespread requirement that States prove themselves unable or unwilling genuinely to investigate and prosecute those suspected of international crimes prior to resort to universal jurisdiction, the requirements of international law with respect to the effective administration of justice are presented and analyzed.

PCHR's universal jurisdiction case history, and the Centre's efforts aimed at promoting awareness of universal jurisdiction issues are also highlighted. This information is presented as a resource, in order to highlight how cases are taken, and the practical and political problems surrounding the pursuit of universal jurisdiction.

'The Principle and Practice of Universal Jurisdiction'

concludes that universal jurisdiction is the only available legal mechanism capable of ensuring Palestinian victims right to an effective judicial remedy. In the broader context, universal jurisdiction is also an essential tool in the fight against impunity. As long as individuals and State are granted impunity, they will continue to violate international law: civilians will continue to suffer the often horrific consequences.

Universal jurisdiction is presented as stepping stone on the road to universal justice, whereby the protections of international law may be extend to all individuals without discrimination.

1. INTRODUCTION

'The Principle and Practice of Universal Jurisdiction' is released by the Palestinian Centre for Human Rights (PCHR) at a time when world attention is focused on the Gaza Strip. Israel's conduct of hostilities during 'Operation Cast Lead' (27 December 2008 – 18 January 2009) provoked global shock and outrage, and drew international condemnation, while the subsequent report of the UN Fact Finding Mission (the Goldstone Report) focused international attention. PCHR and numerous other human rights organizations have documented and publicized Israel's alleged violations of international humanitarian law (IHL); many of which amount to war crimes and grave breaches of the Geneva Conventions. The widespread and systematic nature of these violations raise suspicion that Israel committed crimes against humanity in the Gaza Strip; an allegation not lightly made.

Yet despite this level of international attention, the State of Israel and suspected Israeli war criminals have not been held to account. Regrettably, this lack of accountability, and the resultant climate of impunity, has been a long-standing feature of Israel's occupation of Palestinian territory. Since the occupation began in 1967, neither the State of Israel, nor individuals suspected of committing war crimes, have been brought before a court and prosecuted in accordance with the norms of international law. Israel has been allowed to act as a State above the law; a reality illustrated by the reaction of powerful States – lead by the U.S. – to the publication of the Goldstone Report.

PCHR firmly believe that this lack of accountability serves to encourage continued violations of international law and to undermine respect for the rule of law itself. It is Palestinian civilians – the protected persons of IHL – who pay the price for this impunity, as they continue to suffer at the hands of a brutal and illegal occupation.

In order to overcome the State of Israel's unwillingness to genuinely investigate and prosecute individuals suspected of committing war crimes, PCHR has turned to the principle of universal jurisdiction. This principle holds that 'international crimes' – such as grave breaches of the Geneva Conventions, crimes against humanity, and torture – are of such seriousness that they affect the international community as a whole. Consequently, national courts, acting as agents of the international community, are granted jurisdiction, despite the lack of a traditional jurisdictional nexus to the crime: they may investigate, try, and prosecute those suspected of committing international crimes.

This booklet is intended to provide information on the principle and practice of universal jurisdiction. In recent years, following the codification of the Statute of the International Criminal Court (ICC) and the Pinochet trial in particular, universal jurisdiction has emerged as a practical and prominent legal mechanism. High profile cases, such as that of Pinochet, the Guatemalan Generals, Hissène Habré, and PCHR's own efforts against senior members of the Israeli military and political establishment, have caught the attention of the media and State officials. The horrific nature of international crimes, and the high political standing of those accused, has given rise to significant controversy, and in some instances an aggravation of inter-

State tension. Those prosecuting universal jurisdiction cases have been accused of manipulating international law for political purposes. In order to refute these allegations, and to inform the debate, this booklet has a twofold purpose. First, it addresses the principle of universal jurisdiction itself, detailing its underlying motivation, its evolution, and its application in the post-second world war period. It is intended that this aspect of the booklet will explain the purpose and utility of universal jurisdiction, illustrating why such cases are pursued. Second, the legal mechanisms available to Palestinian victims of Israeli violations are examined. This aspect of the booklet draws universal jurisdiction into the Palestinian context, examining the available legal mechanisms in light of the requirements of international law, and illustrating why the pursuit of universal jurisdiction is of such fundamental necessity if victims' rights are to be protected, and the rule of law upheld.

In order to illustrate PCHR's own work in the field of

universal jurisdiction, the second half of this booklet provides an overview of PCHR's case history, and some of the conferences which PCHR has organized in order to increase knowledge of universal jurisdiction issues and to facilitate cooperation among lawyers and human rights defenders.

It must be emphasized that the utility of universal jurisdiction is not restricted to the occupied Palestinian territory (oPt). The incomplete ratification of the Statute of the International Criminal Court (ICC), and the international political climate, contribute to a situation whereby countless victims throughout the world are denied an effective judicial remedy. This situation serves to prolong individual suffering, to encourage impunity, and, ultimately, to undermine respect for the rule of law. Universal jurisdiction is a long-established legal mechanism; the crimes which give rise to universal jurisdiction are universally recognized and condemned. The pursuit of universal jurisdiction is, above all else, the pursuit of justice. It seeks to ensure an effective remedy for victims – combined with the goal of deterrence – and accountability for those responsible for crimes which 'shock the conscience of humanity'. Universal jurisdiction may be considered as a stepping stone on the path to universal justice, whereby the protections of, inter alia, international human rights law and international humanitarian law, are guaranteed to all individuals on the basis of equality, and shared humanity.

Section 2 will outline the origin and evolution of universal jurisdiction, paying particular attention to recent jurisprudence. Issues of individual criminal responsibility and immunity will also be explained, given their relevance to the prosecution of senior State figures. In order to elucidate the motivations underlying the pursuit of universal jurisdiction and individual criminal responsibility, section 3 will discuss impunity and deterrence. Section 4 analyses the underlying elements of the international crimes which form the basis of universal jurisdiction, while section 5 details examples of international crimes committed by Israeli forces during Israel's offensive on the Gaza Strip. Section 6 outlines international standards with respect to the effective administration of justice, in light of the widespread requirement that a State with primary jurisdiction prove itself unwilling or unable genuinely to investigate alleged war criminals prior to the pursuit of universal jurisdiction. Section 7 examines the legal options available to Palestinian victims of Israeli war crimes, paying particular attention to the mechanisms of the Israeli legal system. Section 8 outlines PCHR's universal jurisdiction case history, while section 9 focuses on some of PCHR's efforts to further the understanding and practice of universal jurisdiction.

Annexed to this report are two papers presented at a universal jurisdiction conference organized by PCHR in Cairo, November 2008. They detail the practitioners experience with respect to the pursuit of universal jurisdiction in the United Kingdom and Spain.

1.1. Applicable Legal Framework

In order to ensure clarity, the bodies of law applicable to the current situation in the oPt – including those obligations which bind the State of Israel – must be briefly outlined.

The situation between the State of Israel and the Palestinians is one of international armed conflict and belligerent occupation. As such, the applicable bodies of international humanitarian law (IHL) include the four Geneva Conventions of 1949,[1] the Hague Regulations of 1907, and customary IHL. The Additional Protocols to the Geneva Conventions are also relevant. Although the State of Israel has not ratified the Protocols, they were intended to expound upon the provisions codified in the Fourth Geneva Convention, particularly as these relate to the principle of distinction, and the conduct of hostilities. As such, they are of primary interpretive relevance. Certain provisions within the Additional Protocols have gained the status of customary international law and are thus legally binding on all States.

As a State Party to the major international human rights law treaties – including the International Covenant on Civil and Political Rights,[2] the International Covenant on Economic, Social and Cultural Rights,[3] and the Convention on the Rights of the Child (CRC)[4] – Israel is also bound by its human rights law obligations. In its Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, the International Court of Justice confirmed the extraterritorial application of the ICCPR, the ICESCR, and the CRC with respect to Israel's actions in the occupied Palestinian territory.[5] The ICCPR is particularly relevant to the current discussion: Article 2 concerns the right to an effective remedy, Article 14 contains the right to a fair trial, while Article 26 affirms that all people are entitled to the protection of the law.

1 Israel's date of ratification.

2 Israel ratified the ICCPR on 3 Jan., 1992.

3 Israel ratified the ICESCR on 3 Jan., 1992.

4 Israel ratified the CRC on 2 Nov., 1992.

5 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C. J. 136 (July 9) §111, §112, §113.

2. TRADITIONAL JURISDICTION AND THE EVOLUTION OF UNIVERSAL JURISDICTION

2.1. Jurisdictional Bases

Legally defined, jurisdiction is "the authority of states to prescribe their law, to subject persons and things to adjudication in their courts and other tribunals, and to enforce their law, both judicially and nonjudicially";[6] jurisdiction may be civil, or criminal.[7] There are five widely acknowledged bases of prescriptive jurisdiction: nationality, territoriality, the protective principle, the passive personality principle,[8] and universal jurisdiction. Consequently, jurisdiction may be exercised: if the accused is a national of the State (nationality), if the alleged crimes occurred on the forum state's territory (territoriality), to protect a state's interests (the protective principle), or if the alleged criminal action harmed a national of the state (the passive personality principle). In order to legitimise the exercise of jurisdiction all of these bases require a direct connecting link, or nexus, between the state and the alleged crime. Universal jurisdiction, however, requires no such nexus. Indeed, negatively defined, universal jurisdiction "means that there is no link

6 Restatement (Third) of the Foreign Relations Law of the United States, pt. IV, 1987, §402(1)(a).

7 Kate Parlett, Universal Civil Jurisdiction for Torture, European Human Rights Law Review 4, 385, 385 (2007).

8 In International Court of Justice, Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium) [Arrest Warrant], 2002 I.C.J., Judgment (February 2002) the passive personality principle, was not generally accepted but was, however, acknowledged in the separate opinion of the Judges Higgins, Kooijmans and Buergenthal.

of territoriality or nationality between the State and the conduct of the offender, nor is the State seeking to protect its security or credit."[9] Rather, it is the crime itself that forms the basis of jurisdiction: some crimes, typically referred to as international crimes, are considered so heinous that they affect the international community as a whole. In 1948 the U.S. Military Tribunal, in US v. List and others, defined an 'international crime' as an "act universally recognised as criminal, which is considered a grave matter of international concern and for some valid reason cannot be left within the exclusive jurisdiction of the state that would have control over it under ordinary circumstances."[10] The gravity of the crime itself serves as the basis of jurisdiction.

2.2. The Evolution of Universal Jurisdiction

Universal jurisdiction was first applied to the crime of piracy. Indeed, even "[b]efore International Law in the modern sense of the term was in existence, a pirate was already considered an outlaw, a 'hostis humani generis' [enemy of the human race]."[11] Given the nature of piracy, the locus delicti (scene of the crime), is a key premise underlying the principle of universal jurisdiction. With respect to piracy, the crimes invariably occurred on the 'high seas', i.e. in international waters not subject to any individual State's jurisdiction. Consequently, in the interests of justice, jurisdiction was awarded to any State who apprehended a pirate. In the modern era, a second underlying premise is also relevant, international crimes are regarded as so "threatening to the international community or so heinous in scope and degree that they offend the interest of all humanity".[12] Such crimes are thus crimes against the international community itself, and therefore fall within each State's jurisdiction.

Until the post-second world war trials, piracy and slave-trading were the only crimes subject to universal jurisdiction. However, the concept was soon expanded, in keeping with the growth of the international legal order,[13] to accommodate two new classes of crime: war crimes and crimes against humanity.[14] These crimes are of such

9 L. Reydams, Universal Jurisdiction, International and Municipal Legal Perspectives, 5 (2003).

10 Quoted in, Claus Kress, Universal Jurisdiction over International Crimes and the Institut de Droit International, 4 Journal of International Criminal Justice, 561 (2006).

11 L. Oppenheim, International Law, 609 (8th ed., 1955).

12 Michael P. Scharf, Application of Treaty-Based Universal Jurisdiction to Nationals of Non-Party States, 35 New England Law Review 2, 363, 369 (2001).

13 Bartram S. Brown, The Evolving Concept of Universal Jurisdiction, 35 New England Law Review 2, 383 (2001).

14 UN General Assembly Resolution 95(1) of 1946, reiterating the principles in the Nuremberg Charter and Judgment. Crimes against humanity has now been defined in the Rome Statute of the International Criminal Court to include a number of acts committed as part of a widespread or systematic attack directed against any civilian population, including murder, enslavement, deportation or forcible transfer of population, imprisonment in violation of international law, torture, rape, sexual slavery, persecution of a group, enforced disappearance and apartheid.

horrific severity that they shock the conscience of humanity and so constitute international crimes, giving rise to the application of universal jurisdiction. Equally, those who commit such crimes are deemed, along with pirates and slave-traders, to be hostis humani generis.[15] In this respect it is worth noting the decision in re Eisentrager where it was stressed that, "A war crime … is not a crime against the law or criminal code of any individual nation, but a crime against the jus gentium [the law of nations]. The laws and usages of war are of universal application, and do not depend for their existence upon national laws and frontiers. Argument to the effect that only a sovereign of the locus crimis [the place of the crime] has jurisdiction and that only the lex loci [the local laws] can be applied, are therefore without any foundation."[16] Evidently, the international legal order "has a fundamental interest in upholding the integrity and credibility of the [international legal] system by prosecuting those who violate its basic injunctions."[17]

An additional basis for the application of universal jurisdiction to these crimes may arise owing to their place of commission; crimes against humanity and war crimes often occur in situations where the territorial State, or the State where the accused holds national residence are unlikely to exercise jurisdiction, "because, for example, the perpetrators are State authorities or agent's of the state."[18] In such a situation, similar to that of a pirate on the high seas, the crimes effectively occur outside a State's jurisdiction – given the unwillingness to prosecute – and so responsibility must fall on the international community, or on individual State's acting as agents thereof.[19] The International Law Commission (ILC) in principle VI of the Principles of International Law Recognized in the Charter of the Nüremberg Tribunal and in the Judgment of the Tribunal subsequently confirmed that crimes against humanity and war crimes rise to the level of international crime.[20] These principles are now recognised as being indicative of customary international law.[21]

15 Leila Nadya Sadat, Redefining Universal Jurisdiction, 35 New England Law Review 2, 241, 244 (2001).

16 Quoted in, Kenneth C. Randall, Universal Jurisdiction Under International Law, 66 Texas Law Review, 785, 810 (1988).

17 Georges Abi-Saab, The Proper Role of Universal Jurisdiction, 1 Journal of International Criminal Justice 3, 596, 597 (2003).

18 Michael P. Scharf, Application of Treaty-Based Universal Jurisdiction to Nationals of Non-Party States, 35 New England Law Review 2, 363, 369 (2001).

19 Christopher C Joyner, Arresting Impunity: The Case for Universal Jurisdiction in Bringing War Criminals to Accountability, 59 Law and Contemporary Problems 4, 153, 166 (1996).

20 International Law Commission, Principles of International Law Recognized in the Charter of the Nüremberg Tribunal and in the Judgment of the Tribunal in Report of the International Law Commission Covering its Second Session, 5 June-29 Duly 1950, Document A/1316, 11-14.

21 "On 11 December 1946 the UN General Assembly unanimously adopted Resolution 95, whereby it 'affirmed' 'the principles recognized by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal'. ... All of these Principles, Israel's Supreme Court noted in Eichmann, 'have become part of the law of nations and must be regarded as having been rooted in it also in the past'." - Antonio Cassese, When May Senior State Officials be Tried for International Crimes? Some Comments on the Congo v. Belgium Case, 13 European Journal of International Law 4, 853, 872 (2002).

2.3. The Exercise of Universal Jurisdiction

A national court exercising universal jurisdiction does not act in its own name uti singulus (a special interest),[22] but instead may be seen as a de facto agent of the international community; a collective entity who's declared values the proceedings vindicate.[23] Further, it seems that, at the level of customary international law, universal jurisdiction may only be exercised as a substitute for other countries who would be in a better position to prosecute – i.e. the state in whose territory the crime was actually committed – but for some reason do not. This is evidenced by the Rome Statute, whereby the ICC may only assume jurisdiction if a State which has jurisdiction over the crime is unwilling or unable to genuinely carry out the investigation or prosecution. Such inability or unwillingness may arise consequent to, inter alia, inept or corrupt legal systems, or in the event of a sham trial designed to shield the accused from international justice. Universality therefore represents a jurisdiction of last resort, as recently emphasised by the Spanish Tribunal Supremo in the Guatemalan Generals case.[24]

2.4. Universal Jurisdiction in the Modern Era

In the aftermath of the post-Second World War trials universal jurisdiction enjoyed a significant level of evolutionary codification and development. As such, the modern evolution of universal jurisdiction may be looked at in terms of two components: first, treaty based universal jurisdiction obligations and, second, the implementation of the principle of universal jurisdiction at the legislative and judicial level.

2.4.1. Treaty Based Universal Jurisdiction Obligations

Various post-war Conventions specifically address State's jurisdictional competency over crimes with which they have no direct connection; prominent among these are the Geneva Conventions of 1949. Common Article 1 of the Conventions places an obligation on all High Contracting Parties to, "respect and ensure respect for the present Convention in all circumstances."[25] The official ICRC Commentary on the Conventions notes that the phrase 'ensure respect' demands "that the Contracting Parties should not be content merely to apply its provisions themselves, but should do everything in their power ensure

22 Georges Abi-Saab, The Proper Role of Universal Jurisdiction, 1 Journal of International Criminal Justice 3, 596, 601 (2003).

23 Bruce Broomhall, Towards the Development of an Effective System of Universal Jurisdiction for Crimes Under International Law, 35 New England Law Review 2, 399, 403 (2001).

24 See further, Antonio Cassese, When May Senior State Officials be Tried for International Crimes? Some Comments on the Congo v. Belgium Case, 13 European Journal of International Law 4, 853 (2002).

25 Emphasis added.

that the humanitarian principles underlying the Convention are applied universally",[26] while 'in all circumstances' emphasizes that "no Contracting Party can offer any valid pretext, legal or otherwise, for not respecting the Convention in its entirety."[27] To this end, the four Geneva Conventions also contain a common article which requires that, regarding grave breaches of the Conventions, "[e]ach High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts."[28] The U.K. Manual of the Law of Armed Conflict explains the motivation behind the codification of this article:

The Geneva Conventions 1949 introduced a new concept, that of "grave breaches". These are war crimes of such seriousness as to invoke universal jurisdiction. Universal jurisdiction entitles any state to exercise jurisdiction over any perpetrator, regardless of his nationality or the place where the offence was committed. In the case of grave breaches, states are obliged to introduce legislation to this effect.[29]

The Geneva Conventions now enjoy virtual universal ratification, and grave breaches of the Conventions – as defined in, inter alia, Article 147 of the Fourth Geneva Convention – are considered to form part of customary international law.[30] To this end, all States must exercise effective universal jurisdiction over a grave breach of the Geneva Conventions, indeed, they are under an obligation to implement appropriate enabling national legislation. As noted in the ICRC Commentary to Article 146 of the Fourth Geneva Convention, "The obligation on the High Contracting Party to search for persons accused to have committed grave breaches imposes an active duty on them. As soon as a Contracting Party realizes that there is on its territory a person who has committed such a breach, its duty is to ensure that the person concerned is arrested and prosecuted with all speed."[31]

Similarly, the 1987 United Nations Convention against Torture requires that, each State Party "in whose territory a person alleged to have committed" the crime of torture "is present shall take him into custody or take other legal measures to ensure his presence."[32] Article 7 confirms this obligation through the application of the aut

26 ICRC Commentary to the Fourth Geneva Convention 1949, p. 16.

27 ICRC Commentary to the Fourth Geneva Convention, p. 16.

28 Art. 49 GC I, Art. 50 GC II, Art. 129 GC III, Art. 146 GCIV. Emphasis added.

29 U.K. Manual of the Law of Armed Conflict, para 16.23

30 International Committee of the Red Cross, States Parties to the Following International Humanitarian Law and Other Related Treaties as of 7-Jul-2008, Jul. 7, 2008, available at http://www. icrc.org/ihl.nsf. Accessed on Nov. 4, 2008.

31 ICRC Commentary to the Fourth Geneva Conventions 1949, p. 593. Emphasis added.

32 CAT, Art. 6(1).

dedere, aut judicare (extradite or prosecute) principle, which requires that states either prosecute or extradite an alleged torturer. Evidently, State Parties to the CAT are obliged to exercise effective universal jurisdiction with respect to the crime of torture. It is worth noting that, consequent to the jus cogens (compelling law) nature of the crime, torture committed in States not party to the CAT can be prosecuted elsewhere on the basis of universal jurisdiction;[33] a finding reinforced by the ICTY in Furundzija.[34]

Significantly, Article 8 of the ILCs Draft Code of Crimes against the Peace and Security of Mankind also provides for universal jurisdiction with respect to genocide, crimes against humanity and war crimes.[35] Indeed, the ILC Commentary expressly states that, "The phrase 'irrespective of where or by whom those crimes were committed' is used in the first provision of the article to avoid any doubt as to the existence of universal jurisdiction for those crimes."[36] The principle of universal jurisdiction is also recognized in the preamble to the Rome Statute, which recalls "that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes".[37] A number of other treaties, inter alia, the Convention for the Suppression of Unlawful Seizure of Aircraft, the International Convention Against the Taking of Hostages, and the Convention on the Suppression and Punishment of Apartheid, also place similar universal jurisdiction obligations on States Parties.

2.4.2. Jurisprudence Relating to Universal Jurisdiction in the Modern Era

The purpose of this section is to analyze the jurisprudence relating to the contemporary exercise of universal jurisdiction. As universal jurisdiction is "one of international law's most controversial topics",[38] and given that its practice has only recently been reinvigorated, its standing within the international legal order must be evaluated. The case law will thus be examined in order to determine, first, whether or not universal jurisdiction is universally accepted and, if so, in what form, and second, what crimes come within its scope.

The 1961 trial of Adolf Eichmann is perhaps the most famous of the early (post- Second World War) universal

33 Kate Parlett, Universal Civil Jurisdiction for Torture, European Human Rights Law Review 4, 385, 385 (2007).

34 Prosecutor v. Furundzija, Case No. IT-95-17/1-T, Judgment (Dec. 10, 1998) §140.

35 Article 8.

36 International Law Commission, Principles of International Law Recognized in the Charter of the Nüremberg Tribunal and in the Judgment of the Tribunal in Report of the International Law Commission Covering its Second Session, 5 June-29 Duly 1950, Document A/1316, 11-14, Commentary 29.

37 Rome Statute, Preamble, para. 6.

38 Roger O'Keefe, Universal Jurisdiction – Clarifying the Basic Concept, 2 Journal of International Criminal Justice 3, 735, 736 (2004).

jurisdiction cases. This case concerned the prosecution of Eichmann, a former SS-Obersturmbannführer, on charges of crimes against humanity, war crimes, and "crimes against the Jewish people".[39] Though the court had domestic jurisdiction, pursuant to Section 1 of the Nazis and Nazi Collaborators (Punishment) Law, 5710-1950, the Court also based its "right to punish"[40] on the universal character of the alleged crimes. In justifying its use of universal jurisdiction the Court held that international crimes "are grave offences against the law of nations itself",[41] and that, in the absence of an international court, the judicial and legislative organs of every country must endeavour to bring effect to international law's legal injunctions, and to bring criminals to trial.[42]

This argument coherently explains the motivation underlying the application of universal jurisdiction, while affirming the important role that the principle plays in the international legal system. Significantly, Eichmann also confirmed the demise of functional immunity for international crimes; quoting the International Military Tribunal at Nuremberg, the Court held that: "[t]he principle of international law which, under certain circumstances, protects the representatives of a state, cannot be applied to acts which are condemned as criminal by international law."[43] Eichmann was convicted of war crimes, crimes against humanity, and "crimes against the Jewish people",[44] and sentenced to death. The universality principle was later confirmed in Demjanjuk v. Petrovsky, where an American Court held that universal jurisdiction is "based on the assumption that some crimes are so universally condemned that the perpetrators are the enemies of all people. Therefore, any nation which has custody of the perpetrators may punish them according to its law applicable to such offenses."[45] This sentiment was also roundly endorsed by the Spanish Constitutional Court in Guatemalan Generals:[46] "The international … prosecution which the principle of universal justice seeks to impose is based exclusively on the specific characteristics of the crimes which are subject to it, where the damage (as in the case of genocide) transcends the specific victims and affects the International Community as a whole."[47]

39 The constitutive elements of 'crime against the Jewish people', are similar to those of genocide, but limited to one specific group, §16.

40 The State of Israel v. Eichmann, Cr.C. (Jm) 40/61, 45 P.M. 3, part II, (1961), §11.

41 Id., §12.

42 Id.

43 Id., §28.

44 Again, the constitutive elements of this crime are similar to those of genocide, but limited to one specific group. Id., §244.

45 Demjanjuk v. Petrovsky. 776 F.2d 571, §582. Quoted in Monroe Leigh, Demjanjuk v. Petrovsky. 776 F.2d 571, 80 American Society of International Law 3, 656, 658 (1986).

46 Guatemala Genocide, Judgment No. STC 237/2005 (Tribunal Constitucional Sept. 26, 2005), available at http://www.tribunalconstitucional.es/Stc2005/STC2005-237.htm.

47 Quoted in Anthony J. Colangelo, Double Jeopardy and Multiple Sovereigns: A Jurisdictional Theory, SMU Dedman School of Law Legal Studies Research Paper Number 00-19, p.21.

The landmark Pinochet cases taken in the United Kingdom and Spain signalled a revitalisation of the principle of universal jurisdiction.[48] The House of Lords discussion raised two significant issues: first, as this was the first major universal jurisdiction case dealing with international crimes committed after the Second World War, it confirmed the broad application of universal jurisdiction, and; second, the alleged crimes were committed while the accused was a Head of State, thereby raising interesting questions with respect to immunity. In fact, Pinochet was the first trial wherein the former Head of State of a foreign country was held accountable for acts of torture allegedly committed while he was in his post.[49] Confirming the application of universal jurisdiction for international crimes, Lord Browne-Wilkinson noted that "[s]ince the Nazi atrocities and the Nuremberg trials, international law has recognised a number of offences as being international crimes. Individual states have taken jurisdiction to try some international crimes even in cases where such crimes were not committed within the geographical boundaries of such states."[50] With respect to immunity, though it was acknowledged that "[i]t is a basic principle of international law that one sovereign state (the forum state) does not adjudicate on the conduct of a foreign state",[51] and that an incumbent head of State will enjoy personal immunity while in office, there can be "no immunity from prosecution for the charges of torture and of conspiracy to torture [international crimes] which relate to the period after that date";[52] the House of Lords thus confirmed that functional immunity cannot extend to international crimes, building on the judgments of the Nuremberg Trials, and inter alia, the decisions in Eichmann, Furundzija and Demjanjuk.

The issue of universal jurisdiction and functional immunity was also addressed by the International Court of Justice in Arrest Warrant. This case concerned the issuance of an arrest warrant against the incumbent Minister for Foreign Affairs of the Democratic Republic of the Congo (DRC), Mr. Abdulaye Yerodia Ndombasi; Belgium issued the arrest warrant pursuant to a domestic law allowing for the prosecution of international crimes on the basis of universal jurisdiction. In the event the Court did not specifically deal with the issue of universal jurisdiction – though it was discussed in detail in a number of dissenting

48 Bruce Broomhall, Towards the Development of an Effective System of Universal Jurisdiction for Crimes Under International Law, 35 New England Law Review 2, 399, 399 (2001).

49 Andrea Bianchi, Immunity versus Human Rights: The Pinochet Case, 10 European Journal of International Law 2, 237, 237 (1999).

50 Regina v. Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet Regina v. Evans and Another and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet (On Appeal from a Divisional Court of the Queen›s Bench Division), House of Lords, Mar. 24, 1999. Lord Browne-Wilkinson.

51 Id.

52 Lord Hope of Craighead, Id.

opinions[53] – as the DRC failed to contest Belgium's exercise of universal jurisdiction in its final submission.[54] With respect to immunity, the Court held conclusively that customary international law protects an incumbent Foreign Minister.[55] The Court stressed, however, that immunity does not mean impunity, and that "criminal jurisdiction and individual criminal responsibility are quite separate concepts."[56] Consequently, the Court listed a number of instances in which the immunities enjoyed by an incumbent Foreign Minister would not represent a bar to criminal prosecution: trial in their own countries, waiver of immunity by the State they represent, loss of immunity due to loss of office, and trial before certain international criminal courts.[57]

Subsequent to Arrest Warrant there have been a number of successful universal jurisdiction prosecutions. In the United Kingdom, Zardad was convicted of torture committed in Afghanistan between 1992 and 1996,[58] while in the Netherlands, Heshamuddin Hesam and Habibulla Jalalzoy were convicted of torture committed in Afghanistan between 1978 and 1992;[59] Belgium, France and Spain have also concluded successful universal jurisdiction prosecutions.[60] Additionally, there has been a significant number of universal jurisdiction prosecutions in the United States, under the Alien Tort Claims Act, which enables universal civil jurisdiction for violations of the laws of nations (customary international law), and U.S.

Treaty Law.[61] Prominent cases include Filartiga v. Pena-Irala, and Kadic v Karadzic.[62]

It is perhaps appropriate to end this analysis with the case of Guengueng et al v Senegal which deals with the trial of Hissène Habré, the former Chadian head of State, in Senegal.[63] In Guengueng the Committee Against Torture found that, by not exercising universal jurisdiction, Senegal was in fact in breach of its obligations with respect to the

53 See further, Antonio Cassese, When May Senior State Officials be Tried for International Crimes? Some Comments on the Congo v. Belgium Case, 13 European Journal of International Law 4, 853, (2002).

54 Arrest Warrant §41.

55 Id., §58.

56 Id., §60.

57 Id., §61.

58 The case has not yet been published. For details see, Afhgan Zardad Jailed for 20 Years, BBC, Jul. 19, 2005. For original hearing, R. v. Zardad, Case No. T2203 7676, Central Criminal Court, Apr. 7, 2004.

59 Guenael Mettraux, Dutch Court's Universal Jurisdiction over Violations of Common Article 3 qua War Crimes, 4 Journal of International Criminal Justice, 326 (2006).

60 Human Rights Watch, Universal Jurisdiction in Europe: The State of the Art, Volume 18, No. 5(D), June 2006, p.3.

61 In practice, violations of U.S. Treaty law are not prosecuted under the Alien Tort Statute, as a result of U.S. doctrine that bars the use of treaties as a source of authority for law suits without explicit Congressional authorization.

62 Filártiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980) Karadic v. Karadzic, 70 F.3rd 232 (2nd Cir. 1995).

63 Guengueng v. Senegal, Communication No. 181/2001, CAT/C/36/D/181/2001, May 19, 2006.

Convention against Torture. This is a hugely significant finding as "it is the first time that breaches of the universal jurisdiction obligations of CAT have been found in an individual complaint."[64] This case unambiguously confirms that, consequent to Articles 5(2) and 7, CAT contains an individual right with respect to universal jurisdiction. The Committee also noted that, "the obligation to prosecute the alleged perpetrator of acts of torture does not depend on the prior existence of a request for his extradition."[65]

This case confirms, explicitly, that a State Party is under an obligation to exercise universal jurisdiction with respect to the international crime of torture.

It is worth briefly discussing – given their centrality to the modern practice of universal jurisdiction – two additional issues that arose from the Nuremberg Trials: first, individual criminal responsibility and command responsibility, and second the concept of immunity for official acts.

2.4.3. Individual Criminal Responsibility and Command Responsibility

The concepts of individual criminal responsibility, and command responsibility were perhaps most famously brought to the world's attention following the judgments of the International Military Tribunal at Nuremburg, and the International Military Tribunal for the Far East. The Nuremberg Principles hold that, "[a]ny person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment."[66] The motivation for such responsibility was eloquently stated by the International Military Tribunal at Nuremberg, in general terms, "[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced".[67] This principle, which is now recognised as a well established element of customary international law,[68] means that international crimes can no longer be attributed to acts of state: the perpetrator will bear individual responsibility, and may be punished accordingly. The principle of individual responsibility has been codified in Article 25 of the Rome Statute, and has been endorsed, inter alia, by the ICTY in Furundzija.[69] It is now a well established

64 Sarah Joseph, Committee against Torture: Recent Jurisprudence, 6 Human Rights Law Review 3, 571, 577 (2006).

65 Guengueng v. Senegal, Communication No. 181/2001, CAT/C/36/D/181/2001, May 19, 2006. §6.3.

66 ILC supra note 31, Principle 1.

67 Trials of the Major War Criminals Before the International Military Tribunal, Vol. I, p. 223.

68 See Cassese, supra note 23, also: "Article 6 of the Nuremberg Charter has since come to represent general international law." I. Brownlie, Principles of Public International Law, 562 (1991).

69 Prosecutor v. Furundzija, Case No. IT-95-17/1-T, Judgment (Dec. 10, 1998) §140.

principle of customary international law that individuals are criminally responsible for war crimes they commit.[70] Additional Protocol I elaborates on the duty of commanders a discussion pertinently relevant to the issue of command and superior responsibility. Article 87(1) states that: "The High Contracting Parties and the Parties to the conflict shall require military commanders, with respect to members of the armed forces under their command and other persons under their control, to prevent and, where necessary, to suppress and to report to competent authorities breaches of the Conventions and of this Protocol."[71] The ICRC Commentary notes that the adoption of this requirement the drafters justifiably considered that commanders had the means to ensure respect for the Conventions:

In the first place, they are on the spot and able to exercise control over the troops and the weapons which they use.

They have the authority, and more than anyone else they can prevent breaches by creating the appropriate frame of mind, ensuring the rational use of the means of combat and by maintaining discipline. Their role obliges them to be constantly informed of the way in which their subordinates carry out the tasks entrusted to them, and to take the necessary measures for this purpose. Finally, they are in a position to establish or ensure the establishment of the facts, which would be the starting point for any action to suppress or punish a breach.[72]

The Hadzihasanovic Trial Chamber of the ICTY noted that: "the role of a commander is decisive for the proper application of the [Geneva] Conventions and Additional Protocol I and to avoid a fatal gap between the undertakings entered into by parties to the conflict and the conduct of individuals under their control. A superior must therefore provide structure for his subordinates to ensure they observe the rules of armed conflict and must also prevent the violation of these norms. As noted in the Halilovic Judgement, a commander's overall obligation to prevent the commission of crimes by his subordinates arises from the importance which international humanitarian law places on the prevention of violations of its norms."[73]

Customary international law holds that commanders and other superiors are criminally responsible for war crimes committed pursuant to their orders.[74] A commander will be responsible for any international crimes committed by forces under their effective control if they "either knew or, owing to the circumstances at the time, should have

70 ICRC, Customary International Humanitarian Law, 2005, Rule 151.

71 Article 87(1), Additional Protocol I.

72 ICRC Commentary, Additional Protocol I, §3560.

73 Prosecutor v. Hadzihasanovic, Case No. IT-01-47-T, 15 March 2006, §143, 144.

74 ICRC, Customary International Humanitarian Law, 2005, Rule 152.

known that the forces were committing or about to commit such crimes",[75] and "failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution."[76] The Galic Trial Chamber of the ICTY thus held that: "In situations where a person in authority under duty to suppress unlawful behaviour of subordinates of which he has notice does nothing to suppress that behaviour, the conclusion is allowed that that person, by positive acts or culpable omissions, directly participated in the commission of the crimes."[77] The doctrine of command/superior responsibility has been codified in Article 86(2) of Additional Protocol I to the Geneva Conventions 1949, and Article 28 of the Rome Statute establishing the International Criminal Court, as well as the Statutes of the ICTY and ICTR; it has further been endorsed in the judgments of the ICTY, inter alia, in Delalic[78] and Blaskic.[79]

The mens rea requirement of superior or command individual criminal responsibility "requires no more than the superior either (a) having known or (b) having had reason to know that his subordinates were about to commit relevant criminal acts or had already done so. Whereas the former requires proof of actual knowledge, the latter requires proof only of some grounds which would have enabled the superior to become aware of the relevant crimes of his or her subordinates."[80] A superior is liable for "not just the failure to have acquired sufficient knowledge about the criminal conduct of his subordinates, but ultimately the failure to react appropriately by preventing or punishing the relevant crimes."[81] Obviously, if a commander/superior orders crimes to be committed, direct individual criminal responsibility is straightforwardly obtained.

2.4.4. Immunity

Traditionally, State officials have been afforded immunity for acts committed in their official capacity. However, concurrent with the concepts of individual and command responsibility, the Nuremberg Principles hold that, "[t]he fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law."[82] Nuremburg thus confirmed the demise of immunity for international crimes.

75 Article 28(a)(i) Rome Statute.

76 Article 28(a)(ii) Rome Statute.

77 Prosecutor vs. Galic, Case No. IT-98-29-T, 5 December 2003, §170.

78 The Prosecutor v Zejnil Delalic, Zdravko Mucic, Hazim Delic and Esad Landzo, Case No. IT-96-21-A, Judgement, Appeals Chamber, 20 February 2001.

79 The Prosecutor v Timohir Blaskic, Case No. IT-95-14-T, Judgment, Trial Chamber, 3 March 2000.

80 Prosecutor v. Oric, Case No. IT-03-68-T, 30 June 2006, §317.

81 Prosecutor v. Oric, Case No. IT-03-68-T, 30 June 2006, §319.

82 ILC supra note 36, Principle III.

However, there are two types of immunity: functional immunity and personal immunity. Functional immunity is immunity afforded to persons performing acts of State. The premise underlying this type of immunity holds that acts of State, by their very nature, are attributable to the State, and not an individual. Personal immunity is conferred upon those holding a specific office, i.e. heads of State, heads of Government, Foreign Ministers, and so on. In Arrest Warrant, the International Court of Justice stressed that such immunity was not granted for an individual's personal benefit, but rather was intended to "ensure the effective performance of their functions on behalf of their respective States."[83]

The loss of immunity referred to in the Nuremburg Principles relates to functional immunity. It has been found that international crimes cannot constitute official acts and consequently that such acts are not afforded the protections of functional immunity. As the ICTY held in Tadic, "[it] would be a travesty of law and a betrayal of the universal need for justice, should the concept of State sovereignty be allowed to be raised successfully against human rights".[84] This principle has been codified in Article 7(2) of the Statute of the ICTY, Article 6(2) of the Statute of the ICTR, and Article 27 of the Rome Statute. Various Trial Chambers of the ICTY, including, inter alia, Karadzic[85] and Furundzija,[86] have held that these rules reflect customary international law. Further, the House of Lords, in Pinochet, "took the view, with regard to any senior state agent, that functional immunity cannot excuse international crimes."[87]

Nonetheless, an incumbent official will remain protected by personal immunity. As the International Court of Justice have stressed, however, this immunity only applies for so long as that individual continues to hold office.[88]

2.4.5. Summary

This jurisprudential analysis shows that universal jurisdiction for international crime constitutes a well-accepted component of customary international law; an ever-increasing number of universal jurisdiction cases are being prosecuted across a wide-range of diverse jurisdictions and legal traditions. As Cassese notes, "[t] hese crimes infringe values shared by all members of that [international] community, as held in a series of cases from Eichmann, to Guatemalan generals, and Ricardo Miguel Cavallo. It is therefore held justified that each

83 Arrest Warrant §53.

84 Prosecutor v. Dusko Tadic, Case No. IT-94-1-t, Judgment (Oct. 2, 1995) §58.

85 Prosecutor v. Radovan Karadzic and Ratko Mladic, Case No. IT-95-5/18-I, Indictment, (Jul. 25, 1995) §24.

86 Prosecutor v. Furundzija, Case No. IT-95-17/1-T, Judgment (Dec. 10, 1998) §140.

87 Antonio Cassese, When May Senior State Officials be Tried for International Crimes? Some Comments on the Congo v. Belgium Case, 13 European Journal of International Law 4, 853, 871 (2002).

88 Arrest Warrant, §61.

State should be authorized to bring the alleged offender to book."[89] Further, it may be said that the category of international crimes currently falling within the scope of universal jurisdiction includes, at a minimum, genocide, grave breaches of the Geneva Conventions, crimes against humanity, and torture.[90] The exercise of universal jurisdiction is an obligation with respect to grave breaches of the Geneva Conventions, and, for States Parties to the CAT, torture. Additionally, functional immunity cannot be said to extend to the perpetration of international crimes, while personal immunity will only protect an individual for so long as that individual remains in office.

89 Antonio Cassese, When May Senior State Officials be Tried for International Crimes? Some Comments on the Congo v. Belgium Case, 13 European Journal of International Law 4, 853, 891 (2002).

90 Donald Francis Donovan & Anthea Roberts, The Emerging Recognition of Universal Civil Jurisdiction, 100 American Journal of International Law 1, 142, 143 (2006).

3. The Motivations Underlying International Criminal Responsibility and the Pursuit of Universal Jurisdiction

This section will analyse the motivations underlying the pursuit of international criminal responsibility, asking why the quest for international justice is of such profound importance, and what it hopes to achieve. Two key issues are focused on: the need to combat impunity, and the importance of deterrence.

3.1. Impunity

The Inter-American Court of Human Rights has defined impunity as "the total lack of investigation, prosecution, capture, trial and conviction of those responsible for violations of rights".[91] Impunity refers to the impossibility, de jure or de facto, of bringing the perpetrators of violations to account – whether in criminal, civil, administrative or disciplinary proceedings – given that they are often not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties, and to making reparations to their victims.[92] On the day after the Rome Statute entered into force, the then-UN Secretary-General Kofi Annan commented that "[t]here must be no relenting in the fight against impunity…It [Rome Statute] reaffirms the centrality of the rule of law in international relations.

91 Paniagua Morales and Others, Inter-American Court of Human Rights, 8 Mar. 1998, ¶173.

92 UN Social and Economic Council, 'Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity' E/CN.4/2005/102/Add.1 (Feb. 8, 2005).

It holds the promise of a world in which the perpetrators of genocide, crimes against humanity and war crimes are prosecuted when individual States are unable or unwilling to bring them to justice. And it gives the world a potential deterrent to future atrocities."[93]

Impunity stems from States' failure to meet their obligations to investigate violations, inter alia: to take appropriate measures in respect of the perpetrators, particularly in the area of justice, by ensuring that those suspected of criminal responsibility are prosecuted, tried and duly punished; to provide victims with effective remedies and to ensure that they receive reparation for the injuries suffered; to ensure the inalienable right to know the truth about violations; and to take other necessary steps to prevent a recurrence of violations.[94] The Human Rights Committee has confirmed that impunity, whether de jure or de facto, is incompatible with State violations under the ICCPR.[95] It must be noted that de facto impunity exists, not only when authorities fail to investigate violations, but also when they fail to do so promptly, and effectively, in accordance with international standards. In Del Caracazo, for example, the Inter-American Court of Human Rights stated that investigations which persist for a long-period of time, without those responsible for gross human rights violations being identified or punished, constitute "a situation of serious impunity and […] a breach of the State's duty".[96]

Undoubtedly, States have a primary responsibility to exercise jurisdiction over serious crimes under international law. However, the ICC, the international tribunals, and as a last resort other national courts (engaging universal jurisdiction), may exercise concurrent jurisdiction when domestic courts cannot offer satisfactory guarantees of independence and impartiality or are unable or unwilling to conduct effective investigations or prosecutions. The scourge of impunity, at the international and domestic level, should not be underestimated. Fostering accountability, thereby ensuring a fair and equitable justice system, has an enormous part to play in reconciliation and stability within societies, including conflict and post-conflict and societies in transition.[97] There has been extensive criticism of the use of universal jurisdiction (and similar criticisms levelled at the ICC) on the basis that such prosecutions are little more than politically or moralistically motivated

93 Kofi Annan, Press Release, UN Information Office, SG/SM/8293 L/T/4369 (Jul. 2, 2002).

94 Diane Orentlicher, 'Report of the independent expert to update the Set of principles to combat impunity' [the Orentlicher Report] UN Social and Economic Council E/CN.4/2005/102/Add.1 (Feb. 8, 2005).

95 Concluding Observations of the Human Rights Committee – Lesotho, 8 April 1999, U.N. Doc. CCPR/C/79/Add.106, ¶17.

96 Del Caracazo v. Venezuela, Inter-American Court of Human Rights, 29 August 2002, ¶117, quoted in International Commission of Jurists, Military Jurisdiction and International Law, Military courts and gross human rights violations vol. 1, 55 (2004).

97 The Office of the High Commissioner for Human Rights, Human Rights Resolution on Impunity 2005/81.

witch-hunts.[98] However, the source of such accusations must be acknowledged: they emanate from States who wish to shield suspected war criminals from justice. Universal jurisdiction would not be necessary if States fulfilled their own legal obligations, and effectively and genuinely investigated and prosecuted those suspected of committing international crimes. In the absence of such compliance, universal jurisdiction offers the only currently available legal mechanism capable of combating impunity and upholding victims' rights; it must be regarded as an essential component in the international legal framework.

3.2. Deterrence

In order to successfully challenge global impunity, the Rome Statute stipulates that genocide, crimes against humanity and war crimes are not subject to any statute of limitation, and therefore that persons accused of these crimes shall not be subject to any immunity. This is a notable shift in the focus of international criminal law towards holding those considered most responsible to account. Traditionally, diplomats, heads of State and government, along with many of their senior officials, held wide immunity from both criminal prosecution and civil lawsuits, at home and abroad; their protections subsiding only once they had left office. As highlighted above, Nuremburg spelled the demise of immunity for international crimes, a trend cemented by the Rome Statute and the Statutes of the ad hoc tribunals. In 1999, this idea was reinforced at the national level by the U.K. House of Lords; the Law Lords ruled that Pinochet could be prosecuted for torture, on the basis that some crimes are so heinous that they cannot be considered part of a head of State's official functions.

World leaders now have good reason to fear that they will be prosecuted for international crimes, as the indictments of Slobodan Milosevic, Charles Taylor and Omar al-Bashir demonstrate. Unfortunately, this development has also spurred on a number of attempted immunity bills, aimed at protecting heads of state and government officials from prosecutions.[99] Despite this trend, under international criminal law, there can be no immunity for international crimes. The infamous bilateral agreements drawn up by the U.S administration, aimed at protecting officials and servicemen from prosecution for international crimes, is in effect only pseudo-immunity; whilst some countries may agree not to apprehend, extradite or prosecute American citizens, this does not apply to all countries. Indeed, universal jurisdiction may prove to be an important means

98 Anne Herzberg, 'NGO "Lawfare" Exploitation of Courts in the Arab-Israeli Conflict', NGO Monitor (Sep. 2008).

99 For example, Silvio Berlusconi, is trying to rush an immunity bill through parliament to protect himself against any prosecution for financial misdeeds. See The Economist, 'Political immunity Pulling Back the Blanket', Jul. 10, 2008. Available at www.economist.com Accessed on Nov. 4, 2008.

by which to hold U.S. officials and servicemen to account for international crimes, as the vaguely concealed legal, economic and political threats levelled at the Netherlands by the U.S. government precludes ICC jurisdiction over international crimes committed by U.S. citizens.[100]

This legal and political skirmish goes some way to proving that international criminal law has elevated the recognition of international crimes to new levels of authority. One important element of this exposure is deterrence. The international community has a legitimate interest in the prosecution of grave crimes under international law in order to deter the commission of such crimes in the future. It is hoped that the high profile indictments and convictions of the ICC, the ac hoc tribunals, and the threat of universal jurisdiction, will disconcert the conscious of those likely to commit grave offences, and ultimately deter them from such crimes. As part of the potential ambit of international criminal protections, universal jurisdiction has an important part to play in this deterrence. As previously mentioned, the current incomplete ratification status of the Rome Statute means that there are several jurisdictional gaps, where the reach of international criminal law is thwarted. If universal jurisdiction did not exist, there would be absolutely no deterrent to the commission of international crimes, especially with respect to the world's most powerful nations.

100 Human Rights Watch, U.S.: 'Hague Invasion Act' Becomes Law, Human Rights Watch News, Aug. 3, 2002.

4. AN EXAMINATION OF SELECT INTERNATIONAL CRIMES

This section will address the fundamental principles of IHL, the prohibition on torture, and crimes against humanity. Violations of the prohibitions discussed herein, such as willful killing, torture, the extensive destruction of property, or crimes against humanity, form the basis of those crimes pursued in accordance with the principle of universal jurisdiction. Consequently, an understanding of the crimes and the requirements necessary for a finding of individual criminal responsibility is essential. The scope of the prohibitions are illustrated and explained with reference to relevant international jurisprudence.

4.1. The Fundamental Principles of IHL

4.1.1. The principle of distinction

The principle of distinction is an essential component of customary IHL.[101] In the Nuclear Weapons Advisory Opinion, the International Court of Justice stated that the principle of distinction was one of the "cardinal principles" of IHL and one of the "intransgressible principles of customary law."[102] In order to effectively limit the suffering caused by conflict, and to ensure civilians' protection against the dangers arising from hostilities, the principle of distinction requires that civilians and civilian objects must at all times

101 Rules 6, 7, 8 and 10. International Committee of the Red Cross, Customary International Humanitarian Law, Volume1: Rules, 2005.

102 ICJ, Nuclear Weapons Case, Advisory Opinion, §179.

be distinguished from combatants and military objectives. This fundamental principle of customary IHL is codified in Article 48 of Additional Protocol 1:

"In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives."[103]

Under IHL, civilians and civilian objects are negatively defined as all those who are not legitimate combatants or military objectives. This negative definition is a reflection of the desire to protect all those not directly involved in hostilities, ensuring that only legitimate military targets may be made the object of an attack. Consequently, there is one significant exception to the immunity and protection afforded to civilians and civilian objects; they lose their protection for such time as they 'directly participate' in hostilities.[104]

Combatants are all members of the armed forces of a Party to the conflict, with the exception of medical personnel and chaplains.[105] Simply, combatants are all those who have the right to participate in hostilities. Drawing on Article 1 of the Hague Regulations 1907, Article 4(2) of the Third Geneva Convention establishes a four-part test to determine combatant status; members of armed groups, including organized resistance movements, must fulfil the following conditions:

a. that of being commanded by a person responsible for his subordinates;
b. that of having a fixed distinctive sign recognizable at a distance;
c. that of carrying arms openly;
d. that of conducting their operations in accordance with the laws and customs of war.[106]

In keeping with developments concerning the nature of warfare, Article 43 of Additional Protocol I, reduced the four conditions to two, the principal difference being the exclusion of the requirement of visibility (at all times) for the definition of armed forces. Article 43 thus requires that armed "forces are under a command responsible to that Party for the conduct or its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, inter alia,

103 Article 48, Additional Protocol I.

104 The concept of 'direct participation in hostilities' is expanded upon in Section 5.1.6. below.

105 Article 43, Additional Protocol I.

106 Article 4(2), Third Geneva Convention.

shall enforce compliance with the rules of international law applicable in armed conflict."[107]

In a 2009 interpretive guide to direct participation in hostilities, the ICRC held that in non-international armed conflicts, persons who belong to an organized armed group and undertake a 'continuous combat function', may, under certain circumstances, lose their protection from direct attack.[108] Such individuals may thus be considered as equivalent to 'combatants' or members of armed forces. However, it must be emphasized that this document is not necessarily reflective of customary law, and that such persons are not accorded the rights and privileges associated with combatant status.

In keeping with the negative definition of civilians, it is clear that "only members of the armed forces are combatants";[109] all other individuals are civilians or protected persons, entitled to the full protections of IHL, including immunity from direct attack.[110]

Military objectives are "limited to those objectives which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage."[111] The Commentary to Additional Protocol I notes that this definition of a military objective contains two, cumulative, elements:

The nature, location, purpose or use which makes an effective contribution to military action;
The total or partial destruction, capture or neutralization which in the circumstances ruling at the time offers a definite military advantage.[112]

In order for an object to be considered a military objective, these two elements must be simultaneously present. It is recognized and accepted that, in the course of hostilities, civilian objects may become military objectives. However, their classification as military objectives only continues for so long as the two above-mentioned elements remain simultaneously present.

In order to effectively understand what constitutes a military objective, and thus what constitutes a civilian object, further analysis of this definition is required. Several States interpret 'military advantage' as referring to advantage anticipated from the military attack as a

107 Article 43, Additional Protocol I.

108 ICRC, Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law, May 2009, p. 16.

109 ICRC Commentary to Additional Protocol I, §1677.

110 Again, the caveat with respect to 'direct participation in hostilities' applies.

111 Article 52(2), Additional Protocol I.

112 ICRC, Commentary to Additional Protocol I, §2018.

whole, and not only from isolated or particular parts of the attack.[113] However, this is not in conformity with the nexus of 'direct' military advantage codified in Additional Protocol I.[114] In Galic, the Trial Chamber of the ICTY noted that, "an object shall not be attacked when it is not reasonable to believe, in the circumstances of the person contemplating the attack, including the information available to the latter, that the object is being used to make an effective contribution to military action."[115] Additionally, the Commentary to the protocol notes that, "it is not legitimate to launch an attack which only offers potential or indeterminate advantages."[116]

This conclusion is emphasised in the Commentary which defines the 'nature' test for military objectives as "all objects directly used by the armed forces: weapons, equipment, transports, fortification, depots, buildings occupied by armed forces, staff headquarters, communications centres etc."[117] This approach "would appear to limit military objectives to objects that are functionally and temporally tied to the actual conduct of operations."[118] Indeed, as noted by Marco Sassoli, this interpretation is essential; without the limitation to the actual situation at hand, "the principle of distinction would be void, as every object could in abstracto, under possible future developments, e.g. if used by enemy troops, become a military objective."[119] The 'circumstances ruling at the time', clearly limits the intended military advantage to tangible results.

An attack as a whole must be a finite event, it cannot be confused with the entire war.[120] In this regard it is significant to note that military operations do not include "ideological, political or religious campaigns."[121]

The principle of distinction is regarded as "the foundation on which the codification of the laws and customs of war rests."[122] As such, it is clear that, in cases of doubt regarding the status of an individual or object, ostensibly civilian individuals or ostensibly civilian objects must be presumed civilian;[123] they cannot be attacked. Therefore,

113 ICRC, Customary International Humanitarian Law, Volume1: Rules, 2005, p. 31.

114 Article 52(2), Additional Protocol I.

115 Prosecutor vs. Galic, Case No. IT-98-29-T, 5 December 2003, §51. Emphasis added.

116 ICRC, Commentary to Additional Protocol I, §2024.

117 ICRC, Commentary to Additional Protocol I, §2020.

118 Kenneth Watkin, Assessing Proportionality: Moral Complexity and Legal Rules, Yearbook of International Humanitarian Law, Volume 8, pp3-53, 2005, p. 42.

119 Marco Sassoli, Legitimate Targets of Attack under International Humanitarian Law, Background Paper prepared for the Informal High-Level Expert Meeting on the Reaffirmation and Development of International Humanitarian Law, Cambrdige, January 27-29, 2003, p. 3.

120 Francois Hampson, Means and Methods of Warfare in the Conflict in the Gulf, in Peter Rowe (ed.), the Gulf War 1990-91 in International and English Law, 1993, p. 94.

121 ICRC, Commentary to Additional Protocol I, §1875.

122 ICRC, Commentary to Additional Protocol I, §1863.

123 Article 50(1), Additional Protocol I, "In case of doubt whether a person is a civilian, that person shall be considered to be a civilian." Article 52(3), Additional Protocol I, "In case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used."

"even in contact areas there is a presumption that civilian buildings located there are not used by armed forces, and consequently it is prohibited to attack them unless it is certain that they accommodate enemy combatants or military objects."[124]

The Office of the Prosecutor's report on the NATO bombing campaign against the Federal Republic of Yugoslavia emphasized that "All targets must meet the criteria for military objectives",[125] in terms of classifying objectives a "general label is insufficient."[126] Equally, in Galic, the Trial Chamber of the ICTY held that "the presence of individual combatants within the population does not change its civilian character. … A person shall be considered to be a civilian for as long as there is doubt as to his or her real status."[127] Similarly, with respect to civilian objects, the Trial Chamber held that, "in case of doubt as to whether an object which is normally dedicated to civilian purposes is being used to make an effective contribution to military action, it shall be presumed not to be so used."[128]

In order to give effect to the principle of distinction, IHL lays out a number of specific provisions, including: the prohibition on directly targeting civilians or civilian objects, the prohibition on indiscriminate attack and the principle of proportionality, and the precautions necessary when launching an attack.

4.1.2. The direct targeting civilians or civilian objects

Article 51(2) of Additional Protocol 1 – a component of customary IHL[129] - confirms that "the civilian population as such, as well as individual civilians, shall not be the object of attack."[130] Violations of this principle constitute grave breaches of the Geneva Conventions (willful killing) and a grave breach of Additional Protocol I.

Aricle 52(1) of Additional Protocol 1 – also a component of customary IHL[131] - confirms that, "[c]ivilian objects shall not be the object of attack or reprisals." Additionally, the extensive destruction of civilian property in occupied territory is a grave breach of the Geneva Conventions.[132]

In Koric and Cerkez, the Trial Chamber of the ICTY explicitly confirmed that attacks on civilians or civilian objects cannot be justified on the grounds of military

124 ICRC, Commentary to Additional Protocol I, §2034.

125 Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, §55.

126 Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, §55.

127 Prosecutor vs. Galic, Case No. IT-98-29-T, 5 December 2003, §50.

128 Prosecutor vs. Galic, Case No. IT-98-29-T, 5 December 2003, §51.

129 ICRC, Customary International Humanitarian Law, 2005, Rule 6.

130 Article 51(2), Additional Protocol I.

131 ICRC, Customary International Humanitarian Law, 2005, Rule 10.

132 Article 147, Fourth Geneva Convention, 1949.

necessity, their immunity and the protections afforded to them are absolute; "prohibited attacks are those launched deliberately against civilians or civilian objects in the course of an armed conflict and are not justified by military necessity. … Such attacks are in direct contravention of the principles recognized in international law".[133]

Violations of the prohibitions discussed herein entail individual criminal responsibility. Intentionally making the civilian population or individual civilians the object of an attack is a grave breach of Additional Protocol I, a provision that has attained customary international law status.[134] Such attacks constitute war crimes, as defined in Articles 8(2)(b)(i) and (ii) of the Statute of the International Criminal Court. The crime of 'wilful killing' is a grave breach of the Geneva Conventions, as is the crime of "extensive destruction or appropriation of property, not justified by military necessity and carried out unlawfully and wantonly."[135] It must be noted that, although excessive destruction of property is required in order for an attack to constitute a grave breach of the Geneva Conventions, individual unlawful attacks on civilian objects are criminalized by customary international law, on the basis of inter alia, Article 23(g) of the Hague Regulations, Article 53 of the Fourth Geneva Convention, and Article 52(1) of Additional Protocol I. This is reflected in Article 8(2)(b)(ii) of the Statute of the International Criminal Court.

Related to the destruction of civilian objects, customary IHL also prohibits attacking, destroying, removing or rendering useless objects indispensable to the survival of the civilian population.[136] This requirement is codified in Article 54 of Additional Protocol I, paragraphs 1 and 2:

1. Starvation of civilians as a method of warfare is prohibited.
2. It is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population, such as food-stuffs, agricultural areas for the production of food-stuffs, crops, livestock, drinking water installations and supplies and irrigation works, for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse Party, whatever the motive, whether in order to starve out civilians, to cause them to move away, or for any other motive.

The ICRC study on customary IHL notes that, "[i]n principle, objects indispensable to the survival of the civilian

133 Prosecutor v Kordic and Cerkez, Case No. IT-95-14/2-T, 26 February 2001, §328.

134 See, ICRC, Customary International Humanitarian Law, 2005, Rule 156.

135 Article 147, Fourth Geneva Convention.

136 ICRC, Customary International Humanitarian Law, 2005, Rule 54.

population are civilian objects and may not be attacked as such."[137] However, a further explicit prohibition regarding objects indispensable to the survival of the civilian population was deemed necessary.

Objects indispensable to survival include, but are not limited to, agricultural areas for the production of foodstuffs, livestock, irrigation works, drinking water installations and supplies, and crops.[138] The Commentary notes that this provision "should be interpreted in the widest sense, in order to cover the infinite variety of needs of populations in all geographical areas."[139] Thus, as a result of climate or other facts, shelter or clothing may be considered indispensable to the survival of the civilian population.[140] This was confirmed during the negotiation of the Elements of Crimes for the International Criminal Court, which "recognized that the word "starvation" covered not only the more restrictive meaning of starving as killing by deprivation of water and food, but also the more general meaning of deprivation or insufficient supply of some essential commodity, of something necessary to survival. As a result, other examples that were mentioned during those negotiations included indispensable non-food items such as medicines and, in some cases, blankets."[141]

It must be emphasized that attacks on indispensable objects are prohibited "for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse Party, whatever the motive, whether in order to starve out civilians, to cause them to move away, or for any other motive".[142]

4.1.3 Wilful Killing

Regarding the elements of crimes, the Trial Chamber of the ICTY, in Kordic and Cerkez, held that, "in relation to the crime of wilful killing, the actus reus – the physical act necessary for the offence – is the death of the victim as a result of the actions or omissions of the accused. … the conduct of the accused must be a substantial cause of the death of the victim, who must have been a "protected person"."[143] To satisfy the mens rea (mental state) the Trial Chamber held that, "it must be established that the accused had the intent to kill, or to inflict serious bodily

137 International Committee of the Red Cross, Customary International Humanitarian Law, Volume1: Rules, 2005. p. 189.

138 See, Article 54(2) Additional Protocol I, Article 14, Additional Protocol II.

139 ICRC, Commentary to Additional Protocol I, §2101.

140 ICRC, Commentary to Additional Protocol I, §2103.

141 International Committee of the Red Cross, Customary International Humanitarian Law, Volume1: Rules, 2005, p. 193, referring to Kurt Dormann, Preparatory Commission for the International Criminal Court: The Elements of War Crimes – Part II: Other Serious Violations of the Laws and Customs Applicable in International and Non-International Armed Conflicts, International Review of the Red Cross, Vol. 83, pp. 475-476, 2001.

142 Article 54(2), Additional Protocol I, Emphasis added.

143 Prosecutor v Kordic and Cerkez, Case No. IT-95-14/2-T, 26 February 2001, §229.

injury in reckless disregard of human life."[144] This finding echoed that of Blaskic, where the Trial Chamber held that "The intent, or mens rea, needed to establish the offence of wilful killing exists once it has been demonstrated that the accused intended to cause death or serious bodily injury which, as it is reasonable to assume, he had to understand was likely to lead to death."[145]

The crime of murder, as defined in common Article 3 of the Geneva Conventions, and wilful killing, a grave breach of the Geneva Conventions, have been found to be equivalent with respect to the elements of crimes,[146] with the exception that, regarding murder, "the offence need not have been directed against a 'protected person' but against a person 'taking no active part in hostilities.'"[147]

4.1.4. Extensive Destruction of Property

As regards the wanton destruction of property not justified by military necessity, the elements of the crime are satisfied when:

i. the general requirements of Article 2 of the Statute are fulfilled; [i.e. the conditions required for Grave Breaches of the Geneva Conventions]
ii. property was destroyed extensively;
iii. the extensive destruction regards property carrying general protection under the Geneva Conventions of 1949, or; the extensive destruction not absolutely necessary by military operations regards property situated in occupied territory;
iv. the perpetrator acted with the intent to destroy this property or in reckless disregard of the likelihood of its destruction."[148]

In Hadzihasanovic, the Trial Chamber confirmed that the crime of wanton destruction of property not justified by military necessity and carried out unlawfully, as a grave breach, is similar to the same crime committed as a violation of customary IHL.[149] In Martic, the Trial Chamber held that: "The element of destruction of property "on a large scale" requires that a considerable number of objects were destroyed. However, it is not required that a city, town or village has been destroyed in its entirety."[150] In Blaskic the Trial Chamber clarified that, "[t]he notion of "extensive" is evaluated according to the facts of the case – a single act, such as the destruction

144 Prosecutor v Kordic and Cerkez, Case No. IT-95-14/2-T, 26 February 2001, §229.
145 Prosecutor v. Blaskic, Case No. IT-95-14-T, 3 March 2000, §153.
146 Prosecutor v Kordic and Cerkez, Case No. IT-95-14/2-T, 26 February 2001, §233.
147 Prosecutor v Kordic and Cerkez, Case No. IT-95-14/2-T, 26 February 2001, §233.
148 Prosecutor v. Naletilic & Martinovic, Case No. IT-98-34-T, 31 March 2003, §577.
149 Prosecutor v. Hadzihasanovic, Case No. IT-01-47-T, 15 March 2006, §41.
150 Prosecutor vs. Martic, Case No. IT-95-11-T, 12 June 2007, §92.

of a hospital, may suffice to characterise an offence".[151] The partial destruction of property has also been held to fall within the scope of this prohibition;[152] significantly, the Chamber also held that "although the criteria for determining whether an offence is large scale must be evaluated on a case-by-case basis, they will usually be met when the acts of partial destruction are committed on a large scale."[153]

The mental element for the crime of destruction is satisfied when the perpetrator acted with "intent to destroy the property in question, including a situation in which the perpetrator foresaw as more likely than not that the destruction could occur as a consequence of his conduct, and that he nevertheless accepted the risk by performing the act."[154]

Thus with respect to both the targeting of civilians and civilian objects, recklessness is an accepted element of the necessary mens rea requirement. As the authoritative Commentary to Additional Protocol I states regarding the concept of 'wilfully', "the accused must have acted consciously and with intent, i.e., with his mind on the act and its consequences, and wiling them ("criminal intent" or "malice afterthought"); this encompasses the concepts of "wrongful intent" or "recklessness", viz., the attitude of an agent who, without being certain of a particular result, accepts the possibility of it happening; on the other hand, ordinary negligence or lack of foresight is not covered, i.e., when a man acts without having his mind on the act or its consequences. (although failing to take the necessary precautions, particularly failing to seek precise information, constitutes culpable negligence punishable at least by disciplinary sanctions)".[155] In Blaskic it was confirmed that, "the mens rea constituting all the violations of Article 2 of the Statute [grave breaches of the Geneva Conventions] includes both guilty intent and recklessness which may be likened to serious criminal negligence."[156] The Oric Trial Chamber expanded on the mens rea requirement with respect to murder, "[i] ntent to kill is required in order to fulfil the mens rea of murder. This includes proof of a mental state wherein the perpetrator foresees as more likely than not that the death of the victim could occur as a consequence of his act or omission, and he nevertheless accepts the risk."[157] The Trial Chamber also confirmed that, "premeditation is not a mens rea requirement."[158]

151 Prosecutor v. Blaskic, Case No. IT-95-14-T, 3 March 2000, §157.
152 Prosecutor v. Hadzihasanovic, Case No. IT-01-47-T, 15 March 2006, §44.
153 Prosecutor v. Hadzihasanovic, Case No. IT-01-47-T, 15 March 2006, §44.
154 Prosecutor v. Oric, Case No. IT-03-68-T, 30 June 2006, §589.
155 ICRC, Commentary to Additional Protocol I, §3474.
156 Prosecutor v. Blaskic, Case No. IT-95-14-T, 3 March 2000, §152.
157 Prosecutor v. Oric, Case No. IT-03-68-T, 30 June 2006, §348.
158 Prosecutor v. Oric, Case No. IT-03-68-T, 30 June 2006, §348.

4.1.5. Indiscriminate Attacks

Customary IHL prohibits indiscriminate attacks; attacks which by their nature strike military objectives and civilians or civilian objects without distinction.[159] This prohibition is codified in Article 51(4) of Additional Protocol I:

"Indiscriminate attacks are prohibited. Indiscriminate attacks are:

(a) those which are not directed at a specific military objective;
(b) those which employ a method or means of combat which cannot be directed at a specific military objective; or
(c) those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol;

and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction."[160]

Article 51(5) offers examples of indiscriminate attacks:

"Among others, the following types of attacks are to be considered as indiscriminate:

(a) an attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects; and
(b) an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated."[161]

The prohibition of indiscriminate attack is theoretically distinct from the prohibition on directly targeting civilians or civilian objects. In practice however, the two prohibitions often merge.[162] For example, in Galic the Trial Chamber held that "attacks which strike civilians or civilian objects without distinction, may qualify as direct attacks against civilians".[163] This was confirmed in Martic, where the Trial Chamber held that "the shelling of Zagreb was a widespread attack against the civilian population. It reached this conclusion on the basis of the large scale nature of the

159 ICRC, Customary International Humanitarian Law, 2005, Rule 12.

160 Article 51(4), Additional Protocol I.

161 Article 51(5), Additional Protocol I.

162 Michael N. Schmitt, Precision Attack and international humanitarian law, International Review of the Red Cross, Vol. 87, Number 859, (2005), p. 455.

163 Prosecutor vs. Galic, Case No. IT-98-29-T, 5 December 2003, §57.

attack and the indiscriminate nature of the M-87 Orkan."[164] Significantly, the Commentary to Additional Protocol I notes that the prohibition of indiscriminate attacks "was intended to take account of the fact that means and methods of combat which can be used perfectly legitimately in some situations could, in other circumstances, have effects that would be contrary to some limitations contained in the Protocol, in which event their use in those circumstances could involve an indiscriminate attack."[165]

As part of the prohibition of indiscriminate attacks, area bombardment – which treats as a single military objective a number of clearly separated and distinct military objectives located in an area containing a similar concentration of civilians or civilian objects – is explicitly prohibited.[166] As noted in the ICRC Commentary, 'bombardment' refers to all attacks by fire-arms or projectiles (except for direct fire by small arms) and the use of any type of projectile.[167]

This provision places an obligation on the attacker to specifically identify military targets, and to exclusively attack such targets. This provision is particularly relevant to urban warfare; as noted in the Commentary, "in a town, village or any other area where there is a similar concentration of civilian persons and objects, the military objectives in that area may only be attacked separately without leading to civilian losses outside the military objectives themselves."[168] Areas of land between military objectives, do not themselves constitute military objectives.[169] Again, it is explicit that, in any case of doubt regarding the status of an ostensibly civilian object, it must be presumed to be civilian.

The principle of proportionality holds that incidental civilian suffering arising consequent to an attack on a legitimate military objective must not be excessive. Proportionality thus requires that "civilians be protected independently of the intrinsic characteristics of the belligerents. If a state authority or agent is unable in a particular situation to assess with a certain degree of predictability the collateral damage likely to ensue from the envisaged attack, it or he must simply abstain from taking the action."[170] This principle – a core component of customary IHL[171] – is codified in Article 51(5) of Additional Protocol I and repeated in Article 57(2)(a)(iii). Article 51(5)(b) holds that launching "an attack which may be

164 Prosecutor v. Martic, Case No. IT-95-11-A, 8 October 2008, §253.

165 ICRC, Commentary to Additional Protocol I, §1962.

166 Article 51(5), Additional Protocol I, and ICRC, Customary International Humanitarian Law, 2005, Rule 13.

167 ICRC, Commentary to Additional Protocol I, §1968.

168 ICRC, Commentary to Additional Protocol I, §1973.

169 ICRC, Commentary to Additional Protocol I, §1973.

170 Enzo Cannizzaro, Contextualizing proportionality: jus ad bellum and just in bello in the Lebanese war, International Review of the Red Cross, Vol 88 No. 864, 2006, p. 787.

171 ICRC, Customary International Humanitarian Law, 2005, Rule 14.

expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated"[172] is prohibited. During the drafting process, Mexico stated that Article 51 was so essential that it "cannot be the subject of any reservations whatsoever since these would be inconsistent with the aim and purpose of Protocol I and undermine its basis".[173]

Thus, as noted in the Commentary, proportionality "is concerned with incidental effects which attacks may have on persons and objects, as appears from the reference to "incidental loss"."[174] Incidental danger to civilians and civilian objects is dependent on a number of factors, inter alia, their location (possibly in or near a military objective), the weapons used (greater or lesser dispersion, i.e. the impact area, or 'kill zone'), the nature of the military objective in question (ammunition dump, fuel reserves), and the technical skill of the combatants (random dropping of bombs when unable to hit the intended target).[175]

It is noted that all of these factors, and others, must be taken into account when assessing the proportionality calculation. In some instances the assessment will be clear cut, i.e. the presence of a soldier on leave cannot justify the destruction of an entire village. In other cases it will be more difficult, if the destruction of a bridge is of vital importance for the occupation or non-occupation of an area, then it is understood that some houses may be hit, but that the destruction must not be excessive in relation to the definite military advantage.[176]

Complex situations make the proportionality equation a difficult one to calculate. However, it is absolutely clear that the "golden rule" applicable to any situations is the binding duty to spare civilians and civilian objects during the conduct of military operations.[177]

The nexus of the concrete and direct military advantage to the attack in question has already been discussed. As noted in Galic, "the expression "concrete and direct" was intended to show that the advantage must be substantial and relatively close" and that "advantages which are hardly perceptible and those which would only appear in the long term should be disregarded.""[178]

The evaluation of proportionality is an inherently difficult

172 Article 51(5)(b), Additional Protocol I.

173 Quoted in, International Committee of the Red Cross, Customary International Humanitarian Law, Volume1: Rules, 2005, p. 46.

174 ICRC, Commentary to Additional Protocol I, §2212.

175 ICRC, Commentary to Additional Protocol I, §2212.

176 ICRC, Commentary to Additional Protocol I, §2213-2214.

177 ICRC, Commentary to Additional Protocol I, §2215

178 Prosecutor vs. Galic, Case No. IT-98-29-T, 5 December 2003, §58, footnote 106.

task, however, in Galic the Trial Chamber held that: "In determining whether an attack was proportionate it is necessary to examine whether a reasonably well-informed person in the circumstances of the actual perpetrator, making use of the information available to him or her, could have expected excessive civilian casualties resulting from the attack."[179]

In evaluating the principle of proportionality, the British Defence Doctrine, issued by the Ministry of Defence, states that "a commander needs to have an up-to-date assessment of the significance of a target and the value of attacking it. If there is a choice of weapons or methods of attack available, a commander should select those which are most likely to avoid, or at least minimize, incidental civilian casualties or damage. However, he is entitled to take into account factors such as his stocks of different weapons and likely future demands, the timeliness of attack and risks to his own forces."[180] Significantly, however, the Manual confirms that "there may be occasions when a commander will have to accept a higher level of risk to his own forces in order to avid or reduce collateral damage to the enemy's civilian population."[181] A commander may not ignore, or alter, the rules of IHL in order to protect his own forces at the expense of civilians.

Indiscriminate attacks are therefore explicitly prohibited and incur State responsibility. In order to entail criminal responsibility, such attacks must cause – or be expected to cause – disproportionate (excessive) loss of life, injury to civilians, or damage to civilian objects.[182] The actus reus of an indiscriminate attack, as a direct attack against civilians, is that "the attacks resulted in death or serious bodily injury within the civilian population at the time of such attacks."[183] The mens rea "required for attacks against civilians is direct and indirect intent";[184] a conception which includes wrongful intent and recklessness, i.e. the attitude of an agent who, without being certain of a particular result, accepts the possibility of it happening.[185]

4.2. The Prohibition of Torture

4.2.1. The Prohibition of Torture in International Law

The prohibition of torture forms a core component of both

179 Prosecutor vs. Galic, Case No. IT-98-29-T, 5 December 2003, §58.

180 British Defence Doctrine (JWP 0-01), issued by the British Minister of Defence in 1996, quoted in A.P.V. Rogers, Zero-casualty warfare, International Review of the Red Cross, No 837, pp 165-181.

181 British Defence Doctrine (JWP 0-01), issued by the British Minister of Defence in 1996, A.P.V. Rogers, Zero-casualty warfare, International Review of the Red Cross, No 837, pp 165-181.

182 Article 85(3)(b), Additional Protocol I, Article

183 Prosecutor v. Martic, Case No. IT-95-11-A, 8 October 2008, §70.

184 Prosecutor v. Martic, Case No. IT-95-11-A, 8 October 2008, §72.

185 Prosecutor v. Martic, Case No. IT-95-11-A, 8 October 2008, §72.

international human rights and humanitarian law. Treaty law prohibitions include Article 7 of the ICCPR, common Article 3 to the four Geneva Conventions, and the UN Convention against Torture. Article 147 of the Fourth Geneva Convention classifies torture as a grave breach of the Geneva Conventions.

Under international human rights law the prohibition on torture is absolute; there can be no legitimate derogations, even during declared states of emergency.[186] The extensive nature of this prohibition is evidenced by the fact that States are prohibited from expelling, returning, or extraditing a person to another State where there are substantial grounds for believing that that person may be subject to torture.[187] As a result of extensive State practice and treaty codification, and based on "the importance of the values it protects",[188] the prohibition of torture has evolved into a pre-emptory (jus cogens) norm of international law, as confirmed by the Furundzija Trial Chamber of the ICTY.[189]

Equally, Furundzija confirmed that the prohibition on torture during armed conflict forms part of customary international law, stating that it "seems incontrovertible that torture in time of armed conflict is prohibited by a general rule of international law."[190] In support of this finding, the Trial Chamber referred to the judgment of the International Court of Justice in Nicaragua which held that, Common Article 3 of the four Geneva Conventions, which inter alia prohibits torture against persons taking no active part in hostilities, reflect the "elementary considerations of humanity",[191] and are now well-established as belonging to the corpus of customary international law applicable to both international and internal armed conflicts.[192]

The prohibition of torture is thus absolute and applicable at all times, be it in times of peace or war. As relevant to the principle of universal jurisdiction, it is important to note that the jus cogens nature of the prohibition on torture results in a situation whereby "every State is entitled to investigate, prosecute and punish or extradite individuals accused of torture, who are present in a territory under its jurisdiction."[193]

4.2.2. The Definition of Torture

However, although torture is unequivocally prohibited

186 Article 4, International Covenant on Civil and Political Rights

187 See, inter alia, Article 3, Convention against Torture, and Soering v. United Kingdom, Eur. Ct. H. R. 7 July 1989, §91.

188 Furundzija, ICTY, Case No. IT-95-17/1-T, 10 December 1998, §153.

189 Furundzija, ICTY, Case No. IT-95-17/1-T, 10 December 1998, §153.

190 Furundzija, ICTY, Case No. IT-95-17/1-T, 10 December 1998, §139.

191 Nicaragua v. United States of America, (Merits), ICJ, 27 June 1986, §218.

192 Nicaragua v. United States of America, (Merits), ICJ, 27 June 1986, §218.

193 Furundzija, ICTY, Case No. IT-95-17/1-T, 10 December 1998, §156.

during armed conflict, it is not defined; common Article 3 to the Geneva Conventions simply prohibits "violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture".[194] As a result, the definition contained in CAT is commonly used as a reference point, as noted for example in the jurisprudence of the ICTR.[195] This definition states that:

> "torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."[196]

It is apparent from this Article that the human rights law definition of torture comprises four main pillars:

i. The relative intensity of pain or suffering inflicted must be severe.
ii. The act must be intentional.
iii. The act must be perpetrated for a specific purpose.
iv. A public official must be involved in the process (act or instigation, consent or acquiescence).

The ICTY has adopted the main elements of this definition, holding that the definition of torture has the followings elements:

i. The infliction, by act or omission, of severe pain or suffering, whether physical or mental.
ii. The act of omission must be intentional.
iii. The act or omission must aim at obtaining information or a confession, or at punishing, intimidating or coercing the victim or a third person, or at discriminating, on any ground, against the victim or a third person.[197]

It is significant to note that this definition of torture differs from the CAT (or human rights) definition in one key regard, holding that there is no requirement that a public official be involved in order to obtain a finding of torture. In Kunarac the Trial Chamber of the ICTY explained this divergence, "human rights law is essentially born out of the abuses of

194 Article 3(1)(a), Geneva Conventions (1949).

195 Akayesu, ICTR, Case No. ICTR-96-4-T, 2 September 1998.

196 Article 1(1) Convention against Torture.

197 Prosecutor v. Kunarac, Kovac, and Vukovic, ICTY, Case No. IT-96-23 & ICT-96-23/1-A, 12 June 2002, §142.

the state over its citizens and out of a need to protect the latter from state-organised or state-sponsored violence",[198] while in "the field of international humanitarian law, and in particular in the context of international prosecutions, the role of the state is, when it comes to accountability, peripheral. Individual criminal responsibility for violations of international humanitarian law does not depend on the participation of thestate [sic] and, conversely, its participation in the commission is no defence to the perpetrator. Moreover, international humanitarian law purports to apply equally to and expressly bind all parties to the armed conflict whereas, in contrast, human rights law generally applies to only one party, namely thestate [sic] involved, and its agents."[199]

This sentiment is reflected and confirmed in the prohibition of torture as a war crime and crime against humanity codified in Articles 7(f) and 8(2)(a)(ii) respectively of the Statute of the ICC. It is therefore explicit that there is no requirement of public official involvement under IHL and international criminal law.
Interestingly, the absolute requirement of public official involvement for a finding of torture under international human rights law also appears to be contested. For example, in HLR v. France, the European Court of Human Rights held that:

> Owing to the absolute character of the right guaranteed, the Court does not rule out the possibility that Article 3 of the Convention (art. 3) may also apply where the danger emanates from persons or groups of persons who are not public officials.[200]

Equally, commenting on the prohibition of torture contained in Article 7 of the ICCPR, the Human Rights Committee held that: "It is the duty of the State party to afford everyone protection through legislative and other measures as may be necessary against the acts prohibited by article 7, whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity."[201]

It is presented that, with respect to universal jurisdiction – as a means of enforcing international criminal law – there is no requirement that a public official be involved.

4.2.3. The Elements of the Crime of Torture

The ICTY has defined three constituent elements which must be fulfilled for a finding of torture. These three

198 Prosecutor v. Kunarac, Kovac, and Vukovic, ICTY, Case No. IT-96-23-T & ICT-96-23/1-T, 22 February 2001, §470.

199 Prosecutor v. Kunarac, Kovac, and Vukovic, ICTY, Case No. IT-96-23-T & ICT-96-23/1-T, 22 February 2001, §470.

200 HLR v France, European Court of Human Rights, 29 April 1997, §40.

201 Human Rights Committee, General Comment 20, 1992, §1.

elements are similar to those contained in the Elements of Crimes of the ICC, as relative to Article 8(2)(a)(ii) (the war crime of torture).

Element 1: Severe Pain and Suffering Must be Inflicted

In order to constitute torture, the pain or suffering inflicted must be severe. In Krnojelac, the Trial Chamber held that, "When assessing the seriousness of the acts charged as torture, the Trial Chamber must take into account all the circumstances of the case, including the nature and context of the infliction of pain, the premeditation and institutionalisation of the ill-treatment, the physical condition of the victim, the manner and method used, and the position of inferiority of the victim. In particular, to the extent that an individual has been mistreated over a prolonged period of time, or that he or she has been subjected to repeated or various forms of mistreatment, the severity of the acts should be assessed as a whole to the extent that it can be shown that this lasting period or the repetition of acts are inter-related, follow a pattern or are directed towards the same prohibited goal."[202]

As regards the severity of the act or omission, it must be noted that, although torture may result in permanent injury, this is not a requirement for a finding of torture.[203] Additionally, the ICTY emphasized that severe mental suffering also qualifies as torture, as noted in Kvocka, "abuse amounting to torture need not necessarily involve physical injury, as mental harm is a prevalent form of inflicting torture. For instance, the mental suffering caused to an individual who is forced to watch severe mistreatment inflicted on a relative would rise to the level of gravity required under the crime of torture."[204]

Element 2: The Act or Omission Must be Intentional

The mens rea requirement for a finding of torture holds that the act or omission must be intentional. As noted in Kunarac, "it is important to establish whether a perpetrator intended to act in a way which, in the normal course of events, would cause severe pain or suffering, whether physical or mental, to his victims."[205]

Element 3: Prohibited Purpose or Goal Required

As noted previously, the act or omission involved in torture "must aim at obtaining information or a confession, or at punishing, intimidating or coercing the victim or a third person, or at discriminating, on any ground, against the

202 Prosecutor v Krnojelac, ICTY, Case No. It-95-25-T, March 15 2002, §182.

203 Prosecutor v. Kvoca et al, ICTY, Case No. IT-98-30-T, 2 November 2001, §148.

204 Prosecutor v. Kvoca et al, ICTY, Case No. IT-98-30-T, 2 November 2001, §149.

205 Prosecutor v. Kunarac, Kovac, and Vukovic, ICTY, Case No. IT-96-23 & ICT-96-23/1-A, 12 June 2002, §153.

victim or a third person."[206] In Krnojelac the Trial Chamber noted that "The purpose and the seriousness of the attack upon the victim sets torture apart from other forms of mistreatment. Torture as a criminal offence is not a gratuitous act of violence; it aims, through the infliction of severe mental or physical pain, to attain a certain result or purpose. Thus, in the absence of such purpose or goal, even very severe infliction of pain would not qualify as torture pursuant to Article 3 or Article 5."[207]

The findings of the Trial Chamber in Kvocka et al must be emphasized as regards the purpose. The Court held that "the prohibited purposes listed in the Torture Convention as reflected by customary international law "do not constitute an exhaustive list, and should be regarded as merely representative" … humiliating the victim or a third person constitutes a prohibited purpose for torture under international humanitarian law."[208]

4.3. Crimes Against Humanity

Crimes against humanity have long been listed amongst those crimes which "shock the conscience of humanity." After the First World War, a commission investigating war crimes – established in connection the 1919 Treaty of Versailles – found that Turkish officials committed "crimes against the laws of humanity" in relation to the killing of Armenians.[209] However, it was not until the Nuremburg Trials that crimes against humanity entered positive international criminal law. Article 6(c) of the Nurembourg Charter defines crimes against humanity as:

> "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated."

The Numerbourg Charter also specifically held that such crimes give rise to individual criminal responsibility, and that "[l]eaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan."[210] Article 7 of the Statute of the ICC contains a more up-to-date definition, formulated in light of modern history and jurisprudence:

206 Prosecutor v. Kunarac, Kovac, and Vukovic, ICTY, Case No. IT-96-23 & ICT-96-23/1-A, 12 June 2002, §142.

207 Prosecutor v Krnojelac, ICTY, Case No. It-95-25-T, March 15 2002, §180.

208 Prosecutor v. Kvoca et al, ICTY, Case No. IT-98-30-T, 2 November 2001, §140.

209 M. Cherif Bassiouni, Crimes against Humanity, available at: http://www.crimesofwar.org/thebook/crimes-against-humanity.html

210 Article 6, Nurembourg Charter.

1. For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

   - Murder;
   - Extermination;
   - Enslavement;
   - Deportation or forcible transfer of population;
   - Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
   - Torture;
   - Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
   - Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
   - Enforced disappearance of persons;
   - The crime of apartheid;
   - Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

2. From this Article it is evident that there three principal requirements which must be met in order for an attack to constitute a crime against humanity:

   - The attack must be directed against any civilian population.
   - The attack must be widespread or systematic.
   - The perpetrator must have knowledge of the broader context in which the attack occurs.

4.3.1. An Attack Must be Directed Against a Civilian Population

In order to qualify as a crime against humanity, an attack must be directed against any civilian population; as noted in Kunarac, the civilian population must be "the primary object of the attack."[211] In order to determine whether or not an attack is directed against a civilian population, a number of factors are relevant "inter alia, the means and method used in the course of the attack, the status of the victims, their number, the discriminatory nature of the attack, the nature of the crimes committed in its

211 Prosecutor v Kunarac et al, Case No IT-96-23, IT-96-23/1, 12 June 2002, §91.

course, the resistance to the assailants at the time and the extent to which the attacking force may be said to have complied or attempted to comply with the precautionary requirements of the laws of war."[212]

As a result of the nature of crimes against humanity, and in light of the fact that such crimes may be committed "inside or outside the context of an armed conflict",[213] civilian populations are broadly defined. As noted by the Galic Trial Chamber, "[t]he definition of a "civilian" is expansive and includes individuals who at one time performed acts of resistance, as well as persons hors de combat when the crime was perpetrated. There is no requirement that the entire population of the area in which the attack is taking place must be subjected to that attack. It is sufficient to show that a certain number of individuals were targeted in the course of the attack, or that individuals were targeted in such a way as to compel the conclusion that the attack was in fact directed against a civilian "population," rather than against a small and randomly selected number of individuals."[214]

Given that the prohibition on crimes against humanity, "is intended to safeguard basic human values by banning atrocities directed against human dignity",[215] other Trial Chambers have emphasized that "a population may be considered as 'civilian' even if certain non-civilians are present – it must simply be 'predominantly civilian in nature'",[216] and that "the presence of those actively involved in the conflict should not prevent the characterization of a population as civilian and those actively involved in a resistance movement can qualify as victims of crimes against humanity."[217]

Thus it is apparent that an attack must be directed against a civilian population, however, this population must simply be predominantly civilian, and the presence of non-civilians will not alter its classification.

4.3.2. Widespread or Systematic

The second requirement holds that a crime against humanity must be either widespread or systematic.[218] In this regard, however, it is important to note that "[o]nly the attack, not the individual acts of the accused, must be 'widespread or systematic.'"[219]

The Blaskic Trial Chamber clarified the meaning of

212 Prosecutor v Kunarac et al, Case No IT-96-23, IT-96-23/1, 12 June 2002, §91.
213 Kayishema and Ruzindana, (Trial Chamber), May 21, 1999, para. 127-129
214 Prosecutor vs. Galic, Case No. IT-98-29-T, 5 December 2003, §143.
215 Prosecutor v. Kupreskic, Case No: IT-95-16-T, 14 January 2000, §547.
216 Prosecutor v Kordic and Cerkez, Case No. IT-95-14/2-T, 26 February 2001, §170.
217 Prosecutor v. Kupreskic, Case No: IT-95-16-T, 14 January 2000, §549.
218 Prosecutor v. Naletilic & Martinovic, Case No. IT-98-34-T, 31 March 2003, §236.
219 Prosecutor v Kunarac et al, Case No IT-96-23, IT-96-23/1, 22 February 2001, §431.

systematic, holding that it contains four elements:

- the existence of a political objective, a plan pursuant to which the attack is perpetrated or an ideology, in the broad sense of the word, that is, to destroy, persecute or weaken a community;
- the perpetration of a criminal act on a very large scale against a group of civilians or the repeated and continuous commission of inhumane acts linked to one another;
- the preparation and use of significant public or private resources, whether military or other;
- the implication of high-level political and/or military authorities in the definition and establishment of the methodical plan.[220]

In this regard it is important to note that "[p]atterns of crimes, in the sense of the non-accidental repetition of similar criminal conduct on a regular basis, are a common expression of such systematic occurrence"[221] and that systematic refers to the "organised nature of the acts and the improbability of their random occurrence."[222] To this end, however, it must be emphasized that "neither the attack nor the acts of the accused needs to be supported by any form of "policy" or "plan",[223] thus although "the existence of a policy or plan may be evidentially relevant, but it is not a legal element of the crime."[224]

The term widespread is perhaps easier to define, and it has been found to refer "to the large scale nature of the attack and the number of targeted persons."[225] A crime may be found to be widespread or committed on a large scale, by the "cumulative effect of a series of inhumane acts or the singular effect of an inhumane act of extraordinary magnitude".[226]

Ultimately, any assessment of what constitutes a widespread or systematic attack must be made relative to the population under attack.[227] Of relevance, therefore, are the "consequences of the attack upon the targeted population, the number of victims, the nature of the acts, the possible participation of officials or authorities or any identifiable patterns of crimes".[228]

4.3.3. Knowledge of the Attack

Knowledge of the attack may be regarded as the mens rea

220 Prosecutor v. Blaskic, Case No. IT-95-14-T, 3 March 2000, §203.
221 Prosecutor v. Kordic and Cerkez, Case No. IT-95-14/2-A, 17 December 2004, §94.
222 Prosecutor v. Naletilic & Martinovic, Case No. IT-98-34-T, 31 March 2003, §236.
223 Prosecutor v Kunarac et al, Case No IT-96-23, IT-96-23/1, 12 June 2002, §98.
224 Prosecutor v Kunarac et al, Case No IT-96-23, IT-96-23/1, 12 June 2002, §98.
225 Prosecutor v. Kordic and Cerkez, Case No. IT-95-14/2-A, 17 December 2004, §94.
226 Prosecutor v Kordic and Cerkez, Case No. IT-95-14/2-T, 26 February 2001, §179.
227 Prosecutor vs. Galic, Case No. IT-98-29-T, 5 December 2003, §146.
228 Prosecutor v Kunarac et al, Case No IT-96-23, IT-96-23/1, 12 June 2002, §95.

of a crime against humanity, as distinct from the mens rea requirement associated with each of the underlying crimes. The mens rea requirement of a crime against humanity thus comprises two compenents: "(1) the intent to commit the underlying offence, combined with (2) knowledge of the broader context in which that offence occurs."[229]

As regards the perpetrators knowledge of the attack, he or she must have knowingly participated in a widespread or systematic attack, or have had knowledge of the attack and taken the risk that his/her acts were part of it. As the Kunerac Appeals Chamber stated, the perpetrator "must have had the intent to commit the underlying offence or offences with which he is charged, and that he must have known 'that there is an attack on the civilian population and that his acts comprise part of that attack, or at least that he took the risk that his acts were part of the attack.'"[230] As elaborated upon in Blaskic, "the mens rea specific to a crime against humanity does not require that the agent be identified with the ideology, policy or plan in whose name mass crimes were perpetrated nor even that he supported it. It suffices that he knowingly took the risk of participating in the implementation of the ideology, policy or plan. This specifically means that it must, for example, be proved that: [a] the accused willingly agreed to carry out the function he was performing; [b] that these functions resulted in his collaboration with the political, military or civilian authorities defining the ideology, policy or plan at the root of the crimes; [c] that he received orders relating to the ideology, policy or plan; and lastly [d] that he contributed to its commission through intentional acts or by simply refusing of his own accord to take the measures necessary to prevent their perpetration."[231]

4.3.4. The Underlying Offences

This section will deal with murder, torture, and persecution as crimes against humanity.

The elements of the offence of murder as a crime against humanity, are the same as those for the crime of murder as a violation of customary international law, and wilful killing as a grave breach of the Geneva Conventions.[232] These issues have already been discussed in detail above, and will not be repeated here.

Equally, the elements of the offence of torture as a crime against humanity are the same those discussed above for torture.[233] The issues will not be repeated here.

229 Prosecutor v. Kupreskic, Case No: IT-95-16-T, 14 January 2000, §556.

230 Prosecutor v Kunarac et al, Case No IT-96-23, IT-96-23/1, 12 June 2002, §102.

231 Prosecutor v. Blaskic, Case No. IT-95-14-T, 3 March 2000, §257.

232 Prosecutor v Kordic and Cerkez, Case No. IT-95-14/2-T, 26 February 2001, §236.

233 Prosecutor v Kunarac et al, Case No IT-96-23, IT-96-23/1, 12 June 2002, §142.

In order to establish that a crime against humanity of persecution has been committed, it is necessary to confirm that there was a widespread or systematic attack directed against a civilian population that blatantly discriminated and infringed a fundamental right recognized under customary international law or treaty, and was carried out with the intention so to discriminate.[234] As noted in Article 7(g) of the Statute of the ICC, "Persecution" means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity".

In Tadic, the Trial Chamber of the ICTY held that: "The crime of persecution encompasses a variety of acts, including, inter alia, those of physical, economic or judicial nature, that violate an individual's right to the equal enjoyment of his basic rights."[235]

In Kupreskic the Trial Chamber of the ICTY listed the type of acts which would constitute the crime of persecution:

(a) A narrow definition of persecution is not supported in customary international law. Persecution has been described by courts as a wide and particularly serious genus of crimes committed against the Jewish people and other groups by the Nazi regime.
(b) In their interpretation of persecution courts have included acts such as murder, extermination, torture, and other serious acts on the person such as those presently enumerated in Article 5.
(c) Persecution can also involve a variety of other discriminatory acts, involving attacks on political, social, and economic rights. […]
(d) Persecution is commonly used to describe a series of acts rather than a single act. Acts of persecution will usually form part of a policy or at least of a patterned practice, and must be regarded in their context. […]
(e) As a corollary to (d), discriminatory acts charged as persecution must not be considered in isolation. Some of the acts mentioned above may not, in and of themselves, be so serious as to constitute a crime against humanity. For example, restrictions placed on a particular group to curtail their rights to participate in particular aspects of social life (such as visits to public parks, theatres or libraries) constitute discrimination, which is in itself a reprehensible act; however, they may not in and of themselves amount to persecution. These acts must not be considered in isolation but examined in their context and weighed for their cumulative effect.[236]

234 Prosecutor v Kunarac et al, Case No IT-96-23, IT-96-23/1, 22 February 2001, §431.
235 Prosecutor v. Tadić, Case No. IT-94-1-T, 7 May 1997, §. 710.
236 Prosecutor v. Kupreškić et al., Case No. IT-95-16-T, 14 January 2000, §. 615.

5. Examples of Violations of International Humanitarian Law Committed During the Offensive on the Gaza Strip.

In order to highlight the reality of the situation in the Gaza Strip, and the urgent need for accountability, this section provides examples of crimes perpetrated by Israeli forces during the offensive on the Gaza Strip ('Operation Cast Lead', 27 December 2008 – 18 January 2009).

5.1. Wilful Killing (Murder) of Civilians

The immunity and protection granted to civilians not directly participating in hostilities is one of the most fundamental principles of IHL, and an "intransgressible principle of customary law."[237] Under no circumstances may civilians or civilian objects not directly participating in, or contributing to, hostilities be made the object of an attack. Rather, IHL requires that all feasible precautions be taken to avoid harming civilians or civilian objects.

During Operation Cast Lead, Israeli forces wilfully violated the principle of distinction, intentionally targeting civilians and civilian objects. In numerous cases documented by PCHR, Israeli forces intentionally targeted unarmed civilians, some of whom were carrying white flags. This section will document a sample of cases; this report is not intended to be a comprehensive record, rather it highlights certain cases which are illustrative with respect to Israel's overall policy and conduct of hostilities.

237 ICJ, Nuclear Weapons Case, Advisory Opinion, §179.

The most blatant violations of the principle of distinction concern the intentional targeting and killing of civilians, either at close range using small arms fire, or through the use of unmanned aerial vehicles (UAVs, or drones), one of the most precise weapons in Israel's military arsenal.

5.1.1. Majeda and Raya Abu Hajjaj, 4 January 2009

On 4 January 2009, Majeda (35) and Raya (65) Abu Hajjaj were shot and killed by Israeli forces. The two women were part of a group of 27 civilians fleeing the Johr Ad-Dik area – in accordance with instructions broadcast by Israeli forces – following the onset of the ground invasion. Two members of the group, including Majeda Abu Hajjaj, were carrying white flags.

As the group of unarmed civilians approach an Israeli tank position, they paused – approximately 150 metres from the soldiers – waiting for a sign to indicate that they had permission to proceed. Without warning, the soldiers opened direct fire on the civilians. Majeda and Raya were shot and killed.

At the time of the attack the area was under the effective control of Israeli ground troops, and there was no fighting in the vicinity. The civilians were unarmed, posed no threat to the Israeli forces, and were carrying white flags.

The actus reus of the crime is evidently met, Majeda and Raya, both civilians, were shot and killed by Israeli forces. The mens rea requirement is also present, it is unquestionable that the Israeli soldiers opening fire on a group of unarmed civilians bearing white flags "had the intent to kill, or to inflict serious bodily injury in reckless disregard of human life."[238]

This attack constitutes the crime of wilful killing, a grave breach of the Geneva Conventions. In addition, intentionally making civilians the object of an attack is a war crime, as defined in Article 8(2)(b)(i) of the Statute of the ICC, and Article 85(3)(a) of Additional Protocol I.

5.1.2. Fouad and Farah Al-Helu, 4 January 2009

On 4 January, 2009, Israeli forces shot and killed Fouad (61) and Farah (1 ½) Al-Helu. The Al-Helu family were sheltering in the stairwell of their house in the al-Zaytoun area of the Gaza Strip, when it was stormed by Israeli forces, who opened fire after entering the building. As Fouad stood up on the approach of the soldiers, he was shot and killed.

Later, the family were ordered to leave the house,

238 Prosecutor v Kordic and Cerkez, Case No. IT-95-14/2-T, 26 February 2001, §229.

under the assurance that they would not be harmed. Approximately 500 metres from their home, Israeli soldiers in the upstairs window of a nearby building began to fire directly at the civilians, maintaining their fire for several minutes. Abdullah (20), Islam (18) and Farah (1 ½) Al-Helu were injured. The family crawled to the relative safety of a nearby sandbank where they phoned an ambulance. The ambulance was attacked on its way to the area, and was unable to reach the victims. Farah Al-Helu bled to death at approximately 08:00, two hours after the initial attack.

The family were clearly identifiable as civilians. They had been ordered to leave their house by Israeli forces, and Israeli tanks and soldiers were present in the street at the time of the attack.

The actus reus of the crime is evidently met. Fouad and Farah, both civilians, died as a result of being directly targeted by Israeli forces. The mens rea is also met, as evidenced by the prolonged nature of the second attack, and the proximity of the perpetrators in both incidents; it is evident that the Israeli soldiers "had the intent to kill, or to inflict serious bodily injury in reckless disregard of human life."[239]

This attack constitutes the crime of wilful killing, a grave breach of the Geneva Conventions. In addition, intentionally making civilians the object of an attack is a war crime, as defined in Article 8(2)(b)(i) of the Statute of the ICC, and Article 85(3)(a) of Additional Protocol I.

5.1.3. Shaza and Isra Al-Habash, 4 January 2009

On 4 January 2009, six children were playing on the roof of the Al-Habash family home in the Al-Sha'f district of Gaza City. At approximately 15:00 an Israeli drone fired a missile at the children. Shaza (10) and Isra (12) Al-Habash were killed, while Jamila (14), Mahmoud (15) and Mohammed (16) were injured; Jamila lost both her legs, while one of Mahmoud's legs was amputated above the shin.

There was no fighting in the area at the time of the attack, and given the level of detail and information available to the drone operation, and the lack of imperative military necessity as a result of the absence of hostilities, PCHR believe that Israeli forces deliberately and directly targeted the children. As noted by Human Rights Watch, "it remains unclear why the IDF targeted the al-Habashs' roof, when the video surveillance on the drones should have allowed the operator to identify the six children who were playing."[240]

239 Prosecutor v Kordic and Cerkez, Case No. IT-95-14/2-T, 26 February 2001, §229.

240 Human Rights Watch, Precisely Wrong: Gaza Civilians Killed by Drone Launched Missiles, 2009, p. 23.

The actus reus and mens rea of the crime of wilful killing are clearly satisfied. Two civilian children, Shaza and Isra Al-Habash, were killed in the attack. Given that drones are one of the most precise weapons in Israel's military arsenal and the fact that Israel allegedly "checked and cross-checked targets"[241] it is evident that Israeli forces "intended to cause death or serious bodily injury which, as it is reasonable to assume, he had to understand was likely to lead to death."[242]

This attack constitutes the crime of wilful killing, a grave breach of the Geneva Conventions. In addition, intentionally making civilians the object of an attack is a war crime, as defined in Article 8(2)(b)(i) of the Statute of the ICC, and Article 85(3)(a) of Additional Protocol I.

5.1.4. Al-Dayah, 6 January 2009

At approximately 5:45 am on 6 January 2009, Israeli forces targeted and destroyed a house belonging to the Al-Dayah family, in the Zaitoun district of eastern Gaza City. There were 23 civilians, all members of the Al-Dayah family, sheltering in house at the time of the attack; 21 were killed instantly, while another died of his wounds on 9 January. Only one member of the family inside the house at the time of the attack survived. Among the dead were 12 children and a pregnant woman.

The Israeli government has claimed that this attack "was the result of an operational error. An investigation determined that the IDF intended to strike a weapons' storage facility located in a building next to this residence. However, the IDF erroneously targeted the Al-Daia residence, rather than the weapons storehouse. Although the IDF did provide warning shots to the roof of the Al-Daia residence, other warnings (such as the warning phone call) were made to the building actually containing the weapons, not the al-Daia residence."[243]

However, these claims conflict with investigations conducted by PCHR, and other organisations, including the UN Fact Finding Mission. None of the al-Dayah's neighbours received any warning prior to the attack. In addition, no other houses in the vicinity of the al-Dayah residence were targeted subsequent to the attack, raising doubts as to the veracity of Israel's claim that a weapons storage facility was the intended target.

If this attack was the result of an 'operation error' it would indicate that Israeli forces failed to take the required precautions in attack, in particular the obligation

241 IDF, The Operation in Gaza 27 December – 18 January 2009; Factual and Legal Aspects, July 2009, §8

242 Prosecutor v. Blaskic, Case No. IT-95-14-T, 3 March 2000, §153.

243 IDF, The Operation in Gaza 27 December – 18 January 2009; Factual and Legal Aspects, July 2009, §386.

to "do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects".[244] Further, the choice of munitions indicates a violation of the obligations to "take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss or civilian life, injury to civilians and damage to civilian objects",[245] and to give "effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit."[246] As noted by the UN Fact Finding Mission, "[g]iven the power of the projectile that destroyed the four-storey al-Daya building, the Mission wonders what the consequences would have been if the projectile had in fact struck a weapons store, yet there is no suggestion by the Israeli authorities of a warning having been given to neighbouring houses that secondary explosions were possible. Not only does it appear that the wrong warnings were given to the wrong people, but if the existence of the storage facility is to be believed at all, it would also appear that the apparently feasible step of warning locals of entirely foreseeable danger was not taken either."[247]

The nature of the attack and the failure to attack the alleged weapons storage facility, the purported target, indicate that this attack may not have been an error but rather the direct targeting of civilians and civilian objects. The actus reus of the attack is beyond dispute. The attacks resulted in the death, or injury of civilian forces. It is also evident that the attack was planned carefully, if there was no error in the planning – as claimed by Israel – then the mens rea requirement would also be met, and the attack would therefore amount to wilful killing, a grave breach of the Geneva Conventions.

5.1.5. 'Roof Knocking'

The Israeli government has claimed that, in accordance with its obligations to protect the civilian population to give effective advance warning of an impending attack where possible, "the IDF made even greater efforts to avoid civilian casualties and minimise collateral damage by firing warning shots from light weapons that hit the roofs of the designated targets before proceeding with the strike."[248] This technique was referred to as 'roof knocking' by Israeli forces, and was intended to warn civilians of a pending attack so that they could evacuate the premises. Operation Cast Lead was the first time that this practice was put into use.

244 Article 57(2)(a)(ii), Additional Protocol I.

245 Article 57(2)(a)(iii), Additional Protocol I.

246 Article 57(c), Additional Protocol I.

247 Report of the UN Fact Finding Mission on the Gaza Conflict, September 2009, §856.

248 IDF, The Operation in Gaza 27 December – 18 January 2009; Factual and Legal Aspects, July 2009, §264.

Civilians had no way of knowing that the warning shot was intended to encourage them to leave the building. IHL requires that an effective warning be given, in order to "give civilians the chance to protect themselves."[249] As noted by the UN Fact Finding Mission, effective warning "should not require civilians to guess the meaning of the warning. The technique of using small explosives to frighten civilians into evacuation, even if the intent is to warn, may cause terror and confuse the affected civilians."[250] An attack cannot be considered to constitute a warning. Given the evident danger to civilians, the use of the 'rook-knocking' technique must be regarded as reckless in the extreme, and as constituting a direct attack on civilians and civilian objects.

5.1.6. The Illegal Classification of Civilian Police and Governmental Buildings as Legitimate Military Objectives

During Operation Cast Lead, Israeli forces deliberately targeted members of the civilian police force, and governmental Ministries. During the first wave of attacks on 27 December 2008, the institutions of the police and individual police were heavily targeted. On the first day of the attack alone, 240 police were killed. In total, 255 police were killed over the course of the offensive, and a total of 74 police buildings and outposts were attacked and destroyed. The Ministry of the Interior, the Ministry of Justice, and the Palestinian Legislative Council, and the ministerial complex, which contains the Ministries of Foreign Affairs, Finance, Planning, and Public Works, were also targeted and the ministries completely destroyed. During the attack on the Ministry of Justice, the Ministry of Education also suffered significant damage.

Israel has claimed that internal security forces, which include the police, were legitimate military objectives, and so "were not accorded the immunity from attack generally granted to civilians."[251] Israel has also claimed that: "While Hamas operates ministries and is in charge of a variety of administrative and traditionally governmental functions in the Gaza Strip, it still remains a terrorist organisation. Many of the ostensibly civilian elements of its regime are in reality active components of its terrorist and military efforts."[252] Israel thus classified all targeted ministries, and other government-associated components of the civilian infrastructure as legitimate military objectives; as noted in the IDF's legal analysis of Operation Cast Lead, "[w]ith respect to each particular target, IDF made the determination that the attacks were lawful

249 Commentary to Additional Protocol I, §2225.

250 Report of the UN Fact Finding Mission on the Gaza Conflict, September 2009, §531.

251 IDF, The Operation in Gaza 27 December – 18 January 2009; Factual and Legal Aspects, July 2009, §237

252 IDF, The Operation in Gaza 27 December – 18 January 2009; Factual and Legal Aspects, July 2009, §235.

under international law."[253] This claim will be analysed in light of the requirements of IHL. Ultimately it is presented that, in targeting members of the civilian police, Israel wilfully violated the principle of distinction. These attacks therefore amount to wilful killing, a grave breach of the Geneva Conventions, as the direct targeting of civilians they also constitute grave breaches of Additional Protocol I.[254] Equally, the targeting and destruction of governmental Ministries constitutes a war crime.[255]

As noted previously, only members of the armed forces are combatants and thus legitimate targets for attack. All other individuals are civilians and entitled to the full protections of IHL, including immunity from attack. This immunity is, however, subject to the caveat that individuals lose their protection for such a time as they directly participate in hostilities.

In an interpretative guide to the concept of direct participation in hostilities, the ICRC has noted that civilians "lose protection against direct attack for the duration of each specific act amounting to direct participation in hostilities." This is clearly a temporally distinct concept; civilians participating directly in hostilities may only be targeted for the duration of each individual act. Members of an organized armed group lose their protection for so long as they perform a continuous combat function. This continuous combat function distinguishes members of an organized armed group from "civilians who directly participate in hostilities on a merely spontaneous, sporadic, or unorganized basis".[256] Significantly, it also excludes those civilians "who assume exclusively political, administrative, or other non-combat functions."[257]

Thus, direct participation in hostilities does not depend on an individual's status, function, or affiliation, but rather refers to "his or her engagement in specific hostile acts." Hostile acts, or the constituent components of direct participation, must meet the following cumulative criteria:

1. The act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (threshold of harm), and

253 IDF, The Operation in Gaza 27 December – 18 January 2009; Factual and Legal Aspects, July 2009, §236.

254 Article 8(2)(b)(i) of the Statute of the International Criminal Court prohibits: "Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities".

255 Article 8(2)(b)(ii) of the Statute of the International Criminal Court prohibits: "Intentionally directing attacks against civilian objects, that is, objects which are not military objectives".

256 ICRC, Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law, May 2009, p. 26

257 ICRC, Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law, May 2009, p. 33

2. There must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation), and
3. The act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus).

By definition, civilian police forces, and paramilitary forces and armed law enforcement agencies are not members of the armed forces. Incorporation of these agencies into the armed forces is possible, and is typically carried out by a formal act, such as an act of parliament. The Commentary to Additional Protocol I notes in this regard that "uniformed units of law enforcement agencies can be members of the armed forces if the adverse Party has been notified of this, so that there is no confusion on its part."[258]

Hamas is a multi-faceted organisation, exercising certain governmental functions in the Gaza Strip.[259] As an organisation, it cannot be considered an armed group. Rather, a distinction must be made between Hamas' armed and political/civil components. The Izz ad-Din al-Qassam Brigades are the military wing of the Hamas organisation, they are an armed group, and members of the Brigades are considered combatants according to IHL. However, Hamas' political and civil wings are comprised of civilians, who are legally entitled to the protections associated with this status.

As noted by B'Tselem, an Israeli Human Rights Organization:

> "Hamas is certainly responsible for missile fire at Israeli civilians, which constitutes a war crime. However, as the entity effectively governing the Gaza Strip, it is also responsible for maintaining daily life. As such, it supervises the activity of all civilian frameworks in Gaza – among them the welfare, health, housing, and legal systems. Hamas must also ensure public order and safety by means of a police force. Therefore, even if Hamas is a "hostile entity" whose principle objective is to undermine the existence of the State of Israel, this does not lead to the conclusion that every act it carries out is intended to harm Israel and that every government ministry is a legitimate target."[260]

The police force and other internal security forces were not incorporated into the armed forces. Following the takeover of the Gaza Strip, when Hamas assumed

258 ICRC, Commentary to Additional Protocol I, §1683.

259 Hamas exercises those governmental authorities previously assumed by the PNA. This authority is limited by, inter alia, the Oslo Accords, and Israel's ongoing occupation of the Gaza Strip.

260 http://www.btselem.org/English/Gaza_strip/20081231_Gaza_Letter_to_Mazuz.asp

governmental control in Gaza, it explicitly created new institutions to assume governmental responsibility, and assumed control of the civilian police force. As confirmed in the Report of the UN Fact Finding Mission, the civilian police force cannot be considered an armed group, and thus that policemen cannot be considered combatants by virtue of their membership in the police.[261]

Although some members of the police force were also members of the Izz ad-Din al-Qassam Brigades, it is clear that membership of the Brigades was neither compulsory nor automatic. Equally, while certain individual members of the police may have directly participated in hostilities, consequent to their role in the Izz ad-Din al-Qassam Brigades, these acts were not attributable to the police. The police force as a whole was neither a member of the armed forces, nor an organized armed group, rather it was civilian, engaged in carrying out the traditional functions of a civilian police force, such as the maintenance of public order. The classification of the entire police force as legitimate military targets, was thus illegal, having no basis in international law.

The Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia emphasized that "All targets must meet the criteria for military objectives",[262] in terms of classifying objectives a "general label is insufficient."[263] As noted by the Independent Fact Finding Mission lead by Professor Dugard, all of these individuals were killed while performing normal police actions; none were killed while engaging in combat with Israeli forces.

Even if Israel believed that the police force were to be integrated into the armed forces in the future, i.e. following a ground invasion – a conclusion not reached by PCHR – this does not justify pre-emptively attacking civilians. For as long as the police were not members of the armed force, they were civilians, IHL is explicit in this regard.

If individual police served in a continuous combat function with the Izz ad-Din al-Qassam Brigades, they may be considered legitimate targets. However, in order to legitimately attack these individuals while in police uniforms, or engaging in policing activities, Israeli forces must be aware of this classification in advance. They must have specific evidence relating to each individual's status. All other police retain their status as civilians, and retain immunity from direct attack. As the police force was not a part of the armed forces, and thus ostensibly civilian, it is

261 Report of the UN Fact Finding Mission on the Gaza Conflict, §431.

262 Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, §55.

263 Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, §55.

clear that, in accordance with the principle of distinction, ostensibly civilian individuals or ostensibly civilian objects must be presumed civilian;[264] they cannot be attacked. As noted by the Trial Chamber of the ICTY in Galic, "the presence of individual combatants within the population does not change its civilian character. … A person shall be considered to be a civilian for as long as there is doubt as to his or her real status."[265]

Israel's classification of the entire civilian police force as legitimate military objectives was illegal, and a clear violation of the principle of distinction. It must be emphasized that at the time of the attacks, none of the police officers were effectively contributing to military action; they were engaged in the routine duties of a civilian police force, some were partaking in a graduation ceremony. That limited numbers of the police force were found to be members of the Brigades – after the attacks – is irrelevant with respect to the requirements of IHL. In order to attack ostensibly civilian individuals, doubt as to their status is not permitted.

That Israel's classification of the police force as legitimate military targets was illegal has been confirmed, inter alia, by the Independent Fact Finding Mission,[266] Amnesty International,[267] and the United Nations High Commissioner for Human Rights.[268]

The actus reus and mens rea of the attack are beyond dispute. The attacks resulted in the death, or injury of civilias, and it is apparent that Israel intended to cause this death and injury; the State of Israel has confirmed that such attacks were deliberate, and that they regarded them as legitimate military objectives.[269]

These attacks constitute the crime of wilful killing, a grave breach of the Geneva Conventions. In addition, intentionally making civilians the object of an attack is a war crime, as defined in Article 8(2)(b)(i) of the Statute of the ICC, and Article 85(3)(a) of Additional Protocol I.
Equally, with respect to the destruction of civilian objects, such as the governmental ministries, the actus reus and the mens rea are beyond dispute. The buildings

264 Article 50(1), Additional Protocol I, "In case of doubt whether a person is a civilian, that person shall be considered to be a civilian." Article 52(3), Additional Protocol I, "In case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used."

265 Prosecutor vs. Galic, Case No. IT-98-29-T, 5 December 2003, §50.

266 §453

267 Amnesty International, Operation 'Cast Lead': 22 Days of Death and Destruction, MDE 15/015/2009, 2009, p. 9 and 83.

268 Human Rights Council, The grave violation of human rights in the Occupied Palestinian Territory, particularly due to the recent Israeli military attacks against the occupied Gaza Strip, Report of the United Nations High Commissioner for Human Rights on the implementation of the Human Rights Council resolution S-91, U.N. Doc. A/HRC/12/37, 13 August 2009-08-14, §20.

269 See. IDF, The Operation in Gaza 27 December – 18 January 2009; Factual and Legal Aspects, July 2009,

were completely destroyed, and Israel has acknowledged that they were deliberately targeted.[270] These attacks constitute war crimes, as defined in Article 8(2)(b)(ii) of the ICC Statute.[271]

5.2. Indiscriminate Attacks

During Operation Cast Lead, Israeli forces made extensive use of non-pinpoint weaponry such as artillery, naval guns, and mortars. It is presented that, in a significant majority of cases, these attacks were indiscriminate, inter alia, because they were "not directed at a specific military objective" or employed "a method or means of combat which cannot be directed at a specific military objective." Amnesty International have noted that, "[a]rtillery in general and white phosphorous shells in particular should never be used in populated areas."[272]

In Galic the Trial Chamber held that "attacks which strike civilians or civilian objects without distinction, may qualify as direct attacks against civilians".[273] The Appeals Chamber clarified that whether an attack is directed against the civilian population depends on the factual circumstances, which could include the:

means and methods used in the course of the attack, … the nature of the crimes committed in its course, the resistance to the assailants at the time and the extent to which the attacking force may be said to have complied or attempted to comply with the precautionary requirements of the laws of the war.[274]

Presented herein are examples of clearly indiscriminate attacks, which amounted to the direct targeting of civilians. In addition, PCHR note that there are numerous other cases wherein conclusions are not so clear cut, caused for the most part by the confusion of the battlefield, and the difficulties associated with calculating military necessity. However, given Israel's overall conduct of hostilities, including the widespread direct targeting of civilians and civilian objects, PCHR believe that a significant amount of the destruction was not warranted by imperative military necessity. In this respect the findings of the Trial Chamber in Kupreskic must be emphasised, "it may happen that single attacks on military objectives causing incidental damage to civilians, although they may raise doubts as to their lawfulness, nevertheless do not appear on their face to fall foul per se of the loose prescriptions of Articles 57

270 IDF, The Operation in Gaza 27 December – 18 January 2009; Factual and Legal Aspects, July 2009, §236.

271 Article 8(2)(b)(ii) of the Statute of the International Criminal Court prohibits: "Intentionally directing attacks against civilian objects, that is, objects which are not military objectives".

272 Amnesty International, Operation 'Cast Lead': 22 Days of Death and Destruction, MDE 15/015/2009, 2009, p. 2.

273 Prosecutor vs. Galic, Case No. IT-98-29-T, 5 December 2003, §57.

274 Prosecutor v. Galic, Case No: IT-9-29-A, 30 November 2006, §132.

and 58 (or of the corresponding customary rules). However, in case of repeated attacks, all or most of them falling within the grey area between indisputable legality and unlawfulness, it might be warranted to conclude that the cumulative effect of such acts entails that they may not be in keeping with international law. Indeed, this pattern of military conduct may turn out to jeopardise excessively the lives and assets of civilians, contrary to the demands of humanity."[275]

5.2.1. The Use of Artillery and Mortars

Throughout the course of Operation Cast lead, Israeli forces made extensive use of artillery, mortar and naval barrage. In terms of houses alone, this form of bombardment accounted for the complete or partial (rendered uninhabitable) destruction of at least 773 houses. In many instances artillery, mortar and naval guns were fired directly into urban areas, causing extensive, often illegal, death and destruction. As recalled by one Israeli soldier, in a testimony to Breaking the Silence, "There were days when we fired only into built-up areas, inside Gaza city itself."[276]

These weapons are not precision weapons, they cannot be used to target and destroy a specific building – in the same manner as an F-16 strike for example – as a number of corrective shots (known as 'bracketing', intended to bring the guns into range) will be required. This corrective process, an inherent component of all artillery, mortar or naval attacks, will inevitably result in damage, death or destruction to individuals or objects in the vicinity of the target. For example, the expected lethal radius of a 155mm high explosive projectile, such as those used by Israeli forces in the Gaza Strip, is reportedly between 50 and 150 meters, and the casualty radius is reportedly between 100 and 300 meters;[277] consequently "the use of 155mm high-explosive artillery shells … near populated residential areas cannot be sufficiently discriminate to avoid needless civilian casualties."[278] As noted by Amnesty International, "mortars are notoriously imprecise. They offer a very low probability of striking a precise target, carry a high risk of off-target strikes and should never be used in a densely populated area."[279]

IHL strictly regulates the use of artillery in urban areas. Only in rare circumstances can artillery be used in such situations without causing extensive death or destruction

275 Prosecutor v. Kupreskic, Case No: IT-95-16-T, 14 January 2000, §526.

276 Breaking the Silence, Operation Cast Lead, Testimony 6.

277 Human Rights Watch, Israel: Stop Shelling Crowded Gaza City, 16 January 2009. Available at http://www.hrw.org/ar/news/2009/01/16/israel-stop-shelling-crowded-gaza-city

278 Human Rights Watch, Indiscriminate Fire: Palestinian Rocket Attacks on Israel and Israeli Artillery Shelling in the Gaza Strip, July 2007, p. 82.

279 Amnesty International, Operation 'Cast Lead': 22 Days of Death and Destruction, MDE 15/015/2009, 2009, p. 37

to civilians or civilian objects, as required by the principle of proportionality. Prima facie, the use of artillery and mortars in populated areas violates the principle of distinction and constitutes an indiscriminate attack.

5.2.2. Abu Halima, 4 January 2009

On 4 January 2009, Israeli ground forces launched an intensive assault on the al-'Atatra and al-Sayafa areas west of Beit Lahiya town in the northern Gaza Strip. Israeli forces used numerous weapons, including conventional and white phosphorous shells. At around 15:00 artillery began to target the vicinity of the Abu Halima house, causing extensive damage to property and death and injury to civilians. Two shells struck the Abu Halima house itself, at least one of which contained white phosphorous. 14 civilians were sheltering in the upstairs corridor of the house at the time of the attack. Five of them died instantly, while a sixth died of her injuries in an Egyptian hospital on 19 March. All of the other civilians in the house were injured, three of them suffered extensive burns.

There were no resistance activists in the area at the time of the attack. Indeed, even though this incident coincided with the beginning of the ground offensive, Israeli ground troops had already overrun the area, as evidenced by the fact that members of the Abu Hallima family were shot and killed by Israeli soldiers on their way to hospital, to the west of their home. This attack was evidently "not directed at a specific military objective" in explicit violation of Article 51(4)(a) of Additional Protocol I, a component of customary IHL.

The actus reus requirement of this war crime is met: "the attacks resulted in death or serious bodily injury within the civilian population at the time of such attacks."[280] The mens rea requirement – direct or indirect intent[281] – is also met, these attacks must be presumed to have been deliberate, given the level of planning and oversight claimed by Israeli forces.[282] In any event, given the nature of the attack, and in particular the weapons employed, it is evident that even if whoever launched the attack, even if they could not have been certain of the result (a claim contested by PCHR, given the evident likelihood of extensive death and injury) accepted the possibility of it happening.[283]

PCHR believe that the nature of this indiscriminate attack,[284] indicates that the attack may amount to the

280 Prosecutor v. Martic, Case No. IT-95-11-A, 8 October 2008, §70.

281 Prosecutor v. Martic, Case No. IT-95-11-A, 8 October 2008, §72.

282 IDF, The Operation in Gaza 27 December – 18 January 2009; Factual and Legal Aspects, July 2009,

283 Prosecutor v. Martic, Case No. IT-95-11-A, 8 October 2008, §72.

284 Article 8(2)(b)(iv), Statute of the ICC.

direct targeting of civilians and civilian objects.[285] As such this war crime, [286]may also constitute the crime of wilful killing, a grave breach of the Geneva Conventions.

In addition, PCHR note that contrary to IDF claims that "No exploding munitions containing white phosphorous were used in built up areas of the Gaza Strip for anti-personnel purposes"[287] and that "these munitions [explosive white phosphorous] were fired only at open unpopulated areas and were used only for marking and signalling rather than in an anti-personnel capacity"[288] white phosphorous ammunition (as distinct from smoke shells) was used in this attack.

5.2.3. Al-Fakhoura, 6 January 2009

On 6 January 2009, Israeli forces fired a number of mortars in close proximity to the UNRWA school in the al-Fakhoura area of Jabaliya refugee camp. Four shells struck the street outside the school, while a number of other shells landed in the nearby area, including two which struck the home of the Deeb family. This attack killed at least 24 civilians, and injured at least 50 more; 11 members of the Deeb family were killed, including five children and four women.

Israeli forces initially claimed that they had been responding to Hamas mortar fire from within the school compound, and further that the compound itself had been booby-trapped; a Defence Ministry official stated that "booby-trapped bombs in the school had triggered secondary explosions that killed additional Palestinians there." However, there was no Hamas unit operating from within the school, the school was not booby-trapped, in fact, the school itself was not hit directly.[289]

Israeli forces later claimed that the Hamas mortar unit was located 80 metres from the school,[290] and that "a cell of five terror operatives and seven civilians outside the school grounds were hit."[291] Israeli forces have not provided the names of the 12 individuals it claimed were killed in the attack (including the five alleged combatants) and has not addressed the fact that a significantly higher number of civilians (at least 30) were killed.

The UN Board of Inquiry found that, "the means of response

285 Prosecutor vs. Galic, Case No. IT-98-29-T, 5 December 2003, §57.

286 Articles 8(2)(b)(i), (ii) and (iv) of the Statute of the ICC.

287 IDF, The Operation in Gaza 27 December – 18 January 2009; Factual and Legal Aspects, July 2009, §407.

288 IDF, The Operation in Gaza 27 December – 18 January 2009; Factual and Legal Aspects, July 2009, §407.

289 UN Board of Inquiry, Summary, §22.

290 IDF, The Operation in Gaza 27 December – 18 January 2009; Factual and Legal Aspects, July 2009,, §337

291 Israeli Media Briefing, 22 April 2009, quoted in Amnesty International, Operation 'Cast Lead': 22 Days of Death and Destruction, MDE 15/015/2009, 2009, p. 37

to an identified source of mortar fire which would have carried the least risk to civilians and property, including the UNRWA school, would have been a precisely targeted missile strike."[292] The IDF has claimed that it used the most accurate weapons available to it, 120 mm mortars, when responding to the alleged attack.[293] However, given that Israeli forces claimed that they had been under attack for over an hour before launching the mortar strikes,[294] and given the alleged military objectives location in a densely populated civilian area beside a school whose coordinates were known to Israeli forces,[295] it is untenable that they could not have prepared an air or drone strike.

The UN Board of Inquiry also found that, "in firing 120mm high explosive mortar rounds, the IDF had not maintained an adequate safety distance between whatever its target point may have been and the school. The Board found that one shell had impacted only 20 metres from the school and shrapnel had caused injury to persons inside the school compound. It also noted that, even if the safety distance maintained as regards the school had been adequate, that would not have addressed the issue of the deaths and injuries that were caused in the immediate vicinity of the school."[296]

The actus reus of the crime of launching an indiscriminate attack is clearly met, "the attacks resulted in death or serious bodily injury within the civilian population at the time of such attacks."[297] Equally, the mens rea requirement is evident; Israeli forces acted in reckless disregard of the predictable consequences of launching a series of mortar attacks into a densely populated civilian area, in close proximity to a UN installation. As noted by the UN Fact Finding Mission, "A decision to deploy them [mortars] in a location filled with civilians is a decision that a commander knows will result in the death and injuries of some of those civilians."[298]

PCHR believe that the nature of this indiscriminate attack,[299] indicates that the attack may amount to the direct targeting of civilians and civilian objects.[300] As such this war crime, [301] may also constitute the crime of wilful killing, a grave breach of the Geneva Conventions. "[I]ntentionally directing attacks against personnel, installations, material, units or vehicles involved in a

292 UN Board of Inquiry, Summary, §24.

293 IDF, The Operation in Gaza 27 December – 18 January 2009; Factual and Legal Aspects, July 2009,, §338

294 IDF, The Operation in Gaza 27 December – 18 January 2009; Factual and Legal Aspects, July 2009,, §337.

295 UN Board of Inquiry, Summary, §19

296 UN Board of Inquiry, Summary, §25

297 Prosecutor v. Martic, Case No. IT-95-11-A, 8 October 2008, §70.

298 Goldstone, §697

299 Article 8(2)(b)(iv), Statute of the ICC.

300 Prosecutor vs. Galic, Case No. IT-98-29-T, 5 December 2003, §57.

301 Articles 8(2)(b)(i), (ii) and (iv) of the Statute of the ICC.

humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations"[302] is also a war crime, as defined in Article 8(2)(b)(iii) of the Statute of the ICC.

5.2.4. The Use of White Phosphorous

White phosphorous was extensively used by Israeli forces operating in the Gaza Strip, both as a smoke screen and as an explosive munition. White phosphorous smoke shells were primarily used in an air-burst fashion, which involves exploding the shell at a certain distance above the ground in order to disperse the fragments widely through the air. Used in this manner, the material in the shell – 116 felt wedges soaked in white phosphorous – will disperse in a "radius extending up to 125 meters from the blast point, depending on conditions and the angle of attack."[303]

White phosphorous is a chemical substance which ignites on contact with oxygen; it will continue burning at temperatures of up to 1500 degrees Fahrenheit (816 degrees Celsius) until either the material is expended, or the oxygen supply is cut off. This means that white phosphorous can burn deep into the human body, often to the bone, causing serious, difficult to treat, injury. Human Rights Watch note that, with respect to white phosphorous injuries, "[i]nfection is common and the body's absorption of the chemical can cause serious damage to internal organs, as well as death."[304] The dangers of white phosphorous use were clearly known to Israeli forces. A report prepared during Operation Cast Lead by the office of the IDF chief medical officer notes that "kidney failure and infections are characteristic in long-term outcomes" and that "a wound caused by exposure to ordnance containing white phosphorous is potentially extremely destructive to tissue."[305] In addition a report issued by the Israeli Ministry of Health notes the systemic poisoning that can result:

"In addition to the "usual" burn effects, white phosphorous is poisonous, and has serous consequences that intensify the effects of injury. Many laboratory studies have shown that burns covering a relatively small area of the body – 12-15% in laboratory animals and less than 10% in humans – may be fatal because of their effects on the liver, heart and kidneys. Additional effects include serious hypocalcemia and delayed healing of wounds and burns."[306]

302 Article 8(2)(b)(iii), Statute of the ICC.

303 Human Rights Watch, Reign of Fire: Israel's Unlawful Use of White Phosphorous in Gaza, 2009, p. 3.

304 Human Rights Watch, Reign of Fire: Israel's Unlawful Use of White Phosphorous in Gaza, 2009, p. 3.

305 "Identification of Explosive White Phosphorus Injury and Its Treatment," signed by Dr. Gil Hirshorn, Colonel, Head of the Trauma Unit, Headquarters of the Chief Military Medical Officer, Ref . Cast Lead SH9 01293409. Quoted in Human Rights Watch, Reign of Fire: Israel's Unlawful Use of White Phosphorous in Gaza, 2009, p. 11.

306 "Exposure to White Phosphorous," signed by Dr. Leon Fulls, Ministry of Health War Room, January 15, 2009, Ref. Cast Lead SH9 01393109. Quoted in Human Rights Watch, Reign of Fire: Israel's Unlawful Use of White Phosphorous in Gaza, 2009, p. 12.

Israeli forces claim that they used white phosphorous "exclusively to create smoke screens for military requirements, such as camouflaging armoured forces from anti-tank squads employed by Hamas in Gaza's urban areas."[307] IDF also claimed that the use of white phosphorous as a smoke screen – as opposed to other less harmful smoke alternatives – was essential, stating that "white phosphorous munitions have significant battlefield advantages such as the speed of deployment and the effectiveness of blocking observation and targeting systems."[308]

It is presented however, that this is an invalid claim, and that the IDF's use of white phosphorous violated fundamental principles of IHL including the prohibition on indiscriminate attacks, and the requirement that all feasible precautions be taken when launching an attack. This conclusion is reinforced by the fact that Israel had a less harmful alternative within its military arsenal.

Israeli forces possess 155mm smoke projectiles, manufactured by Israeli Military Industries (IMI). These munitions produce an equivalent visual smoke screen without the incendiary and destructive effect associated with white phosphorous. Human Rights Watch note that "[s]mokescreens generated by smoke artillery can be deployed more easily over a wider area than white phosphorous with no risk of fires or burns to civilians."[309] Unlike white phosphorous, traditional smokescreens do not block infra-red optics and weapons targeting systems. However, "the IDF consistently used white phosphorous during the day, obviating the need to block night vision, and Human Rights Watch found no evidence that Hamas fired anti-tank guided missiles."[310]

White phosphorous is not an internationally banned weapon, however, this does not mean that it can be freely deployed in all circumstances – "In any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited"[311] – its use is strictly regulated by IHL, in particular the prohibition on indiscriminate attacks. The Commentary to Additional Protocol I states that Article 51(4)(i) was "intended to take account of the fact that means or methods of combat which can be used perfectly legitimately in some situations could, in other circumstances, have effects that would be contrary to some limitations contained in the Protocol, in which event their used in the circumstances

307 IDF, The Operation in Gaza 27 December – 18 January 2009; Factual and Legal Aspects, July 2009, §409.

308 IDF, The Operation in Gaza 27 December – 18 January 2009; Factual and Legal Aspects, July 2009, §418.

309 Human Rights Watch, Reign of Fire: Israel's Unlawful Use of White Phosphorous in Gaza, 2009, p. 4.

310 Human Rights Watch, Reign of Fire: Israel's Unlawful Use of White Phosphorous in Gaza, 2009, p. 4.

311 Article 35, Additional Protocol I.

would involve an indiscriminate attack."[312] It is presented that white phosphorous and flechettes (discussed below) fall within the scope of this clause. Given its nature, and the blast range associated with air-bursting, white phosphorous cannot effectively be used to distinguish between combatants and military objectives. Thus, as with artillery, it should not be used in densely populated areas, or areas with a large civilian presence, given the evident and well-known risks, and the requirement that civilians be kept outside the scope of hostilities as far as possible.

Israel has claimed that "smoke obscurants containing white phosphorous are not used for targeting purposes and cannot be classified as an indiscriminate weapon; otherwise, any smoke-screening means would be prohibited, in contrast to the well-established practice of militaries worldwide."[313] This is a blatantly disingenuous argument. The prohibition on indiscriminate attacks concerns the effects of the attack on civilians and civilian objects and is fundamentally related to the principle of distinction. The fact that a munition is used as a smokescreen and not as a 'weapon' is irrelevant; it is the effect of its use and the associated harm that are relevant to any evaluation of legality. Traditional smokescreens do not cause incidental harm to the civilian population, and their composition and the associated risks are fundamentally different to white phosphorous, whose indiscriminate effects are well known and well documented.

In violation of IHL, the IDF repeatedly used white phosphorous in heavily populated civilian areas. They did so in spite of the availability of an effective alternative, and in spite of the knowledge of the extensive harm being caused to the civilian population. For example, during the attack on the UNRWA field headquarters on 15 January 2009, IDF continued firing white phosphorous despite the repeated warnings from UN personnel regarding the danger to civilians. Two days later – after massive publicity – white phosphorous was again used in an attack near the UNRWA school in Beit Lahiya, during which two children were killed and at least 13 injured.

PCHR also note Israel's claim that explosive munitions containing white phosphorous "were fired only at open unpopulated areas and were used only for marking and signalling rather than in an anti-personnel capacity."[314] PCHR refute this claim: in at least one incident – Abu Halima discussed above – Israeli forces used explosive white phosphorous in combination with conventional artillery against populated areas.

312 ICRC, Commentary to Additional Protocol I, §1962.

313 IDF, The Operation in Gaza 27 December – 18 January 2009; Factual and Legal Aspects, July 2009, §416.

314 IDF, The Operation in Gaza 27 December – 18 January 2009; Factual and Legal Aspects, July 2009, §407.

5.2.5. UNRWA Field Office Compound, 15 January 2009

The UNRWA field compound is situated on a four acre site in the heart of Gaza City. It is the centre for UNRWA operations in the Gaza Strip, and contains administrative offices, fuel storage facilities, warehouses for food, medicines, blankets and other provisions for humanitarian assistance. The compound is clearly marked as a UN installation, and its location was well known to Israeli forces; GPS coordinates had been transmitted to the IDF and the compound appeared on the Joint Coordination Map prepared by the IDF.[315] There were between 600 – 700 civilians sheltering in the compound.

At approximately 7:30 am on 15 January 2009, Israeli shells began landing near the compound. The first direct hits occurred at around 7:45 am.[316] The UN Board of Inquiry noted that "United Nations international staff contacted their IDF and Israeli counterparts repeatedly, asking for an end to firing at or near the compound. Assurances were given by the IDF in response, but the Board found that these were ineffective and not matched by action on the ground for over a period of more than two hours."[317]

Scott Anderson, UNRWA Gaza Field Administration Officer and a retired US Army officer, stated that: "The pattern of shelling was that it started over the Gaza Training college, in the western part of the UNRWA compound, and then the shelling moved to the west and walked its way over the whole compound. It was hitting the compound itself for around an hour."[318] 'Walking' artillery fire refers to firing shells along an arc at evenly spaced intervals.

During the attack Israeli forces used conventional artillery – 155mm high explosive shells – and airburst white phosphorous smoke munitions. At least three high explosive shells struck the compound directly, and "at least eight shell casings from M825A1 smoke projectiles containing white phosphorous, together with a large number of burning white phosphorous-impregnated wedges" fell within the compound, specifically near the warehouse area.[319]

Israeli forces have claimed that they were engaging Hamas anti-tank units, allegedly located near the northern side of the UNRWA compound.[320] However, the UN Board of Inquiry "stressed that UNRWA staff stated that they heard no gunfire from within the compound or from the

315 UN, Board of Inquiry, Summary Report, §46.

316 UN, Board of Inquiry, Summary Report, §47.

317 UN, Board of Inquiry, §47.

318 Quoted in, Human Rights Watch, Reign of Fire: Israel's Unlawful Use of White Phosphorous in Gaza, 2009, p. 43.

319 UN, Board of Inquiry, Summary, §50.

320 IDF, The Operation in Gaza 27 December – 18 January 2009; Factual and Legal Aspects, July 2009, §343.

immediate area around it on the morning of 15 January 2009".[321] Israel claims that white phosphorous was used as a smokescreen in response to the alleged anti-tank threat as "it effectively blocks the enemy's field of view and prevents it from using visual observation tools (including infra-red)."[322] These claims, and the availability of an effective alternative, have been dealt with above. Further, it must be noted that the IDF did not address the protracted targeting of the compound with high explosive shells.

This was an indiscriminate attack which constituted the direct targeting of civilians and civilian objects. The actus reus requirements of the crimes are met, three persons were injured by shrapnel from the high explosive shells and "very substantial damage was caused to buildings, vehicles and supplies, both from the direct impact of the shelling and from the resulting conflagration. That conflagration actively consumed warehouses and buildings containing food, medicines and other goods essential for the delivery of humanitarian assistance by UNRWA to the people of Gaza."[323]

The mens rea of the crimes are also evident, as noted by the Board of Inquiry "the firing of artillery with high explosive and projectiles containing white phosphorous into, over or in such close proximity to the UNRWA Headquarters as to cause injuries to persons and very substantial damage to property was grossly negligent, amounting to recklessness."[324] Israeli forces continued with the attack despite repeated warnings.

PCHR believe that the nature of this indiscriminate attack,[325] indicates that the attack may amount to the direct targeting of civilians and civilian objects.[326] "[I]ntentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations"[327] is also a war crime, as defined in Article 8(2)(b)(iii) of the Statute of the ICC.

5.2.6. UNRWA Beit Lahia School, 17 January 2009

On 5 January 2009, the UNRWA school in Beit Lahiya was transformed into an emergency shelter. By 16 January, 1,891 civilians were sheltering in the school, including 265 children under the age of three. UN guards checked

321 UN Board of Inquiry, Summary, §49.

322 IDF, The Operation in Gaza 27 December – 18 January 2009; Factual and Legal Aspects, July 2009, §344.

323 UN Board of Inquiry, Summary, §52.

324 UN Board of Inquiry, Summary, §56.

325 Article 8(2)(b)(iv), Statute of the ICC.

326 Prosecutor vs. Galic, Case No. IT-98-29-T, 5 December 2003, §57; Articles 8(2)(b)(i), (ii) and (iv) of the Statute of the ICC.

327 Article 8(2)(b)(iii), Statute of the ICC.

all individuals at the gate to ensure that no weapons were brought into the school. The GPS coordinates of the facility had been communicated to the IDF, it appeared on the Joint Coordination Map prepared by COGAT, and the schools was also included on a list of 91 provisional shelters communicated to the IDF prior to Operation Cast Lead.[328]

At approximately 6 am on 17 January, at least six white phosphorous shells were airburst in the vicinity of the school. Numerous burning white phosphorous wedges and ordinance cases fell on the school itself. Two children were killed in the attack, and at least 13 civilians were injured.

Israeli forces claim that they were exposed to "continuous fire from different sources" and were threatened "by Hamas' units armed with advanced anti-tank missiles."[329] The IDF's use of white phosphorous was thus claimed to have been used "in order to create a protective smokescreen between themselves and Hamas' anti-tank units along the route of their progress."[330] It was further claimed that a safety buffer of several hundred metres was maintained.

The fact that numerous fragments and shell casings landed directly on the school conflicts with this claim of an appropriate buffer zone, given the relatively restricted dispersal range (up to 150 metres) of air burst white phosphorous. The Board of Inquiry noted that "any buffer zone that was being applied around the school in connection with the use of M825A1 shells was obviously ineffective."[331] Further, Israeli forces did not conduct ground operations in the vicinity of the school at any time during Operation Cast Lead; investigations conducted by Human Rights Watch in the area "did not uncover any physical evidence to suggest a confrontation with Palestinian armed groups, such as bullet holes, bullet casings or tank tracks."[332]

The actus reus of these crimes are evidently met, two children were killed, and at least 13 civilians were wounded, some seriously. The mens rea requirements are also met, Israeli forces acted with "a reckless disregard for the lives and safety of those sheltering in the school."[333]

PCHR believe that the nature of this indiscriminate attack,[334] indicates that the attack may amount to the

328 UN Board of Inquiry, Summary, §57.

329 IDF, The Operation in Gaza 27 December – 18 January 2009; Factual and Legal Aspects, July 2009, §360.

330 IDF, The Operation in Gaza 27 December – 18 January 2009; Factual and Legal Aspects, July 2009, §361.

331 UN Board of Inquiry, Summary, §64.

332 Human Rights Watch, Reign of Fire: Israel's Unlawful Use of White Phosphorous in Gaza, 2009, p. 48.

333 UN Board of Inquiry, §67.

334 Article 8(2)(b)(iv), Statute of the ICC.

direct targeting of civilians and civilian objects.[335] As such this war crime, [336]may also constitute the crime of wilful killing, a grave breach of the Geneva Conventions. "[I]ntentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations"[337] is also a war crime, as defined in Article 8(2)(b)(iii) of the Statute of the ICC.

5.2.7. The use of Flechettes

Flechettes were used on a number of occasions during Operation Cast Lead, predominantly in the North of Gaza, and in a village south of Gaza City. Several civilians, including a woman and a paramedic were killed, and score more civilians were injured.

Flechettes are small steel darts, approximately 3.5cm in length, with pointed tips and four fins at the rear. They are typically contained inside 105mm or 120mm tank shells. Shortly after firing, the shell ruptures, releasing 5,000 to 8,000 flechetttes, which then scatter at high speed in a funnel shaped pattern and have an effective range of approximately 300 meters. Flechettes are not internationally banned weapons, however, they are inherently indiscriminate and operate in a manner similar to a shotgun, dispersing over a relatively large area. Consequently, flechettes are designed to be used against massed troop concentrations in open areas. The Israeli High Court of Justice has confirmed this use: "Like other armaments that contain submunitions – such as cluster bombs – flechettes are intended to be used against field targets, as opposed to distinct, individual targets."[338]

IHL strictly regulates the use of flechettes in civilian areas, based in principal on the principle of distinction and the prohibition on indiscriminate attacks. Only in very rare circumstances can they be used in such situations without causing excessive death or injury to civilians, as required by the principle of proportionality. Prima facie, the use of flechettes in populated areas violates the principle of distinction and constitutes an indiscriminate attack.

5.2.8. Abdul-Dayem, 5 January 2009

On 5 January 2009, the Adbul-Dayem family was holding a condolence ceremony next to a house in Izbat Beit Hanoun in the northern Gaza Strip, to mark the death of 33 year old paramedic Arafa Hani Adbul-Dayem. During the ceremony,

335 Prosecutor vs. Galic, Case No. IT-98-29-T, 5 December 2003, §57.

336 Articles 8(2)(b)(i), (ii) and (iv) of the Statute of the ICC.

337 Article 8(2)(b)(iii), Statute of the ICC.

338 HCJ 8990/02, Physicians for Human Rights, Palestinian Center for Human Rights v. Doron Almog, April 27, 2003.

the house was struck by a projectile. The family and their guests subsequently began to move across the street for their own safety. As they were doing so, they were targeted with two tank shells containing flechette darts. Three members of the Adbul-Dayem family, including one child, were killed instantly by the flechettes. Two other members of the family, including a second child, subsequently died in hospital of their injuries.

The actus reus of this indiscriminate attack which amounted to the direct targeting of civilians is met. At least five civilians were killed, and over 20 injured. The mens rea requirement is also present; using flechettes in densely populated civilian areas can reasonably be expected to inflict massive suffering on the civilian population. Israeli forces either "had the intent to kill, or to inflict serious bodily injury in reckless disregard of human life."[339]

PCHR believe that the nature of this indiscriminate attack,[340] indicates that the attack may amount to the direct targeting of civilians and civilian objects.[341] As such this war crime, [342]may also constitute the crime of wilful killing, a grave breach of the Geneva Conventions.

5.3. Extensive Destruction Not Justified by Military Necessity

This section will address the extensive destruction of property not justified by military necessity, a grave breach of the Geneva Conventions.[343] It must also be emphasized that the targeting and destruction of civilian objects – absent the 'extensive' requirement - is also criminalized by customary IHL, and codified in Article 8(2)(b)(ii) of the Statute of the International Criminal Court.[344] For the purposes of this section, specific attention will be paid to the demolition of buildings, and the razing of agricultural land, after they came under Israel's effective control. It is presented that this destruction was not justified by military necessity, that it was carried out deliberately, and that the destruction was extensive.

In addition to the cases referred to herein, Israeli forces extensively destroyed property, both private and public, throughout the Gaza Strip. For example, 2,114 houses were completely destroyed (2,864 housing units), and 3,242 were partially destroyed, i.e. rendered uninhabitable (5,014 housing units), this destruction affected 51,842 Palestinians. In addition, 286 economic establishments were totally or partially destroyed, 167 industrial

339 Prosecutor v Kordic and Cerkez, Case No. IT-95-14/2-T, 26 February 2001, §229.

340 Article 8(2)(b)(iv), Statute of the ICC.

341 Prosecutor vs. Galic, Case No. IT-98-29-T, 5 December 2003, §57.

342 Articles 8(2)(b)(i), (ii) and (iv) of the Statute of the ICC.

343 Article 147, Fourth Geneva Convention.

344 ICRC, Customary International Humanitarian Law, 2005, Rule 50. See, also Article 3(b), Statute of the International Criminal Tribunal for the former Yugsolavia.

establishments were totally and partially destroyed, and 150 (of 384) public schools were attacked.

Article 53 of the Fourth Geneva Convention states that, "Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations." As the Gaza Strip is currently occupied by the State of Israel, this provision is applicable to the destruction caused by Operation Cast Lead.

However, it should be noted that Article 53 of the Fourth Geneva Convention, simply confirms that Article 23(g) of the Hague Regulations – which prohibits the destruction of civilian property – also applies to occupied territory.[345]

Thus in addition to property explicitly protected by the Geneva Conventions, such as hospitals, and religious or cultural objects, all private and public property in the Gaza Strip is granted explicit protection.

Consequent to the removal of its fixed military posts and illegal settler population in 2005, the State of Israel has claimed that it is no longer the Occupying Power in the Gaza Strip. It is presented that this refutation of legal status is invalid; Israel's de jure status as an Occupying Power is confirmed both by fact, and by the opinions of the international community. Equally, as Israel exercised effective control in the areas where the destruction referred to herein took place, such areas are unquestionably considered to be occupied territory. As noted in Article 42 of the Hague Regulations – a component of customary IHL – "[t]erritory is considered occupied when it is placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised." This test of authority is known as the effective control threshold, and has been endorsed, inter alia in the Hostages Case,[346] and by the Naletilic and Martinovic Trial Chamber of the ICTY.[347]

Further, as noted in Article 3(b) of the Statute of the ICTY, extensive, wanton destruction of property not justified by military necessity is a violation of customary IHL, regardless of the existence of an occupation. The Trial Chamber in Hadzihasanovic noted that the crime of destruction under Article 3(b) is constituted when:

i. the destruction of property occurs on a large scale;

345 ICRC, Commentary to Fourth Geneva Convention, p. 301.

346 USA vs. Wilhelm List et al., Law Reports of Trials of War Criminals, vol. VIII, London: United Nations War Crimes Commission, 1949, at p. 56.

347 Prosecutor v. Naletilic and Martinovic, Case No.IT-98-34-T, Judgment, (Mar. 31 2003), §217.

ii. the destruction is not justified by military necessity, and
iii. the perpetrator acted with the intent to destroy the property in question or in reckless disregard of the likelihood of its destruction.[348]

Israel has claimed that it demolished houses on the basis of five principal criteria, targeting: "(1) houses which were actually used by Hamas operatives for military purposes in the course of the fighting, (2) other structures used by Hamas operatives for terrorist activity, (3) structures whose total or partial destruction was imperatively required by military necessities, such as the movement of forces from one area to another (given that many of the roads were booby-trapped), (4) agricultural elements used as cover for terrorist tunnels and infrastructure, and (5) infrastructure next to the security fence between Gaza and Israel, used by Hamas for operations against IDF forces or for digging tunnels into Israeli territory."[349]

As noted previously, the definition of a military objective contains two cumulative elements:

a. The nature, location, purpose or use which makes an effective contribution to military action;
b. The total or partial destruction, capture or neutralization which in the circumstances ruling at the time offers a definite military advantage.[350]

Thus, in order for a civilian object to be accurately classified as a military objective, these two elements must be simultaneously present. The requirement that an objective make 'an effective contribution to military action' requires a direct, tangible and temporally limited nexus to the hostilities. It is "not legitimate to launch an attack which only offers potential or indeterminate advantages."[351]

It is accepted that, in the course of military operations, civilian objects may sustain 'collateral damage' as demanded by the requirement of military necessity. As noted by the Trial Chamber of the ICTY in Martic, "military necessity may justify the infliction of collateral damage to civilian objects and as such constitutes an exception to the principles of the protection of civilian objects."[352] The Trial Chamber added, however, that "In principle, destruction carried out before fighting begins or after fighting has ceased cannot be justified by military necessity."[353]

Housing areas in the Gaza Strip were extensively destroyed

348 v. Hadzihasanovic, Case No. IT-01-47-T, 15 March 2006, §39.
349 Israel Legal Report, §439/
350 ICRC, Commentary to Additional Protocol I, §2018.
351 ICRC, Commentary to Additional Protocol I, §2024.
352 Prosecutor vs. Martic, Case No. IT-95-11-T, 12 June 2007, §93.
353 Prosecutor vs. Martic, Case No. IT-95-11-T, 12 June 2007, §93.

after fighting had ceased, and absent the requirement of military necessity. During Operation Cast Lead, 1,126 houses were destroyed beyond repair using bulldozers (731 completely, 395 partially) and 187 houses were destroyed beyond repair using explosive charges placed within the house (145 completely, 42 partially).

The nature of this destruction requires that soldiers approach and/or enter a building. Given the reality of combat and the dangers posed to troops, it is inconceivable that Israeli forces would approach a building, whether on foot or in a bulldozer, from which resistance activists were firing, in order to demolish it. Equally, given the danger posed to troops by secondary explosions, it is presented that Israeli forces were confident that houses demolished, either by explosive charges or bulldozers, were not booby-trapped. Regarding the demolition of houses using explosive charges, Amnesty International have noted that:

> The fact that the soldiers used this method – which required them to leave their ranks, walk between buildings and enter houses in order to place the explosive charges inside the houses along the supporting walls – indicates that they felt extremely confident that there were no Palestinian gunmen inside or around the houses. It also indicates their confidence that there were no tunnels under the houses which gunmen could use to capture them, and that the houses were not booby-trapped. Had the soldiers believed that they were in danger of being shot, blow up or captured, they would not have ventured out of their tanks to place the mines inside the houses.[354]

Clearly, this form of destruction is not justified by military necessity. These homes were not being used by resistance activists at the time the destruction took place, indeed, the area was under the effective control of Israeli forces and there was no fighting in the immediate vicinity of the demolition, and they were not being used to store arms. Equally, their destruction cannot be legitimately justified on security grounds, or in relation to their potential future use. The contribution to military action must be direct and tangible, and as stated by the ICRC "the destruction of property as a general security measure is prohibited."[355]

This conclusion is reinforced by the jurisprudence of the ICTY. In Martic, the Trial Chamber of the ICTY held that destruction of civilian objects "was not justified by military necessity, noting in particular the evidence that the attack had ceased at the time this destruction took place."[356] This

354 Amnesty International, Operation 'Cast Lead': 22 Days of Death and Destruction, MDE 15/015/2009, 2009, p. 56.

355 ICRC, Gaza Strip: ICRC deeply concerned over house destructions in Rafah, Press Release, 18 May 2004, available at: http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/5z4lb4?opendocument

356 Prosecutor vs. Martic, Case No. IT-95-11-T, 12 June 2007, §381.

was confirmed in Naletilic & Martinovic where the Trial Chamber held that: "The destruction was not justified by military necessity as it occurred both in Sovi}I [sic] and Doljani after the actual shelling ceased."[357] In Oric, the Trial Chamber held that the destruction of civilian objects in Ratkovici and Gonji Ratkovici was not justified by military necessity, based, inter alia, on the finding that fighting had ceased. The justification of military necessity was thus not considered applicable, even though attacks had been launched from these villages in the past.[358]

As regards the elements of crimes, it is evident that the destruction of these homes was extensive, and not justified by military necessity. Areas in the Gaza Strip, such as al-Zaytoun, Jabal al-Rayees, al-Atatra, al-Twan, al-Maghraqa, Absan, Khuza'a and al-Fukhari were completely destroyed and rendered uninhabitable. Additionally, it is evident that the mens rea requirement of the crime was met, given the nature of the demolitions discussed herein, Israeli forces unquestionably "acted with the intent to destroy the property in question or in reckless disregard of its destruction."[359]

In relation to the destruction of civilian objects, Israeli forces committed grave breaches of the Geneva Conventions, and serious violations of customary IHL.

5.4. Extensive Destruction of Agricultural Land

During the course of Operation Cast Lead, Israeli forces razed or destroyed approximately 6,855 dunums of agricultural land.[360] Prior to the offensive, the agricultural sector was the most important economic sector in the Gaza Strip, and produced food for 25 percent of the population. Losses incurred to the agricultural sector are estimated at US$ 170 million, or 55 percent of the total direct losses inflicted on all economic sectors. Israel has attempted to justify this destruction, classifying it as the "destruction of agricultural elements used as cover for terrorist tunnels and infrastructure."[361] The majority of agricultural land was destroyed after it had been placed under the IDF's effective control.

Agricultural areas are protected under IHL as civilian objects. Additionally, as objects indispensable to the survival of the civilian population, agricultural areas are afforded further protection under both treaty and customary IHL.[362] Attacks against such areas "for the

357 Prosecutor v. Naletilic & Martinovic, Case No. IT-98-34-T, 31 March 2003, §589.

358 Prosecutor v. Oric, Case No. IT-03-68-T, 30 June 2006, §607.

359 v. Hadzihasanovic, Case No. IT-01-47-T, 15 March 2006, §39.

360 1 dunum = 1000m2.

361 IDF, The Operation in Gaza 27 December – 18 January 2009; Factual and Legal Aspects, July 2009, §439.

362 Article 54, Additional Protocol I, and ICRC, Customary International Humanitarian Law, 2005, Rule 54..

specific purpose of denying them for their sustenance value to the civilian population or to the adverse Party, whatever the motive, whether in order to starve out civilians, to cause them to move away, or for any other motive" are explicitly prohibited.[363]

In order for destruction to be legitimate, the agricultural land in question must have been used to make an effective contribution to military action, and its destruction must have offered a definite military advantage in the circumstances ruling at the time.[364] In any case of doubt as to its status, i.e. uncertainty as to whether or not certain areas of land are covering tunnels, agricultural areas must be presumed to be civilian objects and protected as such; "in case of doubt as to whether an object which is normally dedicated to civilian purposes is being used to make an effective contribution to military action, it shall be presumed not to be so used."[365]

Tunnels used by armed groups for the conduct of hostilities may be legitimate military objectives, however, it is difficult to envision how the razing of agricultural land would affect the existence of underground tunnels; if rendered necessary by military necessity individual tunnel entrances could have been destroyed without necessitating the extensive destruction of entire agricultural areas. Additionally, agricultural areas along the green line between the Gaza Strip and Israel – either within or adjacent to the so-called 'buffer zone' – were heavily targeted and razed. It is believed that this destruction is intended to consolidate the buffer zone, and to render these areas uninhabitable, an explicit violation of IHL.[366]

Israel's extensive destruction of agricultural land on the presumption that it may be used as cover for tunnels is straightforwardly illegitimate; destruction for 'security' reasons, or in anticipation of potential advantage, is illegal.[367] Further, as noted by the Martic Trial Chamber, "In principle, destruction carried out before fighting begins or after fighting has ceased cannot be justified by military necessity."[368]

The razing of agricultural land was intentional, extensive, and not justified by military necessity. Israeli forces committed grave breaches of the Geneva Conventions, and serious violations of customary IHL.

363 Article 54(2), Additional Protocol I, emphasis added.

364 Article 52(2), Additional Protocol I.

365 Prosecutor vs. Galic, Case No. IT-98-29-T, 5 December 2003, §51.

366 Article 54(2), Additional Protocol I.

367 ICRC, Gaza Strip: ICRC deeply concerned over house destructions in Rafah, Press Release, 18 May 2004, available at: http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/5z4lb4?opendocument, and ICRC, Commentary to Additional Protocol I, §2024.

368 Prosecutor vs. Martic, Case No. IT-95-11-T, 12 June 2007, §93.

5.5. Crimes against Humanity

In addition to the perpetration of numerous violations of international human rights and humanitarian law, there is sufficient evidence to indicate that Israeli forces may have committed crimes against humanity in the Gaza Strip. Indeed, the crime against humanity of persecution, manifested inter alia by the continuing illegal blockade of the Gaza Strip, is ongoing.

International law defines crimes against humanity as acts "committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack."[369] Such acts include murder, torture, deportation or forcible transfer of population, persecution and other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

In order to constitute a crime against humanity, the attacks must be either widespread or systematic in nature.[370] The Appeals Chamber of the ICTY noted that "the phrase "widespread" refers to the large-scale nature of the attack and the number of targeted persons, while the phrase "systematic" refers to the organized nature of the acts of violence and the improbability of their random occurrence. Patterns of crimes, in the sense of the non-accidental repetition of similar criminal conduct on a regular basis, are a common expression of such systematic occurrence."[371]

The requirement that an attack be directed against a "civilian population" has also been clarified. The Galic Trial Chamber stated that: "A population may qualify as "civilian" even if non-civilians are among it, as long as the population is predominantly civilian. The definition of a "civilian" is expansive and includes individuals who at one time performed acts of resistance, as well as persons hors de combat when the crime was perpetrated. There is no requirement that the entire population of the area in which the attack is taking place must be subjected to that attack. It is sufficient to show that a certain number of individuals were targeted in the course of the attack, or that individuals were targeted in such a way as to compel the conclusion that the attack was in fact directed against a civilian "population," rather than against a small and randomly selected number of individuals."[372]

It is presented that Israel's systematic targeting of civilians – directly and through indiscriminate attacks which constituted direct attacks – may constitute the crime

369 Article 7(1), Statute of the International Criminal Court.

370 Prosecutor v. Naletilic & Martinovic, Case No. IT-98-34-T, 31 March 2003, §236.

371 Prosecutor v. Kordic and Cerkez, Case No. IT-95-14/2-A, 17 December 2004, §94.

372 Prosecutor vs. Galic, Case No. IT-98-29-T, 5 December 2003, §143.

against humanity of murder.[373] Repeated, non-accidental, violations of IHL are indicative of systematic occurrence;[374] these incidents – which were widespread in their nature – have been extensively investigated, documented, and reported upon. In numerous instances Israeli forces intentionally murdered unarmed civilians, in situations devoid of any military necessity. These were widespread systematic attacks, directed against a civilian population.

The mens rea for a crime against humanity is "comprised by (1) the intent to commit the underlying offence, combined with (2) knowledge of the broader context in which that offence occurs."[375] The Appeals Chamber of the ICTY held that "it is … irrelevant whether the accused intended his acts to be directed against the targeted population or merely against his victim. It is the attack, not the acts of the accused, which must be directed against the target population and the accused need only know that his acts are part thereof."[376]

The mens rea of the underlying offense of the crime against humanity of murder is met; it is the same requirement as that of wilful killing,[377] which is discussed above in detail. Essentially, Israeli Forces "intended to cause death or serious bodily injury which, as it is reasonable to assume, [they] had to understand was likely to lead to death."[378]

With respect to knowledge, the Blaskic Trial Chamber held that" the mens rea specific to a crime against humanity does not require that the agents be identified with the ideology, policy or plan in whose name mass crimes were perpetrated nor even that he supported it. It suffices that he knowingly took the risk of participating in the implementation of the ideology, policy or plan." Significantly, this plan "need not necessarily be declared expressly or even stated clearly and precisely"[379] and "it is not necessary to show that they [the actions] were the result of the existence of a policy or plan."[380] Given the actions of Israeli forces, it seems apparent they were aware of a policy or plan – such as the Dahiya doctrine – which directly targeted Palestinian civilians.

PCHR believe that the actions of the Israeli government and military could justify a competent court finding that the crime against humanity of murder has been committed.

There is also evidence to indicate that the crime against

373 Certain incidents where indiscriminate attacks met the required mens rea and actus reus of murder have been presented above.

374 Prosecutor v. Kordic and Cerkez, Case No. IT-95-14/2-A, 17 December 2004, §94.

375 Prosecutor v Kupreskic et al, Case No. IT-95-16/T, 14 January 2000, §556.

376 Prosecutor v Kunarac et al, Case No IT-96-23, IT-96-23/1, 12 June 2002, §102.

377 Inter alia, Prosecutor v Kordic and Cerkez, Case No. IT-95-14/2-T, 26 February 2001, §236.

378 Prosecutor v. Blaskic, Case No. IT-95-14-T, 3 March 2000, §153.

379 Prosecutor v. Blaskic, Case No. IT-95-14-T, 3 March 2000, §204.

380 Prosecutor v Kunarac et al, Case No IT-96-23, IT-96-23/1, 12 June 2002, §98.

humanity of persecution has been committed, and is indeed, ongoing. In order to establish that a crime against humanity of persecution has been committed, it is necessary to confirm that there was a widespread or systematic attack directed against a civilian population that blatantly discriminated and infringed a fundamental right recognized under customary international law or treaty, and was carried out with the intention so to discriminate.[381] In Tadic, the Trial Chamber of the ICTY held that: "The crime of persecution encompasses a variety of acts, including, inter alia, those of physical, economic or judicial nature, that violate an individual's right to the equal enjoyment of his basic rights."[382]

In Kupreskic the Trial Chamber of the ICTY listed the type of acts which would constitute the crime of persecution:

> […] (c) Persecution can also involve a variety of other discriminatory acts, involving attacks on political, social, and economic rights. […]
> (d) Persecution is commonly used to describe a series of acts rather than a single act. Acts of persecution will usually form part of a policy or at least of a patterned practice, and must be regarded in their context. […]
> (e) […] discriminatory acts charged as persecution must not be considered in isolation. Some of the acts mentioned above may not, in and of themselves, be so serious as to constitute a crime against humanity. For example, restrictions placed on a particular group to curtail their rights to participate in particular aspects of social life (such as visits to public parks, theatres or libraries) constitute discrimination, which is in itself a reprehensible act; however, they may not in and of themselves amount to persecution. These acts must not be considered in isolation but examined in their context and weighed for their cumulative effect.[383]

The deliberate actions of the Israeli authorities – before, during and after the offensive – serve to deprive Palestinians in the Gaza Strip of their means of subsistence, employment, housing, and water. Palestinians are illegally denied their right to leave or enter their own country, they face discrimination from within the Israeli judicial system, and are consistently denied an effective judicial remedy

PCHR believe that the actions of the Israeli government and military – which occur in the broader context of an international armed conflict, and are indicative of a widespread policy – could justify a competent court finding that the crime against humanity of murder has been committed; a conclusion also reached by the UN Fact Finding Mission.[384]

381 Prosecutor v Kunarac et al, Case No IT-96-23, IT-96-23/1, 22 February 2001, §431.
382 Prosecutor v. Tadić, Case No. IT-94-1-T, 7 May 1997, §. 710.
383 Prosecutor v. Kupreškić et al., Case No. IT-95-16-T, 14 January 2000, §. 615.
384 Report of the UN Fact Finding Mission on the Gaza Conflict, §1329.

6. International Obligations Relating to the Administration of Justice

The effective administration of justice is an essential component with respect to enforcing the rule of law, and protecting and promoting individual's rights; it is through the courts that the obligations to, inter alia, prosecute and punish, are discharged. The ICCPR codifies explicit principles in this regard. For example, Article 2 codifies the right to an effective remedy, Article 14 concerns the right to a fair trial, while Article 26 affirms that all people are entitled to the equal protection of the law. The importance of the legal system is evident when one considers that an independent and impartial judiciary, free from governmental interference and guaranteeing due process rights, is essential both for the protection of individual's rights, and the law itself.[385] It is a condition sine qua non for respect for the rule of law. This importance is emphasized with respect to international crimes, given that it is often States themselves who are involved in the commission of such acts.

States are obliged to guarantee – and not merely respect – individual's rights.[386] As guarantors of human rights, States are obliged to prevent violations, investigate them should they occur, bring to justice the perpetrators and provide reparations to victims. The necessity of the duty to guarantee human rights has been eloquently explained

385 International Commission of Jurists, Military Jurisdiction and International Law, Military courts and gross human rights violations vol. 1, 9 (2004).

386 Article 2, ICCPR.

by the Inter-American Commission on Human Rights:

> "These duties of the State, to respect and to guarantee, form the corner-stone of the international protection system since they comprise the States' international commitment to limit the exercise of their power, and even of their sovereignty, vis-à-vis the fundamental rights and freedoms of the individual. […] The duty to guarantee, for its part, entails that the States must ensure the effectiveness of the fundamental rights by ensuring that the specific legal means of protection are adequate either for preventing violations or else for reestablishing said rights and for compensating victims or their families in cases of abuse or misuse of power. […] there is the duty to prevent violations and the duty to investigate any that occur since both are obligations involving the responsibility of the States".[387]

The jurisprudence of international human rights tribunals, and mechanisms such as the United Nations Human Rights Committee, have established five basic obligations in this regard. States must:

- investigate,
- bring to justice and punish those responsible,
- provide an effective remedy for victims,
- provide fair and adequate compensation,
- and establish the truth.[388]

By their nature these obligations are complimentary and mutually reinforcing. The United Nations Special Rapporteur on extrajudicial, summary or arbitrary executions has noted that: "Governments are obliged under international law to carry out exhaustive and impartial investigations into alleged violations of the right to life, to identify, bring to justice and punish their perpetrators, to grant compensation to the victims or their families, and to take effective measures to avoid future recurrence of such violations. The first two components of this fourfold obligation constitute in themselves the most effective deterrent for the prevention of human rights violations."[389] This logic is easily extended to the commission of international crimes in general. Additionally, the European Court of Human Rights, has stated that "the notion of an 'effective remedy' entails … a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the complainant to the

387 Report N° 1/96, Case 10,559, Chumbivilcas (Peru), 1 March 1996.

388 International Commission of Jurists, Military Jurisdiction and International Law, Military courts and gross human rights violations vol. 1, 22 (2004).

389 Commission on Human Rights, Question of the violation of human rights and fundamental freedoms, in any part of the world, with particular reference to colonial and other dependent countries and territories: Extrajudicial, summary or arbitrary executions, Report by the Special Rapporteur, U.N. Doc. E/CN.4/1994/7, §688 and §711

investigative procedure."[390]

Given its relationship to the principle of universal jurisdiction (the exhaustion of domestic remedies requirement) two components of the obligations to investigate and prosecute must be highlighted: any investigation or prosecution must be conducted in good faith, and in a timely manner.

The good faith requirement is reflected in Article 16 of the Statute of the International Criminal Court, which affirms that the Court may exercise jurisdiction if a State is unwilling genuinely to carry out an investigation or prosecution. This requirement is intended to protect against 'sham' trials or investigations, whose primary purpose is to shield perpetrators from justice, rather than to pursue justice itself. Such actions serve to perpetuate a climate of impunity.

The separation of powers principle – whereby the executive, the legislative, and the judiciary have separate and independent powers and areas of responsibility – is a key component with respect to adequate investigation and effective judicial remedy. As noted this requirement is particularly relevant to the investigation and trial of international crimes, given the often high level of State involvement in the commission of these acts. International human rights law recognizes that an independent and impartial judiciary, due process of law, and the existence of judicial guarantees are essential components in the administration of justice.[391] As noted by Professor Singhvi,

> "The principles of impartiality and independence are the hallmarks of the rational and the legitimacy of the judicial function in every States. The concepts of the impartiality and independence of the judiciary postulate individual attributes as well as institutional conditions. These are not mere vague nebulous indeas but fairly precise concepts in municipal and international law. Their absence leads to a denial of justice and makes the credibility of the judicial process dubious. It needs to be stressed that impartiality and independence of the judiciary is more a human right of the consumers of justice than a privilege of the judiciary for its own sake."[392]

The Special Rapporteur on the Independence of Judges and Lawyers has emphasized that "the principle of the separation of powers […] is the bedrock upon which the requirements of judicial independence and impartiality

390 Aksoy v. Turkey, (Preliminary Objection), European Court of Human Rights, 18 December 1996, §98.

391 Article 14 ICCPR.

392 United Nations document E/CN.4/Sub.2/1985/18, paragraph 75.

are founded."[393] Any interference on the part of the executive, for example, will seriously infringe upon the obligation to investigate and prosecute, thereby calling into question adherence to the good faith requirement.

Given that the principal international crimes discussed herein relate to violations of IHL, military investigations must be briefly discussed. Indeed, as noted by the International Commission of Jurists, "military jurisdiction is often used as a means of escaping the control of the civilian authorities".[394] It is apparent that no investigation conducted or supervised by persons associated with those responsible can be considered truly independent or impartial. In 1969, the Special Rapporteur on Equality in the Administration of Justice, noted with respect to military courts comprised of military officials subject to hierarchical obedience, that "one might wonder whether the aforementioned personnel can be tried and prosecuted in complete freedom, bearing in mind that they are dependent on their commanding officer as far as the determination of efficiency, promotion, allocation of tasks and the right to go on leave are concerned."[395] Indeed the Human Rights Committee has consistently stated that States must take measures to ensure that military forces are subject to civilian authority,[396] i.e. that investigations and prosecutions must be conducted within the civilian judicial system. As noted in the Human Rights Committee's Concluding Observations on Venezuela, "The State party should establish an independent body empowered to receive and investigate all reports of excessive use of force and other abuses of authority by the police and other security forces, to be followed, where appropriate, by prosecution of those who appear to be responsible for them."[397]

The obligation to investigate is a component of customary international law, and one of the core components of a State's duty to guarantee human rights.[398] As noted by the Human Rights Commission, such investigations must be conducted promptly and impartially.[399] Timely investigations are thus essential; it is presented that the unjustifiable prolongation of investigations may be considered as constituting an attempt to shield perpetrators from justice. In Isayeva v. Russia, the European Court

393 Commission on Human Rights, Report of Special Rapporteur on Independence and Impartiality of the Judiciary, jurors and assessors and the independence of lawyers, U.N. Doc. E/CN.4/1995/39, 6 February 1995, §55.

394 International Commission of Jurists, Military Jurisdiction and International Law, Military courts and gross human rights violations vol. 1, 28 (2004).

395 U.N. Doc. E/CN.4/Sub.2/296, 10 June 1969, §195. Spanish original, in ICJ.

396 See, inter alia, Concluding Observations - Romania, op. cit. paragraph 9; Concluding Observations - Lesotho, United Nations document CCPR/C/79/Add. 106, paragraph 14; and Concluding Observations - El Salvador, United Nations document CCPR/C/79/Add.34, 18 April 1994, paragraph 8.

397 Concluding Observations – Venezuela, §8, UN. Doc. CCPR/CO/71/VEN, 26 April 2001.

398 International Commission of Jurists, Military Jurisdiction and International Law, Military courts and gross human rights violations vol. 1, 33 (2004).

399 Human Rights Commission, Resolution 2001/62, 25 April 2001, §6.

of Human Rights held that: “a prompt response by the authorities in investigating a use of lethal force may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts (see, for example, Hugh Jordan v. the United Kingdom, cited above, §§ 108, 136-140).”[400] In Del Caracazo the Inter-American Court of Human Rights stated that investigations which persist for a long-period of time, without those responsible for gross human rights violations being identified or punished, constitute “a situation of serious impunity and […] a breach of the State’s duty”.[401] Given the importance of, inter alia, collecting evidence and interviewing witnesses as soon after the commission of the alleged crime as possible, unjustifiably prolonged investigations cannot be considered to constitute an effective remedy.

A State becomes internationally accountable when it fails to take appropriate investigative action. As noted by the Permanent Court of International Justice, in a judgment delivered on 1 May 1925, under international law a “State may become accountable […] also as a result of insufficient diligence in criminally prosecuting the offenders. […] It is generally recognized that the curbing of crime is not only a legal obligation incumbent on the competent authorities but also […] an international duty that is incumbent on the State.”[402] As emphasized by the UN Observer Mission in El Salvador, “State responsibility can ensue not only as a result of a lack of vigilance in preventing harmful acts from occurring but also as a result of a lack of diligence in criminally prosecuting those responsible for them and in enforcing the required civil penalties”.[403]

400 Isayeva v. Russia, European Court of Human Rights, App. No. 57950/00, 24 February 2005, §213.

401 Del Caracazo v. Venezuela, Inter-American Court of Human Rights, 29 August 2002, ¶117, quoted in International Commission of Jurists, Military Jurisdiction and International Law, Military courts and gross human rights violations vol. 1, 55 (2004).

402 Recueil de sentences arbitrales, United Nations, Vol. II, pp. 645 and 646, quoted in International Commission of Jurists, Military Jurisdiction and International Law, Military courts and gross human rights violations vol. 1, 55 (2004).

403 ONUSAL, §29 cited in International Commission of Jurists, Military Jurisdiction and International Law, Military courts and gross human rights violations vol. 1, 26 (2004).

7. Genuinely Unwilling or Unable: Legal Mechanisms Available to Palestinian Victims

Universal jurisdiction is a legal mechanism of last resort; it is primarily utilized when State's with a more traditional jurisdictional nexus to the alleged crime – such as nationality, territoriality, the protective principle, or the passive personality principle – prove unwilling or unable to prosecute alleged crimes. Thus, in the majority of instances, national courts require that domestic remedies be exhausted before the principle of universal jurisdiction can be applied. This section will detail the legal options available to Palestinian victims with respect to the legal systems in the oPt and Israel.

7.1. The oPt

The PNA was established consequent to the 'Oslo Accords', agreements reached between the Palestine Liberation Organisation (PLO) – as the recognised representative body of the Palestinian people – and the State of Israel. Although the PLO have been granted special observer status at the United Nations, the remit of the PNA is expressly limited, both by the Oslo Accords and the resultant Israeli-Palestinian Interim Agreement. For example, although the PNA has established a functioning judicial system capable of upholding the rule of law in the oPt, its jurisdiction is severely limited. Article XVII of the Israeli-Palestinian Interim Agreement stipulates that "the territorial and functional jurisdiction of the [Palestinian] Council will

apply to all persons, except for Israelis".[404] This explicitly removes Israeli citizens, and members of its armed forces, from the jurisdiction of the PNA; no Israeli may be brought before a Palestinian court. When dealing with the prosecution of alleged Israeli war criminals, this legally binding restriction effectively removes the Palestinian judicial system from the ambit of legal options available to victims.

Additionally, consequent to its legal status, the PNA cannot currently ratify or accede to any of the major international criminal law treaties, such as the Statute of the ICC,[405] or to other international human rights law or international humanitarian law treaties such as the Geneva Conventions, the ICCPR, or CAT. Consequently, the primary jurisdiction of inter alia, the ICC, the Human Rights Committee, or the Committee against Torture, does not currently extend to the oPt. However, it must be noted that, as the Occupying Power, Israel has extensive extraterritorial human rights obligations.[406] As such it is required to report to the abovementioned bodies regarding its activities in the oPt. However, no individual petitions on behalf of Palestinian victims can currently be brought before these bodies, and so they cannot offer effective judicial remedy.

The current lacuna in the international legal system, with respect to Palestinian victims of international crimes, results in a situation whereby there are no legal remedies available to Palestinian victims within the Palestinian system.

7.2. The State of Israel

As the Occupying Power, and a belligerent in the hostilities discussed herein, Israel is bound by a number of pressing legal obligations. The State of Israel has ratified several relevant international treaties, such as the Geneva Conventions, the ICCPR, and CAT, and is therefore bound by the provisions contained therein. For example, Article 146 of the Fourth Geneva Conventions requires that Israel enact "any legislation necessary to provide effective penal sanctions for person committing, or ordering to be committed" any grave breaches of the Geneva Conventions. Equally, as illustrated previously, the ICCPR obliges Israel to facilitate victims in their pursuit of an effective remedy, and to guarantee their equal protection before the law; Israel has a legal responsibility with respect to Palestinian victims of Israeli violations of international law. Customary international law also obliges Israel to

404 Interim Agreement on the West Bank and the Gaza Strip, Israel-Palestine, Sep. 28, 1995. Emphasis added.

405 On 22 January 2009, the PNA lodged a declaration with the Registrar of the ICC, recognizing the jurisdiction of the Court. This submission is currently being considered by the Office of the Prosecutor.

406 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C. J. 136 (July 9) §111, §112, §113.

investigate all violations of international law.

To date, however, Israel's investigations have proved inadequate, while prosecutions – particularly at the command level – have not been forthcoming. It is presented that, in this respect, Israel is in violation of its legal obligations, and effectively denies Palestinian victims effective legal remedy. This finding was confirmed on 4 May, 2009, when the Spanish Audencia Nacional(National Court) ruled that the Israeli authorities were not willing to investigate and bring to trial the persons presumed responsible for the Al-Daraj assassination in 2002.

A number of cumulative factors have been identified which fundamentally frustrate Palestinian's pursuit of justice before the Israeli courts. These are: the perceived status of the Gaza Strip and the classification of its civilian population as 'enemy aliens', Israel's legal and judicial mechanisms, the mechanisms of investigation, and the lack of a timely remedy. These issues will be explained briefly herein as they illustrate the bias and lack of independence inherent in the Israeli legal system, and Israel's unwillingness to genuinely investigate and prosecute those suspected of committing crimes against the Palestinian population.

7.2.1. The Perceived Status of the Gaza Strip and the Classification of its Civilian Population as 'Enemy Aliens'

The Israeli authorities – including the Attorney General (AG), the Supreme Court, and the legislative – have consistently advanced the position that the Gaza Strip is a 'hostile territory' and that its inhabitants are 'enemy aliens'.[407] In a statement issued on 19 September, 2007, the Israeli Ministry of Foreign Affairs stated that: "Hamas is a terrorist organization that has taken control of the Gaza Strip and turned it into hostile territory. This organization engages in hostile activity against the State of Israel and its citizens and bears responsibility for this activity."[408] This statement followed former Prime Minister Ariel Sharon's claim – made before the General Assembly of the United Nations on 15 September, 2005 – that disengagement represented "the end of Israeli control over and responsibility for the Gaza Strip".[409] Israel has used the allegedly modified status of the Gaza Strip to illegally renounce its obligations as an Occupying Power,[410] and to justify the imposition of methods of collective punishment which indiscriminately affect all of

407 See, Israel Government Communiqué, Security Cabinet Declares Gaza Hostile Entity, (Sep. 19, 2007).

408 Ibid.

409 Ariel Sharon, Prime Minister of the State of Israel, Speech before the General Assembly of the United Nations, (Sep. 15, 2005).

410 Despite these assertions, Israel remains the Occupying Power in the Gaza Strip, based, inter alia, on the level of effective control – including control of all land, sea, and air borders – which it still exercises.

Gaza's 1.5 million inhabitants. For example, in al-Basyuni – a case which challenged the legality of restricting the supply of fuel and electricity to the Gaza Strip – the State argued that such measures were intended to, inter alia, "defeat the military efforts of all terrorist organisations in the Strip by reducing the sum of all resources available to these organizations"[411] and to "exert pressure on the Hamas regime aimed at impelling it to limit the scope of its hostile activities against Israel from within the Gaza Strip."[412] The civilian population have been used as a means of political leverage – in violation of their inherent human dignity – and subject to collective punishment; an argument made possible by their classification as enemy aliens.

With respect to the effective administration of justice, it must be highlighted that the "enemy aliens" doctrine effectively treats all inhabitants of the Gaza Strip as enemies, and thus as potential 'terrorists'. In a petition challenging the legality of a law preventing residents of Gaza from entering Israel,[413] the Israeli Supreme Court expanded upon this doctrine:

> An armed conflict has been taking place between Israel and the Palestinians for many years. This conflict has reaped a heavy price on both sides, and we have seen the massive scale of the harm caused to Israel and its inhabitants. The Palestinian public plays an active part in the armed conflict. Among the Palestinian public there is enmity to Israel and Israelis. Large parts of the Palestinian public — including also persons who are members of the organs of the Palestinian Authority — support the armed struggle against Israel and actively participate in it […] It follows from this that the residents of the territories — Judaea, Samaria and the Gaza Strip — are enemy aliens.414

Justice Cheshin further added that:

> This natural and simple rule, that a foreign national who presents a risk to national security will not be allowed to enter the state, leads almost automatically to the conclusion that in times of war hostile nationals will not be allowed to enter the state, since they are presumed to endanger national security and public security.[415]

This presumption was reiterated by the AG in his statement

411 See the state's response of 7 November 2007 in HCJ 9132/07, Gaber Albasyouni Ahmad, Najer Maher, Adalah, Gisha, HaMoked, Alhaq, Almezan Center for Human Rights, Physicians for Human Rights, Palestinian Centre for Human Rights, The Public Committee Against Torture in Israel, Gaza Center for Mental Health, B'Tselem v. The Prime Minister and The Minister of Defence, IsrSC (Jan. 30, 2008), para. 71. Emphasis added.

412 Ibid.

413 The Citizenship and Entry into Israel Law (temporary provision) 5763 – 2003.

414 HCJ 7052/03, Adalah v. The Interior Minister (decision delivered in 14 May 2006), para. 12 (emphasis added).

415 Ibid., para. 78 (emphasis added).

before the Supreme Court on 31 July 2008, in the context of another petition questioning the legality of the same law. The AG argued that:

> The State of Israel is in a state of war with the Palestinians: a people facing another people; a collective facing another collective. Alongside the Palestinians there are other states, enemy states, some of which seek to destroy the State of Israel; in others Islamic terrorism prevails. In a war between peoples and states, there is an assumption that each human being owes loyalty to the collective to which he belongs.[416]

The claim – presented and accepted at the highest levels of the Israeli political and legal system – that all residents of the Gaza Strip are presumed to endanger the State of Israel's national security and public security, has clear and evident repercussions with respect to the pursuit of justice. The straightforward presumption that all Palestinians pose a direct threat to Israel, comes into direct conflict with the presumption of innocence, a fundamental tenet of international law.[417] It is also evident that in perpetuating this doctrine the Israeli courts cannot be considered impartial. Under such circumstances it is difficult, if not disingenuous, to argue that Palestinian victims can expect to receive a fair trail, or an effective judicial remedy.

7.2.2. Israeli Legal and Judicial Mechanisms

The mechanisms of the Israeli legal and judicial system prevent the impartial pursuit of justice. As will be outlined below, there is no separation of powers between the military and the military legal system (preventing independent non-biased investigation), the hierarchical structure of the military has evident implication with respect to any claim of impartiality, while ineffective civilian oversight and significant – in some cases virtually indefinite – delays within the judicial system contribute to promote a climate of pervasive impunity.

Within the Israeli military system, the Military Attorney General (MAG) serves a twofold function: acting as legal advisor to the military authorities, and enforcing penal laws intended to represent the rule of law and the public interest. In this respect, the MAG performs a similar role to that of the AG in the civilian sphere. However, as noted by the Israeli High Court of Justice, although there is a great deal of similarity between the MAG and the AG regarding their independence as to arraignment, the MAG remains subordinate – in terms of command – to the Chief of Staff. While the Chief of Staff does not have the authority to instruct the MAG regarding arraignments, the

416 See the state's response, on file with Adalah, in HCJ 466/07, Gal'on et al. v. The Interior Minister (case pending).

417 Article 14(2), ICCPR.

military hierarchy within which the MAG operates cannot be ignored.[418]

> The military is a typical hierarchical organization ... and is generally considered to have special characteristics ... as distinct from civilian organizations. Discipline and coercion are among the notable characteristics of the military, as are […] mutual co-dependence and solidarity in the ranks--especially on the battlefield, but not only; obedience of command; […] the relations of trust between commanders and their subordinates and among the soldiers themselves; […] they are an absolutely essential precondition of the existence of a military worthy of the name […].[419]

As illustrated in a previous section, this situation presents clear implications with respect to the impartiality or independence of any investigation.[420]

The Military Justice Law (1955) also confers significant powers on Israeli Defence Force District Chiefs (the commanding officers of the relevant command or corps, such as the Southern Command, or the General Staff) allowing them to intervene in, and influence the legal process. District Chiefs are entitled to: file an appeal against a judgment handed down in a court of first instance,[421] to order the quashing of a charge sheet,[422] and – as a confirming authority – to consent to a military court's final judgment.[423] This relationship raises serious issues with respect to the independence of the military legal system and the separation of powers principle.[424] Simply put, such influence is not conducive to either independence or impartiality; rather, it has the potential to fundamentally undermine it.

Finally, the extensive 'margin of appreciation' awarded to the AG and the MAG by the Israeli Supreme Court must be addressed. Although, issues of independence and impartiality have already been highlighted, the lack of effective civilian judicial oversight may be regarded as the ultimate cumulative factor which fundamentally undermines the pursuit of criminal accountability. In John Doe, the High Court of Justice ruled that the margin of discretion awarded to the AG regarding the decision to issue indictments, is extremely wide, particularly with respect to decisions which are based on an examination

418 HCJ 425/89, Zofan v. the MAG, 43(4) P.D. 718, 725

419 HCJ 3959/99, Movement for Quality Government in Israel v. the Sentencing Commission, 53(3) P.D. 721, 745

420 See supra, Section 2: 'International Obligations Relating to the Administration of Justice'.

421 Section 424(b) of the Military Justice Law.

422 Section 308(a) of the Military Justice Law.

423 Section 44(1)(b) and (c) of the Military Justice Law.

424 See, Finkelstein & Tomer, The Israeli military legal system - overview of the current situation and a glimpse into the future, Air Force Law Review, (2002).

of the evidence.[425] A similar conclusion was reached with respect to the authority of the MAG in the Suffan case.[426] Consequently, the scope of judicial review is extremely limited. As noted by the High Court of Justice:

> The decision made by the prosecuting authorities to close an investigation file on the basis of a lack of sufficient evidence […] normally falls within the 'margin of appreciation' that is afforded to the authorities and curtails – almost to nil – the scope of judicial intervention. I was unable to find even one case in which this court intervened in a decision of the Attorney General not to issue an indictment on the basis of a lack of sufficient evidence.[427]

It must be emphasized – as discussed below – that both the AG and the MAG make decisions on the basis of evidence obtained by flawed investigations, including military/ operational probes; in many instances the accused are intrinsically involved in the investigations.

The Court has further stated that:

> The scope of intervention by this court in the decision of the Attorney General is, as a matter of principle, very narrow, and while his decisions regarding conducting criminal investigations and filing indictments are not immune from judicial review, the intervention of this court is 'limited to those cases in which the Attorney General's decision was made in an extremely unreasonable matter, such as where there was a clear deviation from considerations of public interest, a grave error or a lack of good faith' (HCJ 1689/02, Nimrodi v. The Attorney General, PD 57[6] 49, 55 [2003]. See also HCJ 6271/96, Be'eri v. The Attorney General, PD 50[4] 425, 429 [1996], HCJ 3425/94, Ganor v. The Attorney General, PD 50[4] 1, 10 [1996]).[428]

It is presented that no decision made on the basis of flawed and biased information can be considered to have been made in "good faith". When combined with the Israeli military system's independence and impartiality deficit, the absence of effective civilian judicial oversight and review fundamentally violates Palestinian victims' right to an effective judicial remedy.

425 HCJ 5699/07, Jane Doe (A) v. The Attorney General (decision delivered on 26 February 2008)

426 HCJ 425/89, Suffan v. The Military Advocate General, PD 43(4) 718, 727 (1989).

427 HCJ 5699/07, Jane Doe (A) v. The Attorney General (decision delivered on 26 February 2008), para. 10 of Deputy Chief Justice Rivlin's ruling. Emphasis added.

428 HCJ 10665/05, Shtanger v. The Attorney General (decision delivered on 16 July 2006). See also Amnon Rubenstein and Barak Medina, The Constitutional Law in the State of Israel: Government Authorities and Citizenship, Vol. 2, (Shoken, 2005), pp. 1020, 1024 (Hebrew).

7.2.3. Investigative Mechanisms

Currently, a criminal case is presented, on behalf of a Palestinian victim, to the MAG, who will then consult with the relevant field commander. If requested, an investigation will then be conducted. These investigations take two principal forms, constituting either operational probes (also known as military probes), or criminal investigations. Article 539(A)(a) of the Law on Military Justice defines an operational probe as: "a procedure held by the army, according to the army orders and regulations, with respect to an incident that has taken place during a training or military operation or with connection to them". An operational probe is intended to investigate an incident from an internal military perspective, so that lessons may be learned, operational conclusions drawn, and so on. The distinction between a criminal investigation and a military probe was elaborated upon by the Israeli Supreme Court in Al-Nebari:

> The factual examination is the main role of the investigatory bodies – the Military Police, the Inspecting Officer, and the Investigatory Judge – and its purpose is to reveal the truth in order to do justice and bring those responsible to justice. Conversely, the factual examination that is undertaken within the framework of an operational probe, while it is an essential and extremely important step in conducting the probe, is not its purpose; rather it comes to serve the main purpose of the operational probe, which is to draw conclusions and lessons in order to prevent future failures and errors […] There is, therefore, a substantial difference between an operational probe and a criminal investigation, both at the level of purpose and at the operational level. [429]

Operational probes are conducted by military personnel, as distinct from officers of the military police. The Israeli forces justify this practice on the basis that such personnel are better placed to evaluate the propriety of military action than individuals without combat experience.[430] It is believed that during a military probe, no external witnesses are interviewed; a fundamental flaw given that this precludes a cross-examination of facts, and presumes that those suspected of crimes will not act in their own self-interest. Findings are intended to be confidential so that soldiers will speak openly. Additionally, it appears that operational probes are not conducted in accordance with identifiable standards, other than the basic requirements of the Military Justice Law. In 2002, Col. Daniel Reisner, deputy Judge Advocate General, remarked: "Every commander determines whether he's reached the truth…

429 HCJ 2366/05, Al-Nebari v. The Chief of Staff of the Israeli Army (decision delivered on 29 June 2008), para. 6-10 of Justice Arbel's ruling. Emphasis added.

430 Human Rights Watch, Promoting Impunity: The Israeli Military's Failure to Investigate Wrongdoing, (2005).

There is no textbook on investigations … We see a great variety".[431] Further, the Military Justice Law and the General Security Services Law stipulate that all materials related to an operational probe, including what is said during the course of a probe, the protocols of its hearings, its findings, conclusions and recommendations, shall not be used as evidence in court, and are confidential;[432] the findings of the operational probe cannot be used as evidence in subsequent proceedings.

Following the outbreak of the second intifada an official change in policy was introduced whereby the use of operational probes to address incidents emerging from military operations became the rule. This means that criminal investigations are not necessarily a first step even in the face of credible allegations of serious offences committed by military personnel. This has significant negative implications on any future investigation, making subsequent investigation nearly impossible. As noted by Col. (res) Ilan Katz (Deputy MAG, until March 2003):

> "…when commanders conduct an operational debriefing they destroy the scene of the crime, and months later it is difficult to find traces of evidence on the ground. You cannot even check the gun from which the shots were fired because by the time the [Military Police Criminal Investigation Division] investigation begins many more shots have been fired by the same gun, or in some cases the gun changes hands and it is very hard to trace it. The debriefing law has a certain logic because it raises the level of credibility of the operational debriefings, but the way it is exploited by commanders in order to prevent [Military Police Criminal Investigation Division] investigations is not reasonable."[433]

It must be emphasised that these operational probes often form the basis of any decision relating to the launching of a further investigation; including those decisions made by the MAG and the AG. Therefore, in addition to significantly delaying any subsequent investigation – with evident repercussions with respect to the collection of evidence, the degradation of the crime scene, and so on – these probes constitute an integral but flawed component of the legal system. Such probes are patently ineffective, and cannot be considered either independent or impartial. The report of the UN Fact Finding Mission

431 Tracy Wilkinson, "Israeli Army Probes Slaying of Palestinian Grandmother," Los Angeles Times, December 29, 2002.

432 Article 539A of the Military Justice Law – 1955 states that, "Anything that is said during the course of a military probe, in a protocol of a probe, or any other materials prepared during a probe, as well as its summaries, findings and conclusions, shall not be accepted as evidence in court, except for in a trial for providing false information or concealing an important piece of information in a probe." Article 17(a) of the General Security Services Law – 2002 states that, "Anything that is said during an internal probe or in a report prepared following an internal probe, including protocols, findings, conclusions or recommendations […] shall not be accepted as evidence in court, except for in a disciplinary procedure or a criminal trial for providing false information or knowingly concealing an important piece of information in a probe."

433 Quoted in, Report of the UN Fact Finding Mission on the Gaza Conflict, §1614.

found that operational probes "can hardly be an effective and impartial investigation mechanism … It does not comply with internationally recognized principles of independence, impartiality, effectiveness and promptness in investigations."[434]

Operational probes give rise to a clear conflict of interest, wherein the accused is intrinsically involved in the investigation. Such conflict of interest is, inter alia, in conflict with Israeli law; indeed, the High Court of Justice has held that, "The test of a situation where a conflict of interest exists is an objective one. It is enough for the individual to be in a situation that raises real concerns that there is a conflict of interest, and there is no need for an actual conflict of interest to be proved."[435]

These probes, which form the basis of subsequent decision to open criminal investigations, in no way comply with international standards; reliance on such methods of investigation virtually guarantee that investigations cannot be impartial or independent. As noted by the European Court of Human Rights, "For an investigation into alleged unlawful killing by State agents to be effective, it may generally be regarded as necessary for the persons responsible for and carrying out the investigation to be independent from those implicated in the events (see, for example, Güleç v. Turkey, judgment of 27 July 1998, Reports 1998-IV, §§ 81-82; Oğur v. Turkey [GC], no. 21594/93, §§ 91-92, ECHR 1999-III). This means not only a lack of hierarchical or institutional connection but also a practical independence".[436]

7.2.4. The Opening of Criminal Investigations

The MAG can order the Criminal Investigation Division to open a criminal investigation if there is reasonable suspicion that a criminal offence may have been committed. Typically, a summary of the operational probe is sent to the MAG, but the full file may be requested. Again, it must be emphasised that no materials from the operational probe can be used in a criminal investigation, and any findings will remain confidential from the investigative authorities.[437]

The decision of the MAG may be reviewed by the AG and, ultimately, the Supreme Court. However, as detailed above, the Court awards an extensive margin of appreciation to the military authorities, severely restricting the scope of judicial review.

434 Report of the UN Fact Finding Mission on the Gaza Conflict, §1628.

435 HCJ 5575/94, Mehadrin Ltd. v. The Government of Israel, PD 49(3) 133, 142 (1995). See also, HCJ 531/79, The Likud Party in the Petakh Tikva City Council v. The Petakh Tikva City Council, PD 34(2) 566, 571 (1980).

436 Isayeva v. Russia, European Court of Human Rights, App. No. 57950/00, 24 February 2005, §211.

437 Article 539(A)(b)(4), Law on Military Justice.

Again, it must be emphasized that these decisions, by the MAG, the AG, and potentially the Supreme Court are formed on the basis of either partial or full operational probes. It is impossible that such investigations – conducted by those responsible – can be said to constitute effective, impartial or independent investigations; any decisions which rely on these probes will be inevitably flawed.

7.2.5. The Opening of Civil Investigations

In order to begin civil investigations, claims are submitted to the compensation officer at the Ministry of Defence. These claims must be submitted within 60 days of the incident. Upon opening a file, the compensation officer will look for relevant information, including from the Military prosecutor. The vast majority of compensation claims are rejected.

If the Israelis feel that a compensation case has a significant chance of success, a 'Settlement Committee' comprised of, inter alia, representatives of the Ministry of Defense, and the Civil Prosecutor, may negotiate with lawyers for a settlement outside of court. Previously, lawyers acting for victims could initiate negotiations with this committee directly, however, in recent years only the civil prosecutor can refer cases.

Before the advent of the Palestinian National Authority, a significant number of compensation claims were successfully pursued by lawyers representing victims. However, in recent years, Israel has stopped paying compensation, and now chances of success in the courts are increasingly remote.

7.2.6. Prompt and Timely Remedy

The State of Israel has, on numerous occasions, failed to carry out investigations related to Palestinian victims in a prompt and timely manner, thereby violating victims' right to an effective remedy, and contributing to a climate of impunity. In this respect, a few illustrative examples will be presented.

On 17 August, 2006, a petition was filed to the Israeli Supreme Court against the Prime Minister of Israel to establish an official commission of inquiry into the government's actions in relation to the Second Lebanon War. A final decision was delivered three and a half months later, on 30 November 2006.[438]

A petition submitted to the Supreme Court in June 2007, challenged the authority of the AG to reach a plea bargain agreement with the former President of Israel, Moshe

438 See HCJ 6728/06, Ometz Association v. The Prime Minister (decision delivered on 30 November 2006).

Katzav, for various sexual offenses rather than going to trial against him on rape charges. A final decision was delivered eight months later, on 26 February 2008.[439]

While PCHR do not endorse the above mentioned findings of the HCJ, they are used illustratively: by contrast cases involving Palestinian victims have been delayed for considerable periods of time. For example, in 2003, Israeli human rights organizations submitted a petition to the Israeli Supreme Court, asking the court to order the MAG to open a criminal investigation into the circumstances of the deaths of eight Palestinians from the West Bank and Gaza. The petition also asked the court to order the MAG to open a criminal investigation within a reasonable time into every case brought to the MAG's attention regarding the killing or injury of Palestinians not involved in hostilities. Six years later (April 2009), this petition is still pending before the court.[440]

On 24 January 2002, a petition was submitted to the Israeli Supreme Court challenging the Israeli government's policy of "assassinations" against Palestinians. Nearly five years later, on 14 December 2006, the court delivered its judgment dismissing the petition and upholding the legality of the assassinations.[441]

On 5 April 2007 a petition was submitted by Palestinian human rights organizations to the Israeli Supreme Court asking the court to order a criminal investigation into the killings of Palestinians by the Israeli military in Rafah, Gaza and the extensive demolition of homes there in 2004. Two years later, the court has not held one hearing on the case.[442]

These examples highlight the Israeli authority's unwillingness to genuinely investigate and prosecute alleged crimes involving Palestinian victims. As noted previously, the prolongation of investigations is considered as constituting an attempt to shield alleged perpetrators from justice. As noted by, the Inter-American Court of Human Rights in Del Caracazo, investigations which persist for a long-period of time, without those responsible for gross human rights violations being identified or punished, constitute "a situation of serious impunity and […] a breach of the State's duty".[443]

439 See HCJ 5699/07, Jane Doe (A) v. The Attorney General (decision delivered on 26 February 2008).

440 See HCJ 9594/03, B'Tselem, et al. v. The Military Judge Advocate General (case pending).

441 See HCJ 769/02, The Public Committee Against Torture in Israel v. The Government of Israel (decision delivered on 14 December 2006).

442 See HCJ 3292/07, Adalah, et al. v. Attorney General (case pending).

443 Del Caracazo v. Venezuela, Inter-American Court of Human Rights, 29 August 2002, ¶117, quoted in International Commission of Jurists, Military Jurisdiction and International Law, Military courts and gross human rights violations vol. 1, 55 (2004).

7.2.7. A Note on 'Operation Cast Lead'

Both the MAG and the AG were heavily involved in the planning and execution of 'Operation Cast Lead', Israel's 23 day offensive on the Gaza Strip (27 December 2008 – 18 January 2009). As revealed in the Israeli media, and confirmed by Israeli forces, the offices of the MAG and the AG provided the legal framework regulating the attacks on Gaza.[444] In light of this close relationship, it is unsurprising that the AG rejected Israeli human rights organizations' demands that an independent mechanism be established in order to investigate the killing and injuring of civilians during Operation Cast Lead, and address "the legality of the actual orders and directives given to forces in the field". In their letter, the organizations detailed statistics regarding the killing of civilians, while highlighting the requirements of international humanitarian law. In a response dated 24 February 2009, the AG remarked that:

> In conclusion, we shall state that listing of contentions regarding the general patterns of action employed by the IDF, as set forth in your letter, cannot constitute a basis for the launching of a criminal investigation. Nonetheless, insofar as you have any concrete and pertinent arguments concerning the IDF activity in Operation "Cast Lead", you have the possibility of addressing the relevant entities, and your inquiry will be checked and examined in the customary manner.[445]

The Israeli authorities opened two sets of internal investigations into events associated with Operation Cast Lead. PCHR regard these investigations as inadequate and inappropriate, inter alia, on the basis of the fundamental flaws inherent in such investigations, as outlined above. Both sets of investigations concluded that Israeli forces acted in accordance with the law.

On Monday, 30 March 2009, Military Advocate-General Avichai Mandelblit closed Israel's inquiry into Israeli soldiers accounts of alleged crimes committed in the Gaza Strip. Soldiers had made serious allegations that included war crimes, and grave breaches of the Geneva Conventions (1949). However, the inquiry was closed after just eleven days.[446]

On 22 April 2009, Israeli Military Authorities announced

444 "IDF military lawyers were involved in advising commanders on international law aspects of the Gaza operation. […] In principal legal aspects the MAG is subject to the guidance and supervision of Israel's Attorney-General and regularly consults with the Attorney General." IDF, The Operation in Gaza 27 December – 18 January 2009; Factual and Legal Aspects, July 2009, § 217; See also Yotam Feldman and Uri Blau, "How IDF legal experts legitimized strikes involving Gaza civilians,". Haaretz, 23 January 2009, available at: http://www.haaretz.com/hasen/spages/1057648.html.

445 Both the initial request, and the AG's response are available on the website of the Association for Civil Rights in Israel (ACRI): http://www.acri.org.il/eng/story.aspx?id=602.

446 See, PCHR Press Release, Israel Closes Investigation into Alleged War Crimes Committed in the Gaza Strip, 31 March 2009. Available at, http://www.pchrgaza.org/files/PressR/English/2008/45-2009.html.

the conclusion of five internal investigations examining the conduct of Israeli forces during the recent military offensive in the Gaza Strip. The investigations, supervised by IDF Chief of Staff Gabi Ashkenazi, and conducted by officers of the rank of colonel, addressed 5 issues:

c. Claims regarding incidents where United Nations and international facilities were fired upon and damaged;
d. Incidents involving shooting at medical facilities, buildings, vehicles and crews;
e. Claims regarding incidents in which uninvolved civilians were harmed;
f. The use of weaponry containing phosphorous;
g. Damage to infrastructure and destruction of buildings by ground forces.

These investigations concluded that a very small number of incidents involved intelligence or operational errors, but that "throughout the fighting in the Gaza Strip" Israeli forces "operated in accordance with international law".[447] These claims were later repeated in the IDF's comprehensive report on the offensive on the Gaza Strip, published in June 2009. The UN Fact Finding Mission held that: "these investigations did not comply with international legal standards."[448]

Israel has opened a limited number of criminal investigations into events occurring during Operation Cast Lead. The precise number of opened investigations are unknown, however the Jerusalem Post has reported that Israel has closed investigations into 30 of the 36 incidents documented in the Goldstone Report, claiming that allegations were 'baseless'.[449] The Israeli Military Police have notified PCHR that they have opened investigations in 15 cases; 35 witnesses have been summoned to Erez crossing. PCHR note, however, that requests for investigation were filed on behalf of 941 victims, those cases currently open relate to only 140 victims; less than 15 percent.

PCHR emphasize that these investigations are conducted in a manner inconsistent with the requirements of international law – as illustrated above. In addition, investigations have only been opened in a minority of cases; impunity is being granted in the overwhelming majority of cases. This unwillingness to pursue justice is illustrated by Prime Minister Netanyahu's public statement on 12 October 2009, vowing that Israeli soldiers and leaders will not stand trial for war crimes committed during the Israeli

447 See, PCHR Press Release, PCHR Condemn Israeli Attempts to Legitimise Crimes in Gaza and Shield Perpetrators from Justice, 27 April 2009. Available at, http://www.pchrgaza.org/files/PressR/English/2008/56-2009.html.

448 Report of UN Fact Finding Mission on the Gaza Conflict, §1616.

449 Yaakov Katz, IDF Nearly Done With Goldstone Counter-Report, Jerusalem Post, 11 January 2010.

offensive 'Operation Cast Lead'.[450]

7.2.8. Summary

As has been illustrated, the Israeli system – as it relates to Palestinian victims of Israeli violations – does not meet the necessary international standards with respect to the effective administration of justice. The presumption that all Palestinians are 'enemy aliens' or 'potential terrorists' has evident implications regarding the partiality of the Israeli court system, and the right to a fair trial. The hierarchical nature of the military, the ineffective manner in which investigations are conducted, and the lack of civilian oversight – as epitomised by the wide margin of discretion awarded by the Israeli Supreme Court – all combine to fundamentally frustrate the pursuit of justice. Justice for Palestinians is not attainable within this system.

The UN Fact Finding 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. The Mission is also of the view that the Israeli system presents inherently discriminatory features that have proven to make the pursuit of justice for Palestinian victims very difficult."[451]

Additionally, since the beginning of the second intifada the Judge Advocate General has stopped automatically opening investigations into cases of death and injury of Palestinians not involved in hostilities, except in exceptional circumstances; B'tselem report that between 2000 and 2008 only 287 such exceptional investigations were opened; only 33 of these cases resulted in actual indictments.[452] As noted above, the majority of these isolated cases were opened months after the actual incidents, with evident problems with respect to interviewing witnesses and collecting evidence. In 2002, the Knesset passed a law denying Palestinians the possibility of obtaining compensation in most cases in which they suffered injury as a result of illegal actions perpetrated by Israeli forces. These two decisions had a serious impact as regards the pursuit of accountability.

Finally, two practical issues with respect to access to justice must be highlighted. As has been outlined previously, Israel's classification of the Gaza Strip as a 'hostile territory' means that only in exceptional cases is it possible for residents of the Gaza Strip to enter the State

450 See Joseph Federman, "Netanyahu: No war crimes trials for Israelis", The Washington Times, 12 October 2009, available at: http://www.washingtontimes.com/news/2009/oct/12/netanyahu-no-war-crimes-trials-israelis/ (accessed 14 October 2009); see also "Netanyahu vows never to let Israelis be tried for war crimes", Haaretz, 12 October 2009, available at: http://www.haaretz.com/hasen/spages/1120498.html (accessed 14 October 2009).

451 Report of UN Fact Finding Mission on the Gaza Conflict, §1629.

452 See, http://www.btselem.org/English/Accountability/Investigatin_of_Complaints.asp.

of Israel. As noted by the HCJ: "The responsible authority decided that the current circumstances dictate that such passage [through Israel] is forbidden other than in exceptional cases." These exceptions are extremely rare, and are typically restricted to patients whose condition requires access to medical care unavailable in the Gaza Strip. Consequently, witnesses are often unable to travel freely to court, and are only called on rare occasions. In many of PCHR's cases, for example, witnesses are required to fill out questionnaires, in lieu of physical attendance. The financial cost associated with taking a case before the Israeli legal system is also a prohibiting factor with respect to access to justice for Palestinian victims. The high levels of poverty and unemployment in the oPt, mean that many individuals simply cannot afford to submit a complaint. Court insurance, for example, often amounts to US$15-20,000, a figure that is far beyond the means of most Palestinians.[453] Although certain human rights organisations, including PCHR, do provide free-of-charge legal representation, capacity is limited.

Simply put, the State of Israel has proved itself unwilling, both in practice and in law, to genuinely investigate and prosecute those accused of serious violations of international law. As noted by the UN Fact Finding Mission, Israel's failure "to open prompt, independent and impartial criminal investigations even after six months have elapsed constitute a violation of its obligation to genuinely investigate allegations of war crimes and other crimes, and other serious violations of international law."[454] The State of Israel is internationally accountable for its failure to take appropriate investigative action.

There are thus no domestic mechanisms capable of providing Palestinian victims an effective judicial remedy.

7.3. International Legal Remedies

When national legal systems are unable (oPt) or unwilling (Israel) to offer effective judicial remedy, the demands of justice require resort to international legal mechanisms. It was for this very purpose that the ICC was established. As already noted, however, neither Israel nor the oPt are States Parties to the ICC, and so events occurring in Israel and the oPt are, for the most part, excluded from its jurisdiction. The United Nations Security Council has the potential to overcome this jurisdictional gap by referring the situation directly to the Office of the Prosecutor of the ICC.[455] Additionally, it must be noted that the Office of the Prosecutor is currently investigating the potential of the PNA accepting the jurisdiction of the court, following

453 Court insurance fees are refunded in the event of a successfully prosecuted case. However, the initial outlay is the principal prohibiting factor.

454 Report of the UN Fact Finding Mission on the Gaza Conflict, §1620.

455 The ICC may also exercise jurisdiction if the perpetrators or victims are nationals of States Parties to the ICC.

a declaration lodged with the Registrar of the ICC on 22 January 2009, under Article 12(3) of the ICC Statute. However, given the current political and legal context, and the balance of power within the Security Council, these eventualities are highly unlikely, and cannot be considered as practical options, at least in the short-term.

With respect to Operation Cast Lead, PCHR's investigations have determined that, 1,419 Palestinians were killed, of whom 1,177 were civilians. The Ministry of Health Reports that 5,303 Palestinians were injured.[456] Approximately 4,000 homes were completely destroyed, and approximately 16,000 others significantly damaged. The demands of justice, and the best interests of victims, render it inconceivable that a vacuum of legal accountability be allowed to exist. In order to avoid just such a situation, the international legal order has evolved to accommodate the principle of universal jurisdiction.

Universal jurisdiction is the only viable legal option available to Palestinian victims of Israeli war crimes.

456 Injured figures are taken from the Ministry of Health in Gaza.

8. Review of PCHR's Universal Jurisdiction Casework

This section will detail PCHR's casework in the field of universal jurisdiction. A short synopsis of the facts of each case, the accused, and the outcomes will be presented. Due to their centrality to the cases discussed herein, this section shall begin with a brief discussion of targeted assassinations[457] and house demolitions. The targeted assassination of Shaleh Shehade (the Al-Daraj attack) forms the basis of a number of PCHR's universal jurisdiction cases, it shall be detailed in the opening section to avoid repetition. The report will then deal with each universal jurisdiction case, in chronological order. Necessarily, this section is restricted to those cases in the public domain.

8.1. The Alleged Crimes

8.1.1. Targeted Assassination

Since the beginning of the second intifada on September 28 2000,[458] Israel has adopted a policy of targeted killings, whereby alleged members of 'terrorist' organizations, who plan, launch, or execute attacks against Israel, are pre-emptively assassinated. This policy has been officially acknowledged by the government, and was the subject of a high-profile case before the Israeli High Court of Justice, where it was found that targeted assassinations could not be judged absolutely legal or illegal, but rather that any

457 Alternatively referred to as ‹targeted assassinations› or ‹extra-judicial executions›.
458 Otherwise known as the Al Aqsa intifada.

individual case would be decided on its individual merits.[459]

However, regardless of the questionable legality of the targeted killings themselves – a practice condemned as illegal by PCHR, the United Nations, and international human rights organisations[460] – the impact of any attack on the innocent civilian population must also be assessed. In this respect any incidental loss of life, or destruction of property, that may be suffered is of particular concern.[461] Consequently, the fundamental protections that IHL affords civilians must be considered.[462]

In IHL the proportionality principle is used to reflect the balance between military necessity and the dictates of humanity. This principle acknowledges that civilians may be harmed in the course of military operations; however, it does not constitute a free-hand with respect to the conduct of hostilities. Any attack will be regarded as indiscriminate – and therefore illegal – if it "may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated".[463] There is no bright line rule of proportionality, and any incident must be assessed on an individual basis, in light of the information known at the time of the attack.[464]

A disproportionate – i.e. indiscriminate – attack is a war crime under customary international law, under certain circumstances it may also represent a grave breach of the Geneva Conventions.[465] With respect to targeted killings, possible grave breaches include: "wilful killing", "inhuman treatment", "wilfully causing great suffering or serious injury to body or health", "and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly." As part of a widespread, systematic policy, targeted killings

459 See HCJ 796/02, The Public Committee against Torture in Israel v. The Government of Israel, IsrSC, (Dec. 11, 2005), p.1. See further, Yael Stein, Israel's Assassination Policy: Extra-judicial Executions, B'tselem Position Paper, (Jan., 2001), David Kretzmer, Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence, 16 European Journal of International Law 2, 171 (2005), and Orna Ben-Naftali & Karen R. Michaeli, 'We Must Not Make a Scarecrow of the Law': A Legal Analysis of the Israeli Policy of Targeted Killings, 36 Cornell International Law Journal, 233 (2004).

460 See, inter alia, Martin Scheinin, Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Mission to Israel, including visit to Occupied Palestinian Territory, U.N. Doc. A/HRC/6/17/Add.4, 16 November 2007.

461 For example, in the period between the first assassination in November 2001, and June 2006, Israeli forces attempted 252 targeted killing operations, resulting in 603 deaths, of which 212 were civilians. PCHR Position Paper on Extra-judicial killings.

462 «Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity.» Art 27 Fourth Geneva Convention.

463 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), Art 51(5)(b).

464 The consequences of any action will not be brought into the equation.

465 'Grave breaches', common to all four Geneva Conventions, are codified in, inter alia, Article 147 of the Fourth Geneva Convention.

may also amount to crimes against humanity.

8.1.2. House demolition

Since the beginning of the occupation in 1967, Israel has undertaken demolitions of Palestinian homes, applying the policy with renewed zeal during the second intifada. House demolitions have three alleged motives: operational, administrative and punitive. From the beginning of the second intifada until 30 April 2004, Israel demolished 4,100 Palestinian homes.[466] Approximately 60 per cent of the demolitions were carried out in the framework of what Israel calls "clearing operations", intended to create buffer zones in border areas or near Jewish settlements; 25 per cent were destroyed consequent to Israeli claims that they were built without a permit; the remaining 15 per cent were demolished as a means of punishing the families and neighbours of Palestinians suspected of involvement in attacks against Israelis.[467] PCHR documentation indicates that, over the course of the second intifada, Israeli forces demolished or partially destroyed 6,264 houses in the Gaza Strip alone. Rafah town and refugee camp, situated in the south of the Gaza Strip and on the border of Egypt, bore around 42 per cent (equivalent to 2,670 houses) of that destruction. The motivation behind the demolitions in Gaza, particularly Rafah, was supposedly operational – to create buffer zones – a motivation not justified by military necessity, and thus illegal. Importantly it has been suggested that the demolitions were also used as a punitive measure against the civilian population.[468]

In 2004 Peter Hansen, Commissioner General of UNRWA, condemned the latest demolitions: "Any humanitarian looking at the sheer number of innocent civilians who have lost their homes can only condemn Israel's house demolition policy as a hugely disproportionate military response by an occupation army."[469]

Article 23(g) of the Hague Regulations and Article 53 of the Fourth Geneva Convention states that occupying Powers are forbidden to destroy property, except where such destruction is rendered absolutely necessary by military operations. The Israeli administration has argued that house demolitions are not a violation of IHL, on the basis of, inter alia, military necessity.[470] However, PCHR affirm that the majority of house demolitions occur in situations devoid of military necessity, in acts constituting war crimes. The extensive destruction of property is a

466 B'tselem, Through No Fault of Their Own: Punitive House Demolitions during the al-Aqsa Intifada, Information Sheet, November 2004.

467 Ibid.

468 See, for example, Ibid and Adalah et al. v. Attorney General et al., HCJ 3292/07 (case pending).

469 Peter Henson, 'UNRWA Condemns a Week of Israeli House Demolitions in Rafah', UNIS (23 Jan, 2004).

470 See Meir Shamgar, 'The Observance of International Law in the Administered Territories', in 1 Isr. YHR., 276 (1971).

grave breach of the Geneva Conventions. The seriousness of these actions demand effective judicial review.

8.1.3. The Al-Daraj attack

The targeted assassination of Shaleh Shehade – the suspected leader of Izz ad-Din al-Qassam Brigades, Hamas' military wing – underpins three of PCHR's universal jurisdiction cases.

On July 22 2002, at approximately 11:55 pm, an Israeli Air Force F16 fighter jet dropped a 985 kilogramme bomb on a three-storey apartment building. The apartment building was located within the densely populated Al Daraj district, a residential neighbourhood in Gaza City.[471] At the time of the attack, Shehade was on the upper floor of the building.

The bomb, which was a direct hit, completely destroyed the targeted building. Additionally, as a result of the blast impact, eight other adjoining and nearby apartment buildings were completely destroyed, nine were partially destroyed, and another 21 sustained considerable damage. Excluding Shehade and his guard, a total of 14 civilians were killed, including eight children. Approximately 150 civilians were injured.

Israeli officials have acknowledged that they decided to drop the bomb on Shehadeh's house knowing his wife was with him, intentionally killing her as well.[472] The decision to attack apparently also took into consideration the possibility that, along with Shehadeh, approximately 10 civilians would also be killed.[473]

This attack was planned in advance, targeted a densely populated residential area, and was conducted at a time when it could reasonably be expected that there would be an extremely high number of civilians present. PCHR considers this attack to be a grave breach of the Fourth Geneva Convention with respect to the prohibition on: "wilful killing", "inhuman treatment", "wilfully causing great suffering or serious injury to body or health", "and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly." The severity of this disproportionate attack demands that it be subject to judicial review. If proven that this attack was carried out as part of a widespread and systematic policy – as PCHR allege – it rises to the level of a crime against humanity.

471 Gaza city is itself one of the most densely populated places on earth, with an estimated population density of 3,000 people per square kilometer.

472 Matar v. Dichter, 05 Civ 10270 (WHP), Initial Complaint, Dec. 07, 2005, §41.

473 Ibid. §42.

8.2. Case: Shaul Mofaz in the U.K.

8.2.1. Synopsis

On 29 October 2002, LAW and PCHR instructed British human rights solicitor Imran Khan to lodge complaints relating to war crimes and crimes against humanity perpetrated in the oPt. The organisations were acting on behalf of individuals and families in the West Bank and the Gaza Strip. The U.K. has an obligation to prosecute alleged grave breaches of the Geneva Conventions, which are deemed a criminal offence by the Geneva Conventions Act 1957. Shaul Mofaz was named as a potential defendant.

8.2.2. The defendant and the alleged crimes

Shaul Mofaz served as Chief of the General Staff of the IDF from 1998 until 9 July 2002. His tenure as Chief of Staff covered the outbreak of the second Intifada, which witnessed, inter alia, the commencement of Israel's extra-judicial execution policy, aggressive attacks against civilian property (including house demolitions and the destruction of agricultural land), and the Israeli offensive against Jenin refugee camp in April 2002.

The complaints lodged covered a broad range of different violations, including grave breaches of the Geneva Conventions, war crimes, and crimes against humanity. They include wilful killings of individual civilians, State assassinations amounting to wilful killings, the destruction of homes and agricultural land and crops, and torture. As Chief of Staff, Mofaz may be held accountable for the actions of forces under his command, in accordance with the principle of command responsibility.

8.2.3. Outcome

The complaint was lodged with the U.K.'s Crown Prosecution Service (CPS) on 29 October 2002. CPS subsequently referred the case to the Crimes Against Humanity Unit of the Metropolitan Police Service's Anti Terrorist Branch.

At the time the complaints were submitted, Mofaz was serving as Israeli Defence Minister, a position to which he was controversially appointed by then Prime Minister Ariel Sharon.

In a letter dated 23 October 2003, the Crimes Against Humanity Unit informed lawyers acting on behalf of Palestinian victims that no police action would be pursued. On the advice of the CPS, the Unit claimed that, whilst acting as Defence Minister, Mofaz was the subject of Diplomatic Immunity. The Unit noted, however, that after Mofaz leaves his cabinet position, the matter may need

to be reviewed as the protections afforded by Diplomatic Immunity would no longer apply.

8.3. Case: Ben-Elizer Et Al in Switzerland

8.3.1. Synopsis

On 5 September 2003, two complaints were submitted to the Swiss Military Attorney General in Berne on behalf of Palestinian victims. The complaints concerned the extensive destruction of Palestinians homes, and five counts of torture. PCHR alleged that these crimes constituted grave breaches of the Geneva Conventions, and crimes against humanity. The application for penal prosecution was lodged in accordance with Article 109 of the Swiss Military Penal Code, and instigated by PCHR and Swiss Attorney Marcel Bosonnet on behalf of Palestinian victims.

8.3.2. The defendants

The complaints were lodged against Benjamin Ben-Elizer (former Israeli Minister of Defence), Shaul Mofaz (former IDF Chief of Staff), Doron Almog (former Commander IDF Southern Command), and Avi Dichter (former Director Israeli General Security Services). The complaints were brought against the defendants pursuant to their individual criminal responsibility, in light of the principle of command responsibility.

8.3.3. The Alleged Crimes

Count one: House Demolition

At approximately one a.m. on 10 January 2002, Israeli forces penetrated so-called "Block O" of Rafah refugee camp in the Southern Gaza Strip. During the operation, 59 houses were destroyed completely and one partially. Israeli forces also destroyed nearby electricity and water networks. More than 650 Palestinians were left homeless as a result of the operation, which was at the time the largest single specific house demolition operation of the occupation.

Count Two: Torture

Between July 2001 and March 2002, five Palestinians were detained by Israeli General Security Services (GSS). The individuals were arrested at either Rafah Terminal, or Erez Junction. All five were detained for significant periods of incommunicado detention, had delayed access to lawyers, delayed access to ICRC Representatives, were detained outside the oPt, and were subject to protracted periods of interrogation. During interrogation, all five were subjected to various means of physical and psychological pressure,

including threats, insults, shabeh (shackling a detainee's hand and legs to a small chair, angled to slant forward so that the detainee cannot sit in a stable position), and the use of collaborators. Some were also denied adequate medical care for existing medical conditions, or medical problems arising from their period in interrogation.

8.3.4. Outcome

The Swiss Military General Prosecutor decided not to prosecute the case, as none of the accused were on Swiss soil at the time the complaints were brought. Article 6bis of the Swiss Penal Code, and Article 2 (section 9) and Article 9 of the Military Penal Code require the presence of the alleged foreign criminal.

8.4. Case: Caterpillar Incorporated in the U.S.

8.4.1. Synopsis

Corrie v. Caterpillar was a federal lawsuit brought against Caterpillar Incorporated on behalf of American peace activist Rachel Corrie who was killed by an Israeli operated Caterpillar bulldozer in Gaza on March 16, 2003, and four Palestinian families, the Al Sho'bis, the Abu Husseins, the Fayeds, and the Khalafallahs, whose homes were destroyed and members killed by Israeli operated Caterpillar bulldozers. Charges related to war crimes, aiding and abetting extrajudicial killing, cruel inhuman or degrading treatment or punishment, wrongful death, and negligence. The suit additionally charged Caterpillar with violating the Racketeer Influenced and Corrupt Organizations (RICO) Act. The claims were brought under the United States Alien Tort Statute, and the Torture Victim Protection Act. The lawsuit was filed on 15 March 2005 by the Palestinian Centre for Human Rights, the Center for Constitutional Rights, the Public Interest Law Group PLLC, and the Ronald A. Peterson Law Clinic at Seattle University School of Law.

8.4.2. The Defendant

Caterpillar Incorporated has supplied bulldozers that have been used by Israeli forces for house demolitions since 1967. Between 1967 and the date of the complaint, Israeli forces destroyed approximately 10,000 Palestinian homes, leaving 50,000 Palestinians homeless. In the four years prior to the filing of the suit – following the outbreak of the second Intifada – Israel destroyed 4,100 homes. Many of these homes were destroyed in violation of IHL; their destruction constituted a grave breach of the Geneva Conventions. Caterpillar Incorporated had constructive notice of such violations since at least 1989. Caterpillar has been on actual notice that bulldozers it was supplying were being used to commit violations of IHL since 2001,

when human rights groups and US citizens began notifying Caterpillar that it was aiding and abetting violations of IHL by supplying Israel with bulldozers used in house demolitions.

Caterpillar manufactures the D9R type bulldozer, which is used in the majority of house demolitions. This bulldozer, which Caterpillar modifies for military purposes, weighs 49 tons, and can destroy a house in a matter of minutes.

8.4.3. Outcome

The case was filed on 15 March 2005. On 2 May 2005 an amended complaint was filed to include the four Palestinian families listed above. On 25 May 2005, the Defendant filed a motion to dismiss. The motion for dismissal was based on Fed. R. Civ. P. 12 (b)(6) for failure to state a claim, and on both the political question and act of State doctrines. On 22 November 2005, District Court Judge Franklin Burgess dismissed the case. The Court held, inter alia, that "[s]elling products to a foreign government does not make the seller a participant in that government's alleged international law violations", and further that there were no facts supporting a claim that Caterpillar controlled or participated in the Israeli soldiers' alleged conduct.

In dismissing the Plaintiff's claims the Court controversially stated that "One who merely sells goods to a buyer is not an aider and abettor of crimes that the buyer might commit, even if the seller knows that the buyer is likely to use the goods unlawfully, because the seller does not share the specific intent to further the buyer's venture." It was held that, "the IDF's conduct, or that of individuals of the IDF, is too remote from the sale of bulldozers to the Israeli government to hold Caterpillar liable for any alleged misuse of the bulldozers by a third party."

Finally, it was held that the case "must be dismissed as it interferes with the foreign policy of the United States of America." The Court noted that, "neither of the other branches of government has urged or enjoined sale of weapons to Israel nor restrained trade in any other manner. For this court to preclude sales of Caterpillar products to Israel would be to make a foreign policy decision and to impinge directly upon the prerogatives of the executive branch of government."

On 20 March, 2006 the decision of the Court was appealed. Plaintiffs argued that court applied an incorrect legal standard to many of the claims, and failed to address several of their arguments. Amicus briefs were submitted on several issues, including the scope of the Torture Victims Protection Act; the political question doctrine; aiding and abetting, and liability for corporations; and the scope, elements and application of the prohibition on

destruction of civilian property not justified by military necessity for purposes of establishing jurisdiction under the Alien Tort Statute.

On 17 September 2007, the Ninth Circuit Court of Appeals dismissed the appeal. The Court held that "plaintiffs' claims present nonjusticiable political questions that deprive the district court of subject matter jurisdiction when construed under Federal Rule of Civil Procedure 12(b)(1), we do not reach the remaining questions presented under state, federal, and international law. Plaintiffs' action cannot proceed because its resolution would require the federal judiciary to ask and answer questions that are committed by the Constitution to the political branches of our government."

In finding that the Court did not have jurisdiction, it was held that "[t]he decisive factor here is that Caterpillar's sales to Israel were paid for by the United States. Though mindful that we must analyze each of the plaintiffs' "individual claims," … each claim unavoidably rests on the singular premise that Caterpillar should not have sold its bulldozers to the IDF. Yet these sales were financed by the executive branch pursuant to a congressionally enacted program calling for executive discretion as to what lies in the foreign policy and national security interests of the United States."

On 9 October 2007 a petition was filed requesting a panel rehearing and a rehearing en blanc. It was argued that the previous decision of the Court was based on dubious argumentation which deviated from Supreme Court precedent, particularly with respect to the finding that the political question was jurisdiction and not prudential. On 12 January 2009 the request for a rehearing was denied.

8.5. Case: Doron Almog in the U.K.

8.5.1. Synopsis

On 10 September 2005 Chief London Magistrate Timothy Workman issued a warrant for the arrest of Doron Almog on suspicion of committing grave breaches of the Fourth Geneva Convention. The U.K. has an obligation to prosecute grave breaches of the Geneva Conventions, which are deemed a criminal offence by the Geneva Conventions Act 1957. The action was instigated by PCHR and Hickman & Rose Solicitors, on behalf of Palestinian victims.

8.5.2. The defendant and the alleged crimes

Retired Major General Doron Almog, a 54 year-old Israeli citizen, was Head of the Israeli Gaza Division, from 1993-95, and Head of the Southern Command of the Israeli military – a position which included control over the Rafah

refugee camp – from 8 December 2000 to 7 July 2003. The warrant issued was in relation to the destruction of 59 houses in Rafah refugee camp on 10 January 2002, which formed part of a sustained policy of house demolitions in the area. Hickman & Rose also presented the police and the court with evidence – compiled by PCHR – of Almog's involvement in a number of other alleged grave breaches, including the killing of Noha Shukri al Makadma, who was nine months pregnant at the time of her death, on 3 March 2003; the killing of Mohammad Abed al Rahman al Madhoun on 30 December 2001; and the indiscriminate killing of civilians in the Al-Daraj attack. The Court did not issue a warrant in relation to the other allegations because Judge Workman considered that, in these cases, police interrogation may be necessary.[474] PCHR, Hickman & Rose Solicitors and the Palestinian complainants had hoped that the police would arrest and question Almog in relation to these other matters under their general arrest powers whilst he remained on bail in the UK.

8.5.3. The events surrounding the attempted arrest

The moment Almog's flight landed on 11 September 2005, he was liable to arrest, however, British police made no effort to board the aircraft. Almog, who denies the allegations against him, decided to return to Tel Aviv following a tip-off from the Israeli embassy in London. The Anti-Terrorist and War Crimes Unit appeared to have allowed General Almog to return to Israel. In Almog's absence, the warrant is now annulled. Daniel Machover, of Hickman & Rose Solicitors, made an official complaint about the lack of an investigation and police "failure" to board Almog's plane at Heathrow. Several Members of Parliament and civil society actors, including European Jews for a Just Peace, the International Federation for Human Rights (comprised of 141 affiliated international organizations), Amnesty International and Anthony Hurndall (father of Tom Hurndall, the journalist and peace activist shot by Israeli forces in Gaza on 13 January 2004), have questioned the rectitude of allowing Almog to evade trial, and the implications this action has had for the victims and for the integrity of the British/international justice system.

8.5.4. Outcome of the case

The diplomatic fallout over the attempted arrest of Almog has been significant. Israeli Foreign Minister Silvan Shalom, derided the attempted arrest of Almog and the risk to others as "scandalous", saying he would press British authorities for a change in the law. The then foreign secretary, Jack Straw, apologised to his Israeli counterpart over the attempted arrest. Those at risk of prosecution

474 When a court issues an arrest warrant in relation to an alleged offence this prevents the police from questioning the suspect in relation to that matter.

included, former Israeli military chief, Moshe Yaalon; senior Israeli army officer Brigadier-General Aviv Kochavi; former Airforce Chief, General Dan Halutz; former Defense Minister and IDF chief of staff Shaul Mofaz; and notably former Prime Minister Ariel Sharon. The Times of London reported on 17 September that Sharon had told Tony Blair, "I would really like to visit Britain. The trouble is that I, like Major General Almog, served in the IDF for many years. I too am a general. I have heard that the prisons in Britain are very tough. I would not like to find myself in one." From within the U.K. several MPs expressed grave misgivings as to why diplomatic and political relations were apparently allowed to infringe on judicial processes. Phyllis Starkey, MP for Milton Keynes South West, said: "The obvious concern is the way in which the Israeli government in particular seems to be given quite favoured access to interfere in UK domestic policy.

8.6. Case: Avraham Dichter in the U.S.

8.6.1. Synopsis

Matar v. Dichter is a class action lawsuit brought against the defendant, Avraham Dichter, on behalf of Palestinians who were killed or injured in the Al Daraj targeted attack. Mr. Dichter was charged with crimes against humanity, extra-judicial killing, and war crimes, including grave breaches of the Fourth Geneva Convention. The claims were brought under the United States Alien Tort Statute, according to which the Defendant is liable both for violations of customary international law and U.S. treaty law, and the Torture Victim Protection Act, whereby the Defendant is liable for extra-judicial killings. The lawsuit was filed on 7 December, 2005, by PCHR and the Center for Constitutional Rights (CCR).

The complaint alleged the following acts: war crimes; crimes against humanity; cruel, inhuman or degrading treatment or punishment; extrajudicial killings; wrongful death; negligence; public nuisance; battery; intentional infliction of emotional distress and; negligent infliction of emotional distress.

8.6.2. The Defendant

The Defendant, Avraham Dichter, was the director of the GSS (otherwise known as Shin Bet) at the time of the Al Daraj attack. The GSS works closely with the Israeli Air Force, providing the intelligence necessary to carry out targeted assassinations. It is alleged that the main preparations for each attack, including target selection, and the provision of information relating to the whereabouts of the target, are carried out by the GSS. Additionally, the final approval for firing at the target is given by the GSS, while the Israeli Air Force decides

whether the attack can be executed based on prevailing environmental conditions. Additionally, it is alleged that the defendant advocated using military aircraft to kill Shehadeh, despite the fact that the strike would target a densely populated residential area.

8.6.3. The outcome of the case

The lawsuit was filed on December 8, 2005, prompting the Defendant to file a motion to dismiss on February 22, 2006.

Dichter based his claim for dismissal on three grounds, claiming that i) he was immunized from suit under the Foreign Sovereign Immunity Act ("FSIA"), ii) that the action presented a non-justiciable political question, and iii) that the action implicates the act of state doctrine.

On May 2 2007, Judge William H. Pauley dismissed the case holding that the Defendant Dichter possessed immunity under the FSIA because, according to the Israeli government, he was acting in the course of his official duties. The Court further stated that, even if the FSIA were inapplicable, the "Court would dismiss the action pursuant to the political question doctrine."[475]

The judgment dismissing the case raised a number of interesting legal points, which formed the basis of the appeal. Of particular note with respect to universal jurisdiction, was the finding that the Defendant was immune from prosecution as he had acted in an official capacity. It is proposed that this finding represents an incorrect application of the legal standard, which should have inquired as to whether the Defendant was lawfully entitled to drop a 985 kilogramme bomb on a residential area, in the knowledge that many civilians would be harmed. The act alleged violated norms of customary international law, from which no derogation is permitted.

Actions which violate customary norms are not, and indeed cannot be, considered sovereign acts, and so cannot fall within the scope of "official authority". This has been confirmed by the ICTY in, inter alia, Milosevic and Blaskic, where it was held that "those responsible for [war crimes, crimes against humanity, and genocide] cannot invoke immunity from national or international jurisdiction even if they perpetrated such crimes while acting in their official capacity."

On June 14 2007, Plaintiffs filed a notice of appeal, and appellate briefing before the United States Court of Appeals for the Second Circuit. On 16 January, 2009, this appeal was denied. The Court held that Dichter was granted immunity under common-law principles. This judgment sets a questionable legal precedent, and is in

475 Matar v. Dichter, Judgment, 05 Civ 10270 (WHP), May. 2, 2007, p15.

conflict with customary international law, which holds that there can be no immunity for international crimes.[476]

In Arrest Warrant, the ICJ stressed that personal immunity only applies for as long as an individual holds office.[477]

8.7. Case: Moshe Yaalon in New Zealand

8.7.1. Synopsis

An arrest warrant for Moshe Yaalon was issued on November 27, 2006, by His Honour Judge Avinash Deobhakta in the District Court at Auckland, New Zealand. Mr. Yaalon was charged with grave breaches of the Geneva Conventions, arising consequent to his role in the Al-Daraj assassination. Grave breaches of the Geneva Conventions and other war crimes are criminal offences in New Zealand, in accordance with the Geneva Conventions Act 1958, and the International Criminal Court Act 2000. The petition was brought by Auckland law firm LeeSalmonLong, acting in conjunction with PCHR and Hickman & Rose.

8.7.2. Defendant and alleged crimes

The Defendant, Moshe Yaalon, was the IDF Chief of Staff at the time of the Al-Daraj assassination. He served in this role from July 9 2002 until June 1 2005. Yaalon is being pursued in accordance with the principle of command responsibility which imposes individual criminal responsibility on a military commander for war crimes committed by forces under their effective command and control.

8.7.3. Events surrounding the attempted arrest

In late 2006 Yaalon visited New Zealand on a private fund raising trip organised by the Jewish National Fund. An arrest warrant for Yaalon was issued on November 27, stating "a suspicion of committing grave breaches of the Geneva Conventions 1949".[478] However, at 5pm on November 28, the Attorney-General filed papers directing the District Court to stay the prosecution permanently.

Despite the original ruling holding that there were "good and sufficient reasons" to justify arrest,[479] the Attorney General, in a written statement to the New Zealand Herald, claimed that, "The materials supplied to support the allegations could not be relied upon to show a prima

476 See, Prosecutor v. Radovan Karadzic and Ratko Mladic, Case No. IT-95-5/18-I, Indictment, (Jul. 25, 1995), and Prosecutor v. Furundzija, Case No. IT-95-17/1-T, Judgment (Dec. 10, 1998).

477 See, supra, Section 1.4.4: 'Immunity'.

478 Quoted in, Talia Dekel, Ya'alon adamant after arrest warrant, The Jerusalem Post, Nov. 30, 2006.

479 Judge Avinash Deobhakta, quoted in Ruth Berry, Government overrules war-crimes arrest order, New Zealand Herald. Available at http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10413310.

facie case against the defendant".[480] On November 30, the arrest warrant was extinguished. District Judge Deobhakta noted that the attorney-general's decision had brought an end to the proceedings.

The events surrounding the attempted arrest of Mr. Yaalon raise a number of questions relating to political interference with the rule of law, and the obstruction of justice. The four Geneva Conventions contain a common article which requires that, regarding grave breaches of the Conventions, "[e]ach High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts."[481] If there were indeed "good and sufficient reasons" to justify arrest,[482] then the New Zealand authorities are potentially in breach of their obligations with respect to the Geneva Conventions. If the decision regarding the lack of a prima facie case against Mr. Yaalon was found to be politically motivated, this would raise serious, and disturbing questions with respect to governmental obstruction of justice.

8.8. Case: Ami Ayalon in the Netherlands

8.8.1. Synopsis

On May 16 2008, Dutch law firm BFKW, acting in conjunction with PCHR, filed Al-Shami v. Ayalon, a torture complaint with the Dutch prosecution authorities. The case was filed on behalf of Khaled Joma'a Mohammed al-Shami. The complaint was brought with respect to the Netherland's treaty obligations under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment 1987.

8.8.2. Defendant and alleged crimes

The Defendant, Ami Ayalon, was the director of the GSS (otherwise known as Shin Bet) at the time the alleged torture occurred. He served in this role from February 18 1996 to May 14 2000. Mr. Al-Shami's interrogation was conducted by members of the GSS. Mr. Ayalon is currently serving as Minister without Portfolio in the Israeli Government.

For a period of twenty days, commencing with his initial arrest on the 31 December 1999, Mr. Al-Shami was subject to intensive interrogation. Each interrogation session

480 Ruth Berry, Government overrules war-crimes arrest order, New Zealand Herald. Available at http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10413310.

481 Art. 49 First Geneva Convention, Art. 50 Second Geneva Convention, Art. 129 Third Geneva Convention, Art. 146 Fourth Geneva Convention. Emphasis added.

482 Judge Avinash Deobhakta, quoted in Ruth Berry, Government overrules war-crimes arrest order, New Zealand Herald. Available at http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10413310.

lasted from between 20 to 40 hours, after which he was allowed to rest for approximately two to three hours, in the seclusion of a 2 x 2 metre cell. In addition, Mr. Al-Shami alleges that he was subject to low temperatures, stretching, and exposure. He also claims to have been bound by his arms and feet to a low chair for long periods while having his eyes covered by black glasses; this method of torture, whereby a detainee is forced to sit in unusual, difficult, positions for long periods of time while being subject to sensory disruption, is known as Shabeh. During the course of the interrogation Mr. Al-Shami was struck repeatedly on the back and face in order to prevent him from sleeping.

After 20 days Mr. Al-Shami was brought before a military court, where, in the absence of legal representation, his arrest was extended by a further 30 days. Due to his rapidly deteriorating health, the Court ordered that Mr. Al-Shami be seen by a doctor immediately; the interrogation methods were not modified. Following his appearance before the military court, he spent a week in solitary confinement, and a week in the collaborators unit. During his time in this unit Mr. Al-Shami alleges further ill-treatment, this time at the hands of collaborators who allegedly threatened to kill him, before forcing him to make a written-confession. Mr. Al-Shami has been left with permanent, serious injury as a result of this alleged torture, and is now unable to work. In total he spent 53 days in the interrogation department, before being sentenced to 15 months in prison and fined 1500 NIS. He was released on December 10 2000.

In 1998, Mr. Ayalon, in a sworn affidavit to the Israeli High Court of Justice, roundly endorsed the Shabeh torture method, noting that "in my best opinion and judgment – [the Shabeh measures] are extremely vital in the struggle to abolish terrorism and we cannot forego them without reducing significantly the ability of the service [GSS] to frustrate attacks."[483]

8.8.3. Events surrounding the attempted arrest

Mr. Ayalon was due to visit the Netherlands from May 16-20 2008. Due to the limited duration of his stay, a request for urgency was included in the original torture complaint. Despite an initially positive response, the Public Prosecutor failed to initiate an investigation pending the result of a delayed decision by the College of Procurators-General (The College) regarding Mr. Ayalon's status in relation to diplomatic immunity. The College eventually held that Mr. Ayalon did indeed lack immunity, and could therefore be prosecuted in the Netherlands. However, by the time they reached their decision, on May 21, Mr. Ayalon had already left Dutch territory. The Israeli media have reported that

483 Ami Ayalon, Affidavit, May 20, 1998, HCJ 5100/94, 4054/95, 6536/95, 5188/96, 7563/97, 7628/97.

"[d]iscreet talks between Israel and Holland prevented the arrest of Minister Ami Ayalon".[484]

8.8.4. Outcome of the case

On October 6, 2008, Mr. Al-Shami applied to the Court of Appeal in the Hague for an Order requiring the Prosecutor to start a criminal investigation into Mr. Ayalon, and to issue an extradition order or an international arrest warrant to secure his presence in the Netherlands during any trial. Mr. Al-Shami has also sought an Order for an anticipatory investigation, so that a criminal investigation file may be opened.

The events surrounding the attempted arrest of Mr. Ayalon raise a number of questions relating to political interference with the rule of law, and the obstruction of justice. Why, for instance, did the Dutch authorities contact the Israeli government? Additionally, given the presence of a prima facie case with respect to Mr.

Ayalon, the Netherlands are potentially in violation of the Convention Against Torture, which requires that on finding a person alleged of torture present on their territory, a State is obliged to "take him into custody or take other legal measures to ensure his presence",[485] or to extradite him, in accordance with the relevant legal provisions. If the delay in the decision regarding Mr. Ayalon's immunity was found to be politically motivated, this would raise serious questions with respect to governmental obstruction of justice. PCHR and their Dutch counterparts have called for an investigation into said delay. It should be noted that, in the case of Guengueng et al v Senegal[486] the Committee Against Torture found that, by not exercising universal jurisdiction, Senegal was in fact in breach of its obligations with respect to the Convention against Torture.

This judgement could have serious implications for the Netherlands should a lack of due process be identified with relation to the Al-Shami case.

On 19 August, 2009, the Appeals Court in the Hague turned down Mr. Al-Shami's appeal. However, despite the denial of the complaint, some of the Court's findings represent a victory with respect to the future prosecution of alleged torturers. Significantly, the Court of Appeals ruled that a suspect's presence on Dutch territory is sufficient for the establishment of jurisdiction. However, in order to actually establish jurisdiction in a specific case, the Court held that the prosecutor must establish whether the individual in question could be identified as a suspect under the

484 Itamar Eichner, Report: Minister Ayalon evaded arrest in Holland, YNetNews, Oct. 7, 2008.

485 Art. 6(1) United Nations Convention against Torture.

486 Guengueng v. Senegal, Communication No. 181/2001, CAT/C/36/D/181/2001, May 19, 2006.

Convention against Torture and the Dutch implementing law. In light of the evidence presented to the Prosecutor regarding Mr. Ayalon's involvement in the torture of Mr.

Al-Shami, it is believed that this consideration was added by the Court in order to address the politically difficult situation it found itself in. Ultimately, the Prosecutor's inaction during Mr. Ayalon's original visit was decisive.
Mr. Al-Shami, PCHR, and BFKW are currently evaluating all available legal options.

8.9. Case: Benjamin Ben-Eliezer et al in Spain

8.9.1. Synopsis

On June 24 2008 PCHR, with the assistance of Spanish partners – Antonio Segura, Gonzalo Boye, Juan Moreno and Raul Maillo – filed a lawsuit at the Spanish Audiencia Nacional (National Court), against seven former senior Israeli military officials. Spain has an obligation to investigate alleged war criminals under article 26 of the Organic Law 6/1985, as amended by Organic Law 11/1999, article 23.4 (a) and (g). The lawsuit was taken on behalf of six survivors and relatives of the Al-Daraj assassination.

8.9.2. The defendants and the alleged crime

Those implicated include: former Defense Minister Binyamin Ben-Eliezer, his former military advisor Michael Herzog, former IDF Chief of Staff Lieutenant-General Moshe Yaalon, former Shin Bet Director Avi Dichter, former Israel Air Force Commander General Dan Halutz, former head of the IDF Operation Branch Major-General Giora Eiland, and former Southern Command Chief Doron Almog. Former Prime Minister Ariel Sharon was also on the list despite being incapacitated at the time of the injunction.

The accused are being prosecuted in accordance with the principle of command responsibility, and so may be held criminally accountable if they "either knew or, owing to the circumstances at the time, should have known that the forces [under their effective command and control] were committing or about to commit"[487] international crimes. The role of the GSS and the Israeli Air Force have already been outlined with respect to Matar v. Dichter. As Southern Command Chief Mr. Almog was the commander with responsibility for the Al-Daraj region. The overall operation was under the effective command and control of the IDF, thereby engaging the responsibility of Mr. Eiland, and Mr. Yaalon. It is alleged that Ben-Eliezer personally oversaw the Al-Daraj attack.

The case was originally brought before the Israeli Supreme

487 The Rome Statute is the treaty that established the International Criminal Court.

Court who, in January 2006, stated that the operation "was proportionate to the military aim of assassinating Shehadeh" and that the ensuing devastation was not "intentional". This is the first time that civilian survivors of an Israeli assassination attempt have filed a law suit in Spain against those responsible.

8.9.3. Outcome

On June 24 2008, a petition was lodged with the Audiencia Nacional, requesting an investigation into the Al-Daraj assassination. In late July the court accepted the case.[488] However, according to the principle of subsidiarity, universal jurisdiction cases can only be tried in Spain if the crimes have not been investigated – in conformity with the rules of due process – in the relevant domestic court.

As noted, an Israeli court ruled on the case in 2006.

Thus, in order for the trial to proceed in Spain, it had to be proven, inter alia, that Israel did not conduct the original trial with impartiality, or that the trial itself was conducted in a manner inconsistent with intent to bring the accused to justice. On January 29 2009, the Central Investigative Judge No. 4 of the Audiencia Nacional ruled that the Israeli authorities were not willing to investigate and bring to trial the persons presumed responsible for the Al-Daraj assassination; Spanish competence was accordingly asserted over the case. This decision marked the launch of a judicial enquiry into the events of July 22 2002. The case will be tried by Antonio Segura, Gonzalo Boyle, Raul Maillo and Juan Moreno, who are best known for their involvement in the landmark case against Augusto Pinochet.

The January 29 decision was appealed by the Spanish Prosecutor and the State of Israel. However, on 4 May, 2009, Judge Fernando Andreu of the Audencia Nacional, announced his decision to continue the investigation. The Spanish court explicitly rejected the arguments of the State Prosecutor and the State of Israel, which claimed that Israel had adequately investigated the crime. The judge confirmed that this claim is incorrect, and contrary to the rule of law. Judge Andreu noted that, "the judicial authorities of Israel have not initiated any criminal proceedings with the objective of determining if the events denounced could entail some criminal liability."[489]

Significantly, the Court also ruled that, in view of the status of the Gaza Strip as occupied territory (i.e. not part of Israel), Spanish criminal law does not accord Israel primary jurisdiction over suspected Israeli war criminals.

488 No arrest warrant was issued for Ariel Sharon as he is currently incapacitated.

489 Unofficial translation.

The Court also accepted the possibility that, if proven to be part of a widespread and systematic attack as PCHR will argue – this incident may classify as a crime against humanity.

Israel appealed the decision of the Audencia Nacional, and on 30 June 2009 the Appeals Court voted 14-4 in favour of closing the investigation. The case will be appealed before the Supreme Court where it is scheduled to be heard in the first half of 2010.

Israel has ordered the defendants not to travel to Spain, and it is believed that diplomats from Israel and Spain are engaging in concerted negotiations over the case.

Reports in the international media, quoting Israeli Foreign Minister Tzipi Livni, claim that the Spanish government intends to amend Spain's universal jurisdiction legislation.

However, the Spanish State television station, TVE, quoted governments sources saying that the possibility of a legal "adjustment or modification" would not be retroactive, and would not affect cases currently before the courts.[490]

Nonetheless, these rumours, if well-founded, represent a worrying development, indicative of political interference with the rule of law, and the demands of international justice. Following the Court's decision on the 4 May, 2009, Israeli Defence Minister Ehud Barak stated, "I intend to appeal to the Spanish Foreign Minister, the Spanish Minister of Defence, and if need be, the Spanish prime minister, who is a colleague of mine from the Socialist International, to override the decision."[491] PCHR note that such political interference is a direct violation of the separation of powers principle, and must not be accept8.9. Summary

Thus far none of PCHR's universal jurisdiction cases have resulted in a successful prosecution; in a number of instances, political and diplomatic interventions have stymied progression in international courts. However, the cases have received high profile media coverage, and additionally, several high ranking Israeli officials have had their freedom of movement curtailed in certain countries.

Those restricted include: Doron Almog, Binyamin Ben-Eliezer, Moshe Yaalon, Avraham Dichter Dan Halutz, and Giora Eiland.

The outcome of the case concerning Ben-Eliezer et al in Spain is pending. Recent progress in the Ben-Eliezer case, particularly the 4 May 2009 decision of the Central Investigative Judge No. 4 of the Audiencia Nacional, is

490 Barak Ravid, Spanish FM: We'll act to prevent war crimes probes against Israel, Ha'aretz, Feb. 1, 2009.

491 Ha'aretz, Israel urges Spain to halt 'cynical' Gaza war crimes probe, 4 May 2009. Available at: http://www.haaretz.com/hasen/spages/1082932.html

promising, and represents welcome progress towards the realization of victims' demands for justice.

PCHR and our international partners continue to prepare files, and have established a comprehensive network of lawyers in numerous jurisdictions throughout the world. Significant progress was made in 2009.

9. PCHR's Conferences on Universal Jurisdiction.

9.1. Conference: Malaga

9.1.1. Synopsis

In 2006, PCHR and the Al-Quds Malaga Association hosted a conference entitled 'Bringing Cases Against War Criminals: Universal Jurisdiction.' This three day conference, held in Malaga from 28-30 April 2006, was attended by lawyers, human rights activists, representatives of national and international NGOs, academics and international solidarity committees. Attendees came from the Americas, the Middle East, Asia and Europe.

The Malaga conference represented one of the major turning points in PCHR's early universal jurisdiction work. Building on experience gained from pursuing universal jurisdiction cases in Switzerland and the United Kingdom,[492] PCHR wished to share this information with relevant lawyers and activists, in order to further the understanding and practice of universal jurisdiction. By their very nature, universal jurisdiction cases require intense international cooperation. To this end, PCHR invited individuals involved in universal jurisdiction – including lawyers, academics, and activists – in order to tap into existing networks of experience, and to establish and develop contacts which could be used to enhance and strengthen future universal jurisdiction activities.

492 See, supra Section 6.

Spain was chosen as a venue as a result of its central role in the modern practice of universal jurisdiction, as evidenced, inter alia, by the Pinochet and Scilingo cases. The meeting was held in-camera, and without publicity, in order to ensure the best possible professional experience, and to facilitate debate on pertinent legal issues.

The Malaga conference was the first international conference held between lawyers practicing universal jurisdiction. PCHR is honored by the role it played in this conference, believing that it set a precedent for future events, and contributed positively to the protection of victims and the fight against impunity.

Throughout the course of the meeting, lawyers, academics and activists, shared their universal jurisdiction experiences. The discussions were not academic, but practical, focusing on laws, procedures, cases and technical issues surrounding the exercise of universal jurisdiction. The sharing of this information was an essential step in furthering the concept of universal jurisdiction, and the extent of emerging possibilities provoked positive shock among the participants.

The conference marked the establishment of a comprehensive network of cooperation amongst those actively involved in universal jurisdiction: including, lawyers, civil society, academics and NGOs. This cooperation and coordination has proved essential: without it, universal jurisdiction cases can not proceed in an effective and professional manner.

The relationship amongst those involved, who hailed from a variety of different backgrounds, was fundamentally complimentary, founded on a shared belief in fundamental principles, and an acknowledgment of the essential importance of accountability in combating impunity.

The conference took the form of a three day workshop. PCHR provided participants with information regarding the Centre's universal jurisdiction activities. This included an overview of cases initiated by PCHR, details of the categories and nature of evidence presented to the police and courts in these jurisdictions, the perpetrators incriminated and evidence of their global travel, details of the legal steps that were taken in Britain following the escape from arrest of Doron Almog and the legal issues that have arisen from this, and an outline of how PCHR hopes that this work will be expanded to other jurisdictions, and the practical basis for doing so (i.e. protecting the interests of the clients/victims and preserving the credibility of the legal work)

Participants then discussed issues relating to their own experiences, and jurisdictional issues in their country

of work. These discussions were of a practical nature, focusing on questions such as:

- Can criminal proceedings be brought for international crimes such as grave breaches and, if so, what are the criteria? (Key issues: residence or local connection requirements; restrictions on who can bring the proceedings or whose consent is required; any limitation issues; any immunity provisions). What are the key stages of such criminal proceedings?
- Can an individual apply for an arrest warrant for international crimes and, if so, what are the criteria?
- Can a public law challenge be brought if the State fails to take action (to search for/arrest/investigate or prosecute suspects) or if it frustrates action taken privately? If so, what are the likely problems here?
- Failing or in addition to the above, what are the prospects of bringing a civil claim for compensation, and what are the criteria (e.g. jurisdiction, local connection, etc)?
- Is public funding available for you to act for a Palestinian complainant to pursue any or all of the above action in your country? Is any other funding likely to be available? What is the cost risk of any of the above proceedings?

9.2. Conference: Cairo

9.2.1. Synopsis

In the two years between the Malaga and Cairo conferences, PCHR pursued a number of universal jurisdiction cases in the Netherlands, the United States, New Zealand, and Spain. However, there had been little progress with respect to the practice of universal jurisdiction in the Arab world. PCHR organized the conference in Cairo in order to address this situation. The conference was intended to be educational, raising key universal jurisdiction related issues, and detailing PCHR's experiences. As in Malaga, it was also intended to provide an opportunity for those practicing universal jurisdiction to interact, so that contacts and coordination could be facilitated.

The one-day conference, entitled "Impunity and the Prosecution of Israeli War Criminals" was held on 5 November 2008, in Cairo, Egypt, and was jointly hosted by PCHR, the Arab Organization for Human Rights and the Arab Center for the Independence of the Judiciary and the Legal Profession. The event was attended by approximately 100 individuals, including lawyers, activists, academics, practitioners, NGOs, and representatives of the Arab League.

Given the focus on education and awareness raising, PCHR presented a detailed analysis of its universal jurisdiction

activities, highlighting practical experiences and lessons learned. PCHR's legal partners from Spain and the UK also presented information regarding the practice of universal jurisdiction in these jurisdictions. Their contributions are included as an appendix to this report.

The meeting was hugely successful and opened new horizons with respect to future cooperation. The even attracted significant media attention, and was broadcast repeatedly on Al Jazeera.

In hindsight, the Cairo conference came a the perfect time, as the Israeli offensive on the Gaza Strip (27 December 2008 – 18 January 2009) highlighted the urgent need for accountability and an end to impunity.

Speakers at the conference included PCHR Director Raji Sourani, who has worked extensively in universal jurisdiction cases, UK lawyer Daniel Machover, who specialises in international human rights law, including universal jurisdiction, Spanish lawyer Gonzalo Boye, who is working with PCHR on its current case in Spain, Nasser Amin, Director of the Arab Center for Human Rights, Jacob van Garderen, Director Lawyers for Human Rights (South Africa), Shawqi Ben Ayyoub, President of the Moroccan Organization for Human Rights, and South African lawyer Brian Currin, who has worked in transitional justice for more than fourteen years, and has been heavily involved in three separate peace processes.

9.2.2. Follow on from Cairo

PCHR's universal jurisdiction activities have provoked increasing feelings of worry and outrage within the Israeli administration. On 26 November 2008, the Jerusalem Center for Public Affairs, the Global Law Forum, and the Henry Jackson Society, hosted a conference in London entitled 'Ending Impunity or Decreasing Accountability?: Averting Abuse of Universal Jurisdiction'. This conference, accused those who pursue universal jurisdiction of acting in concert with Hamas and Iran against 'democratic countries.' It was addressed by Dore Gold, director of the Jerusalem Center for Public Affairs and formed advisor to Ariel Sharon, and Doron Almog, former Commander IDF Southern Command, and the subject of a number of PCHR's universal jurisdiction cases.[493] Additionally, throughout the course of the Israeli offensive on the Gaza Strip Israeli officials declared their intention to protect senior Israeli officials against potential universal jurisdiction cases arising consequent to Israel's conduct of hostilities. As reported by Reuters, "the military censor ordered local and foreign media in Israel not to publish names of army commanders in the Gaza war and to blur their faces in

493 See, supra Section 6.

photos and video for fear they could be identified and arrested while travelling abroad. Israeli media reports said the military had been advising its top brass to think twice about visiting Europe."[494]

After Cairo, it was decided to hold two further conferences. A number of fundamental principles for these, and future conferences, were agreed on.

- The universal utility of universal jurisdiction must be emphasized. Universal jurisdiction is not only relevant to the Palestinian context, it affects victims throughout the world. The key utility of universal jurisdiction is as a stepping stone towards universal justice.
- Those involved will be committed, independent lawyers dedicated to the rule of law.
- All human suffering is equal, and must be equally protected against.
- International law affirms this inherent equality. However, in order for the law to be respected so that it may adequately affect individuals, it must be enforced and applied.
- All efforts must be extended on behalf of the victims and their families who have entrusted and empowered lawyers to act on their behalf in the hope that justice can be achieved.
- Through universal jurisdiction, justice can be achieved. The pursuit of justice is noble, human, and legal work. In the face of criticism, these are the fundamental principles which must be adhered to.

9.3. Conference: Madrid

9.3.1. Synopsis

The Madrid conference took place between 29 January and 1 February 2009. The conference was focused on establishing cooperation and coordination among universal jurisdiction practitioners, and reacting to the Israeli offensive on the Gaza Strip.

The first day of the conference coincided with the decision of the Spanish Audencia Nacional to launch an investigation into the Al-Daraj attack of 2002. Consequently, the conference commenced on an inspirational note, and a series of meetings were held with the Spanish media in order to take advantage of the resultant publicity. On the evening of the 29th, ACSUR, one of PCHR's Spanish partners, organized a meeting with over 400 members of Spanish civil society. This provided an excellent opportunity to directly address Spanish civil society, in order to share PCHR's experiences, and to raise the awareness and

494 Reuters, Israel promises troops legal backing over Gaza war, Jan. 26, 2009.

understanding of universal jurisdiction.

The Madrid conference had three principal goals: to address universal jurisdiction at large; to invest in and use the experience of universal jurisdiction lawyers, and to improve the relationship between universal jurisdiction and civil society. The conference was divided into two days. The first day consisted of meetings between lawyers from different parts of the world, including France, the US, Palestine, the UK, and Spain. These meetings discussed practical issues, such as current and future cases, coordination, cooperation, and progressing the practice of universal jurisdiction.

The second day primarily consisted of question and answer sessions between lawyers, journalists, civil society, and activists. Questions were fielded by Raji Sourani, Director of PCHR, Daniel Machover of Hickman & Rose, Gonzalo Boye who is prosecuting the Al-Daraj case in Spain, Clemence Bectarte of FIDH, Maria LaHood of the Center for Constitutional Rights. The exchange was facilitated by Cristina Ruiz of Al Quds Malaga.

In anticipation of Israel's retaliation to the 29 January decision of the Spanish Court, particularly as this related to the exhaustion of national jurisdiction vis-à-vis Israel's military investigation, two lawyers from Adalah were invited to attend. Hasaan Jabareen and Rina Jabareen are experts in Israeli law with extensive experience practicing before the Israeli courts. The lawyers agreed to prepare an expert opinion on territorial jurisdiction to be submitted to the Spanish Audencia Nacional.

The Palestinian Minister of Justice, Dr. Khashan flew in to offer his congratulations with respect to the al-Daraj case. He was extensively briefed, and the appeal to the ICC was discussed in detail.

9.4. Conference: London

9.4.1. Synopsis

The London conference, held at the British Museum on 18 March 2009, was an opportunity to counter the 26 November 2008 conference hosted by the Jerusalem Center for Public Affairs, the Global Law Forum, and the Henry Jackson Society entitled 'Ending Impunity or Decreasing Accountability?: Averting Abuse of Universal Jurisdiction'. The London conference thus had two principal aims: first, to clearly explain the practice of universal jurisdiction and its motivations, and second, to increase coordination and cooperation among lawyers, particularly in the aftermath of the Gaza offensive. The meeting was held in accordance

with the Chatham house rule,[495] however, a number of journalists were invited to attend the conference and the dinners in order to facilitate improved public understanding.

Prior to the start of the conference a lawyer's meeting was convened, attended by lawyers from the UK, Spain, and Palestine. The majority of the meeting was focused on technical issues, and the preparation of new cases in light of the Israeli offensive on the Gaza Strip.

The conference itself was divided into two sessions. The morning session focused on 'Torture and Genocide – UK, Dutch and French examples'. Presentations were made by James Lewis QC, Anne-Marie Kundert, Dr Ward Ferdinandusse, Prof Dr Liesbeth Zegveld, Patrick Baudouin.

The session was chaired by Carla Ferstman. Cases discussed included Zardad/UK, Dr Vincent Bajinya & others/UK, Van Anraat case (genocide and war crimes), the Afghan torture cases/Netherlands, Al-Shami and others/Netherlands, Ben Said and The Disappeared of the Beach/France.

The second session addressed 'War Crimes in international armed conflicts and occupations: the example of Gaza'.

Presentations were made by Chris Hall, Raji Sourani, Daniel Machover, and Gonzalo Boye. The session was chaired by Prof. Lynn Welchmann.

The conference attracted a broad range of participants, including members of the UK's Crown Prosecution Service, members of the UK Parliament's Joint Committee on Human Rights, representatives of the Arab League, Emma Playfair, and lawyers from the Netherlands, Belgium, South Africa, Spain, Palestine and the UK. Numerous human rights organizations also participated including, Human Rights Watch, REDRESS, Amnesty International, the International Commission of Jurists, the International Center for Transitional Justice, PCHR, and Adalah.

Governmental officials from the Netherlands and the UK, and journalists from, inter alia, the Guardian, the Economist, and the BBC, were also in attendance.

495 When a meeting, or part thereof, is held under the Chatham House Rule, participants are free to use the information received, but neither the identity nor the affiliation of the speaker(s), nor that of any other participant, may be revealed.

10. Conclusion

Universal jurisdiction evolved in order to overcome jurisdictional gaps in the international legal order. It is intended to ensure that those individuals – considered hostis humani generis (enemies of the human race) – who commit international crimes are brought to justice. The crimes that provide the basis for universal jurisdiction are considered so grave that they constitute a crime against the international community itself; it is in the interests of each and every State that those responsible be investigated, tried, and punished. Accountability is essential if the rule of law is to be maintained.

The ICC was established to provide this accountability: to bring those 'most responsible' to justice. However, the current incomplete ratification of the Rome Statute means that certain States remain outside of the Court's jurisdiction. The UN Security Council, acting under Chapter VII of the UN Charter, has the power to overcome this jurisdictional lacuna and to refer a situation directly to the Court. Contemporary international politics, however, often deny this possibility. Acting in their own political self-interest, the permanent members of the Security Council have the power to veto any referral to the ICC.

There are thus regions in the world where enforceable international law does not reach; where civilians are vulnerable to abuse by the powerful, and where those individuals and States who choose to violate international law can do so with impunity.

In such instances, as has been shown to be the case in the Palestinian context, universal jurisdiction offers the only mechanism capable of providing judicial redress. National courts exercising universal jurisdiction offer the only forum whereby victims' rights to an effective judicial remedy can be upheld, and where impunity can be combated.

If the rule of law is to be relevant, it must be enforced. As long as individuals and States are allowed to act with impunity they will continue to violate international law: civilians will continue to suffer the horrific consequences.

Universal jurisdiction is an essential component in the international legal framework, it must be pursued and promoted, so that victims rights are protected, the rule of law upheld, and impunity effectively combated. It should be seen as the first step on the road to true universal justice.

ANNEXES

ANNEX 1: GONZALO BOYE: IMPUNITY AND PROSECUTION OF ISRAELI WAR CRIMINALS: A VIEW OF THE SPANISH JURISDICTION[496]

496 Mr Boye obtained his law degree from the UNED University in Spain in 2002. He is currently preparing a doctoral degree on procedural law at the same institution. Mr Boye has worked on a number of high profile public cases in Spain, including as a prosecutor for the victims of the March 11th 2004, Madrid bombing. With respect to the prosecution of universal jurisdiction cases in Spain, Mr Boye and his firm have a close working relationship with PCHR. Most recently, the Spanish National Court ordered 7 defendants in the Shehade targeted assassination case to present themselves before the Court, if they do not do so international arrest warrants will be issued. Mr Boye has published numerous articles in Spanish newspapers, and legal magazines, and is currently a lecturer with the Madrid Bar Association.

Departing from the known fact that Spain has assumed certain competences in the subject of Universal Jurisdiction, I thought it convenient to present a brief explanation of how Spanish criminal procedure operates and how action should be undertaken in cases of Universal Jurisdiction if seeking to file criminal proceedings of this sort in Spanish Courts.

Those competences as regard Universal Jurisdiction are set forth in the Spanish internal legal system, fundamentally in Article 23 of the Organic Law on the Judiciary, which governs the administration of justice. The said law by which Spain assumes competence with regard to Universal Jurisdiction does not involve the creation of any type of special proceedings or specialized jurisdictional body, which means that the organs competent to hear this type of proceedings are the same ones existing within the scope of competences of the Audiencia Nacional – a special division of the Supreme Court – and that the procedure to follow in order to prosecute such acts will be those corresponding to ordinary case proceedings, with procedural consequences that will be explained later.

In the past few months the Spanish Parliament, in an unusual procedure, has amended this Law including now an additional requirement in order to allow the exercise Universal Jurisdiction within the Spanish legal system; this amendment of the law has been introduced in order to

prevent cases such as the one we presented with regards to the Al Daraj killings. The now regulation obligated the parties to demonstrate either that the defendant is in Spain, that the victim or victims are Spaniards or a special relation to Spain.

That said, it becomes important to know the regulations governing Spanish criminal procedure, because this facilitates the claims of victims and the work of those agencies, NGOs and lawyers who are interested in using the Spanish jurisdiction to prosecute acts that may be admissible within the competence that Spain has attributed itself in connection with universal jurisdiction. Basically, this clarifies those peculiarities of Spanish legal procedure that can more significantly affect the progress of a criminal suit of these characteristics.

In Spain, in contrast to other countries, criminal action may be filed either by the Office of the Public Prosecutor, in its capacity as the guardian of Law, by organizations or NGOs as private prosecutors, or, directly, by the victims of the circumstances, as private prosecutors. These possibilities in the Spanish internal legal system imply that, in one and the same case, we may find several prosecutors, all or some of them with divergent legal premises and interests, making it advisable to analyze the position and activity of each of the possible plaintiffs.

The Office of the Public Prosecutor, which exercises the function of guardian of Law, is a hierarchic entity dependent on the General State Prosecutor, a figure appointed by the administration, implying a kind of dependence, more or less acknowledged, on the administration itself, from which this figure can even receive instructions, albeit of an unofficial nature. Evidently, as regards Universal Jurisdiction, the position generally adopted by the Office of the Public Prosecutor is that of trying to prevent the accusations or suits filed from being admitted to procedure by different means.

The position adopted by the different Spanish administrations, as well as by the Office of the Public Prosecutor, is that of trying to prevent the processing of suits relating to cases of Universal Jurisdiction, and the manner of hampering that activity has basically consisted of:

- questioning the competence of Spain to process the cases,
- abetting the allegations of the accused, attempting to point out that those acts have either been tried or are being tried in the place where they were committed,
- alleging non-existent or questionable immunity for the liable parties, or

- going to the extent of questioning the representation exercised by the lawyers charged with defending the victims; i.e., the prosecuting attorneys.

Obviously, such approaches are not only questionable; in the majority of cases, they have also met with little or no support on the part of the judges charged with investigating the facts, albeit not with regard to the Courts that would have to judge them.

Another possibility of action in this type of case is presented by what in Spain is known as the "acusación popular", a procedural position established in the constitutional text of 1978, by which any Spaniard (physical or legal person) may file criminal suit in representation of a general interest, or an interest of a diffuse nature. This is the kind of procedural activity often well-performed by associations and NGOs. The requirement to exercise it is Spanish nationality, for which reason international organizations, in such a case, must act through local NGOs or associations.

The limits to the exercise of popular prosecution in this mode are similar to those established for direct victims or for the Office of the Public Prosecutor itself. Nonetheless, this kind of penal suit lacks capacity to claim economic compensations for the victims, or at least demand payment of such indemnifications.

A third course of action is that which corresponds to what is known in Spanish law as "acusación particular" and may be exercised by any person who has been the victim of a crime, regardless of his nationality. In these cases, the legal requirements for initiating legal action are:

- being the direct victim of an act understood as subject to arraignment in Spain,
- proving the status of victim through authentic documents that must be translated into Spanish and, preferably, legalized before the Spanish Consulate nearest to the victim's domicile
- issuing special powers of attorney for the filing of legal action, which must be translated into Spanish and, if feasible, holding the authentication of a Spanish Consulate or an international authority; this power of attorney must be issued in favour of the principal prosecuting lawyer and the barrister exercising the representation of the victim(s); in Spain, proceedings of these characteristics necessarily require the defence of a lawyer and the representation of a solicitor
- in addition to the above, it will be necessary to present whatever data is available about the acts or act being reported, as well as the identity, if known, of the perpetrators and the manner of locating them, should this be known.

Apart from the aforementioned formal requirements,

the lawyer charged with conducting proceedings of this nature must file a criminal suit for the acts, in which he will have to establish, in behalf of the plaintiff, who the charges are against, the most detailed description possible of the charges, and, as well, the initial legal indictments attributed to the said acts.

Once the suit is filed, it is distributed to one of the 6 existing Central Magistrates' Courts in the Audiencia Nacional. Cases are distributed by shifts in a random system. Once the suit is received in the Court that corresponds to it by shift in the distribution system, the Judge must dictate a resolution stating whether or not the acts constitute a crime, and if so, whether these fall within or outside the competence of Spanish jurisdiction.

The usual practice is for the Central Magistrates' Court to forward the suit to the Office of the Public Prosecutor before dictating such resolution, so that the Office may report and give its opinion regarding whether or not the legal and formal requirements for admission to due process are present.

When it has been resolved to admit a suit to due process by virtue of these characteristics, the plaintiffs can then request for procedural steps to be taken (experts' analyses, requests for international legal cooperation, testimonies of witnesses or victims and, of course, those of the alleged perpetrators). It is at this point that precautionary measures may be petitioned to secure the presence of the alleged perpetrators by means of international warrants for the search, capture and turnover of these persons to Spain.

Since not everything is as perfect as we could wish, at least from the point of view of the victims, proceedings for acts of the same level of gravity as those that we are analyzing cannot be undertaken without the presence of the accused. This means that, in Spain, there are no trials in absentia for crimes of this degree of seriousness, and thus, in cases of Universal Jurisdiction proceedings, in order for a trial to take place and, naturally, for a sentence to be pronounced, it is previously necessary to manage to bring the alleged perpetrators to Spain, a far from simple task to which the principal efforts of private prosecutors, whether victims or organizations, should lead.

A good example of what we are talking about is the already famous Pinochet case, which has been paralysed for several years due to the impossibility of bringing the defendant to justice; at the present time this case has been reactivated in order to exercise criminal responsibility against the people that have helped Pinochet in different criminal activities such as money laundering. An opposite example is the Scilingo case, which reached the final

phase of proceedings, there already being firm sentence, and Scillingo is currently serving a prison sentence in a Spanish jail.

In a nutshell, Universal Jurisdiction proceedings in Spain are largely destined not to advance further than the preliminary investigation phase, without being able to begin the phase called "hearing of evidence", mainly and exclusively owing to the absence of the alleged perpetrators. Not being able to advance beyond the investigation phase implies that a great part of the proceedings is technically in writing, all the while that even the testimonial declarations made during this phase are documented in writing, despite the fact that they are taken verbally. This manner of proceeding takes those legal practitioners coming from the predominantly oral Anglo-Saxon system very much aback.

Having explained these brief details regarding the manner in which penal proceedings operate in Spain and their application to "Universal Jurisdiction" proceedings, we believe it advisable to insist that the exercise of penal action in this context must always predominantly be motivated by the search for truth, justice and amends to the victims, and not for unrecognisable political interests that always become elements harmful to the activity of Justice.

Expressed in other terms, the limits of universal jurisdiction must be where the victims put them, and not where others want to establish them. Universal jurisdiction is the patrimony of the victims and not of the political interests of persons not directly affected by those acts, or of lawyers whose only mission should consist of helping the victims. We cannot politicize justice, which does not mean leaving the jurist bereft of ideology.

There are too many interests in existence oriented towards destroying and making the rare spaces that have been won for the development of Universal Jurisdiction disappear. And those who aspire to destroy what has been achieved up to now rejoice whenever they are able to demonstrate that many Universal Jurisdiction proceedings are incubated under the aegis of political interests instead of being oriented primarily to satisfying the legitimate wishes and expectations of the victims.

If we are capable of giving priority to the interests of the victims, over and above any other, then we shall be capable of consolidating contemporary universal jurisdiction and transforming it into true Universal Justice, two concepts which are similar, but not identical. If we understand Universal Jurisdiction as the universal competence to hear certain cases that, due to their gravity, should and can be tried in any part of the world, regardless of where and

by whom they were committed, Universal Justice is the penal answer that should be given to the victims, for the satisfaction of their legitimate expectations through the legal punishment of the guilty parties. I invite you to walk through universal jurisdiction towards a broader concept, that of Universal Justice.

ANNEX 2: DANIEL MACHOVER: EXPANDING UNIVERSAL JURISDICYION AND THE PRINCIPLE OF UNIVERSAL JURISDICTION FROM A BRITISH PERSPECTIVE[497]

497 Kate Maynard & Daniel Machover have published an article on the application of universal jurisdiction to Israel which forms the basis for much of this talk, "Prosecuting alleged Israeli war criminals in England and Wales" (2006) Denning Law Journal, pp. 95-114.. Daniel Machover is head of the civil litigation department at Hickman & Rose solicitors. He specializes in international human rights law, and civil actions. In 2001, he received the Margery Fry Award from the Howard League for Penal Reform for 'ensuring the protection of prisoners through tenacious pursuit of legal remedies'. In 1988, Daniel Machover co-founded Lawyers for Palestinian Human Rights, and he is committed to actively pursuing potential legal remedies in the UK and the EU for Palestinian victims of alleged Israeli human rights abuses. PCHR have a longstanding relationship with Daniel Machover, and Hickman & Rose solicitors, having worked on a number of cases together, including Almog, Ya'alon, and Ayalon.

Introduction and background to issues

Some years ago our firm started working with lawyers from the Palestinian Centre for Human Rights (PCHR),[498] on behalf of mutual clients, on files of evidence for use in England and Wales relating to alleged 'grave breaches' of the Fourth Geneva Convention 1949[499], including torture (which is also an international crime regardless of the existence of a military occupation).[500]

Evidence files relating to Gaza cases were handed over to the anti-terrorist and war crimes unit of the Metropolitan police on 26 August 2005.[501]

Naturally, in such cases, lawyers in England and Wales are reliant to a great extent on the collection of evidence by lawyers and other human rights defenders in the Occupied Palestinian Territory (OPT). The cases discussed here therefore have their origins in work carried out by many such people, primarily PCHR, led by Raji Sourani,[502] and by a variety of other lawyers, NGOs, academics and researchers working in the OPT. Without this professional, dedicated and often dangerous work, it would simply not have been possible to credibly pursue cases in England and Wales.

This talk will explain how universal jurisdiction applies to the crimes under discussion at this conference but also identify some difficulties in UK law and practice that need to be addressed, both through legislation and the reforms required to make the mechanisms in place more effective.

Grave breaches are criminalised in England and Wales under the Geneva Conventions Act 1957.[503] The 1957 Act was introduced in order to comply with the UK's treaty obligations to provide domestic laws to enable 'universal jurisdiction' to be exercised over the grave breaches

498 PCHR is an independent Palestinian human rights organization based in Gaza City. The Centre enjoys Consultative Status with the ECOSOC of the United Nation. It is an affiliate of the International Commission of Jurists-Geneva, the International Federation for Human Rights (FIDH) – Paris, and the Euro-Mediterranean Human Rights Network - Copenhagen, Arab Organization for Human Rights – Cairo. It is a recipient of the 1996 French Republic Award on Human Rights and the 2002 Bruno Kreisky Award for Outstanding Achievements in the Area of Human Rights. More information about PCHR can be found on its website at: www.pchrgaza.org.

499 Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949, Vol. 75 U.N.T.S. 287 (IVGC).

500 Israel signed the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984, G.A. Res 39/46 39 UN GAOR Supp (No. 51) UN Doc. A/39/51 (1984), entered into force in 1987, Vol. 1465 U.N.T.S. .85 (UNCAT) on 22 October 1986 and ratified it on 3 October 1991. The Convention entered into force in Israel on 2 November 1991. Article 5 (2) of UNCAT requires each state party to take measures to establish universal jurisdiction over persons suspected of torture, unless it extradites the suspect. The UK ratified UNCAT on 8 December 1988 and it took effect on 7 January 1989. Section 134 of the Criminal Justice Act 1988 makes it a criminal offence for a public official or person acting in an official capacity to commit torture or cruel, inhuman or degrading treatment or punishment, whatever his nationality and wherever in the world he commits the offence.

501 In the absence of a national police force, the Metropolitan Police Service (MPS), as the largest police authority in the country, has traditionally provided a 'home' for major national/international police operations.

502 Raji Sourani is a practising lawyer and the Director of PCHR. He has been detained at various times by both Israel and the Palestinian Authority.

503 1957 c. 52.

specified in the four Geneva Conventions of 1949.

There is no strict rule that alleged victims can only seek remedies in third countries after being denied any remedy through the occupier's legal system, but that has been the case with the cases taken on by H&R.

The allegations we looked at help to demonstrate why the battle between universal jurisdiction and Israel is too important to lose.

The following cases all identify Major General (reserve) Doron Almog[504] as a suspect:-

The demolition of 59 houses in Rafah, Gaza Strip, on 10 January 2002
The killing of Noha Shukri Al Makadma on 3 March 2003 as the result of a punitive house demolition
The killing of Mohamad Abd Elrahman on 30 December 2001
The dropping of a one ton bomb on the Al Daraj neighbourhood of Gaza City on 22 July 2002

Unfortunately, the record shows that most alleged grave breaches in the OPT are not even investigated as such by Israel. They are either ignored or officially sanctioned as legal in the face of international legal opinion to the contrary.

Due to the focus of this conference I will talk about the fourth case only, but will try not to overlap too much with Gonzalo's talk.

Targeted Assassinations

According to PCHR, from 29 September 2000 to 30 June 2008, Israeli occupying forces carried out 348 extra-judicial execution operations in the OPT. A total of 754 Palestinians were killed, including 521 targeted persons and 233 bystanders including 71 children and 20 women. 405 victims were killed in Gaza and 350 in West Bank.[505]

Evidence in relation to one of these assassination operations was presented to the British police. This was the well known case of the assassination of Salah Shehadeh, now before the Spanish Court in Madrid.

Between 11.30 pm and midnight on 22 July 2002, an Israeli F16 fighter plane dropped a one ton bomb on the Al Daraj neighbourhood of Gaza City ('the al-Daraj bombing'). The

504 GOC Southern Command of the Israel Defence Forces (IDF) from 8 December 2000 to 7 July 2003.

505 Extra-Judicial Executions as Israeli Government Policy, PCHR, August 2008.

target of the bombing was the house of Shehadeh, and it was a direct hit. However, his house was in one of the most densely populated residential areas on earth.

In total, fifteen people died in the blast. Up to 150 people received injuries, some of them serious and permanent. Eight houses in the vicinity of the bombing were completely destroyed and a further nine partially destroyed. A further twenty one houses received moderate damage.
The IOF Spokesperson's Announcement of 23 July 2002 stated that:-

> "The IDF attack last night was directed at Salah Shehade and him alone. The strike was accurate, carried out using designated technology. The objective is to thwart future and upcoming terror activities by attacking the source itself, namely Shehade. There was no intention of harming members of his family or other civilians".[506]

The 'Yesh Gvul' movement in Israel filed a petition in the Israeli High Court on 30 September 2003, asking the court to require the Attorney General and the Military Advocate General to mount a criminal investigation with a view to putting on trial all those in the command chain of the bombing.[507]

The State of Israel (respondent) maintained that the assassination itself was lawful and that the military operation was proportionate to the legitimate aim of killing Shehadeh. It stated that the potential for the death of civilians and the destruction of property was considered before going on to take the risk, and ordering the bombing mission:-

> "It is important to emphasize that one of the central considerations, which were accounted for throughout all planning stages of the operation against Shehadeh and its approval was the proportionality consideration – the obligation to make sure that hitting Shehadeh would not lead to hitting the civilian population in his vicinity, disproportionate to the military aims the operation set out to achieve. The discussions largely dealt with the subject of hitting civilians, which may be a result of attacking Shehadeh"

> "After the discussion for instance, it had been decided to carry out the attack in the late hours of the evening (close to midnight), when pedestrians would not be expected to move around the street close to the house

506 http://web.archive.org/web/20030807154927/www.idf.il/english/announcements/2002/july/23.stm

507 The Yesh Gvul petition is against former Prime Minister Ariel Sharon, former Defence Minister Binyamin Ben Eliezer, former Chief of Staff Moshe Ya'alon, the present Chief of Staff and former Air Force Commander Dan Halutz, former Attorney General Elyakim Rubinstein, former Judge Advocate General Menachem Finkelstein and others (Yoav Hess et al. v Judge Advocate General et. al, HCJ case 8794/03).

of Shehadeh"

> "Also upon such consideration it had been decided to use one bomb of 1000 Kg (which was the quantity of explosives required in order to achieve in reasonable probability the aim of the operation) and not two bombs of 500 Kg each, because the use of two bombs would increase considerably the risk of missing the target and as a result endangering a building close to that of the intended target with a direct hit.
>
> At the end, after receiving precise intelligence information about the hiding place of Shehadeh, the execution of the operation had been decided according to the abovementioned outline. This decision was taken at the highest level, having described the importance of stopping the activity of Shehadeh, despite the information and estimates of the damages to other people, which may be caused as a result of the attack".[508]

After the respondent replied, on 3 March 2004, the court suspended the case, pending a decision on another petition (filed by the Public Committee Against Torture in Israel in January 2002) challenging the lawfulness of the assassination policy of the State of Israel.[509]

On 16 February 2005, a hearing of the 'assassination policy' petition was held, and that petition was itself adjourned indefinitely as a result of Prime Minister Sharon's commitment at the Sharm-el Sheikh summit of 8 February 2005, to suspend the policy of assassinations ("pre-emptive liquidations").[510]

The Yesh Gvul movement wrote to the High Court requesting the petition for a criminal investigation into the bombing to be re-opened. Yesh Gvul requested a hearing and the State was given until 15 June 2005 to respond. A hearing took place on 5 September 2005, when the case was adjourned indefinitely (as in the 'assassinations policy' case).

During the course of September 2005, advocates for the petitioners asked for a hearing on the assassination policy case, in response to the public resumption of that policy by the IOF. During the course of November 2005, the State Attorney's Office agreed that both petitions should be restored for a hearing at the High Court.

On 11 December 2005 a hearing of both petitions was held, and the High Court ruled that the Shehadeh petition is dependent on the outcome of the assassination petition.

508 HCJ 8794/03, Yoav Hess. v Judge Advocate General; Response on Behalf of the State Attorney's Office (translation from Hebrew).

509 HCJ 769/02.

510 See the PCATI press release: http://www.stoptorture.org.il/eng/press.asp?menu=6&submenu=1&item=237

The court gave the State Attorney's Office 20 days to submit further legal arguments.

Finally, the High Court handed down its general judgment on the assassination policy on 14 December 2006 which, whatever its very considerable shortcomings, said the following at paragraph 46 of the judgment of Aharon Barak, the outgoing President of the Israeli Supreme Court (emphasis added):

> [T]he requirements of proportionality stricto senso must be fulfilled in a case in which the harm to the terrorist carries with it collateral damage caused to nearby innocent civilians. The proportionality rule applies in regards to harm to those innocent civilians (see § 51(5)(b) of The First Protocol). The rule is that combatants and terrorists are not to be harmed if the damage expected to be caused to nearby innocent civilians is not proportionate to the military advantage in harming the combatants and terrorists (see HENCKAERTS & DOSWALD-BECK, at p. 49). Performing that balance is difficult. Here as well, one must proceed case by case, while narrowing the area of disagreement. Take the usual case of a combatant, or of a terrorist sniper shooting at soldiers or civilians from his porch. Shooting at him is proportionate even if as a result, an innocent civilian neighbor or passerby is harmed. That is not the case if the building is bombed from the air and scores of its residents and passersby are harmed (compare DINSTEIN, at p. 123; GROSS, at p. 621). The hard cases are those which are in the space between the extreme examples. There, a meticulous examination of every case is required; it is required that the military advantage be direct and anticipated (see §57(2)(iii) of The First Protocol). Indeed, in international law, as in internal law, the ends do not justify the means. The state's power is not unlimited. Not all of the means are permitted.

One would have thought that, in view of Barak's description of a criminal act, this analysis alone would prompt an urgent criminal investigation into the al-Daraj bombing.

However, this was not the case. Instead, the petitioners in the al-Daraj case had to push hard to revive their case and two years later (i.e. November 2008) they have not got very far at all. Following a hearing on 17 June 2007, where the state was told by the Court they needed to come up with something (!), the respondents announced on 16 September 2007 that they were willing to establish an "objective" commission of inquiry to investigate the al-Daraj bombing case.

In response to this announcement, despite the fact that the petitioners continued to seek a criminal investigation,

the petitioners accepted the solution of a "commission of inquiry", subject to the requirement that it would be equipped with the legal tools to uncover the truth. The petitioners applied for disclosure of the mandate to be given to the commission, its powers, its membership etc.

On 4 November 2007, the Court ordered the State to release this information, which was supplied on 4 February 2008 and the following was provided:

A. The Prime Minister appointed a commission of inquiry on January 23, 2008 (without waiting for a resolution of this case).

B. The commission is made up of three members who all have a substantial security force background, two of them from the most senior ranks of the IDF and the other s former senior officer in the General Security Service.

   The commission is headed by Brig. General (Res.) Zvi Inbar, formerly the Judge Advocate General and the Knesset Legal Counsel; the other members of the commission are Maj. General (Res.) Iztchak Eitan, formerly the head of the IOF Central Command; and Mr. Iztchak Dar, who formerly performed a great number of operations positions in the General Security Service (GSS), amongst others as the Head of the Service's Israeli and Foreign Interests Section.

C. The commission will carry out its investigations in camera within the legal framework of a military debriefing and all evidence given to it will be confidential.

So, over a year after the December 2006 judgment, the State (under pressure) has simply set up an internal investigation, to be carried out in secret by three former members of the bodies being investigated, without even lip service being paid to the promise of an "objective" commission (for example the inclusion of a public representative or a judge).

This is nothing more than a military debriefing carried out by retired officers. A military debriefing had already been carried out. The petitioners therefore rejected the appointment of this commission as a solution to the issues raised in the petition. They informed the Court on 14 February 2008 that they never sought another military debriefing. They said:

> We believed, and still believe, that the severity of the event, its unacceptable consequences, the light-headed way in which a decision was made to bomb the target in the middle of the night, and the willingness to endanger

> the lives of hundreds of human beings, all these make compulsory a criminal investigation. We were willing to consider a non-criminal investigation if we were convinced that the commission which is appointed will express not only the operational and security considerations of the event, but also the moral and public questions which it raises. We would be willing to pass up on our demand for a criminal investigation if we believed that alternative solution was such that would allow for public critique on both the inquiry's process and its results.

… It is unthinkable that only former security force personnel are vetted to investigate a bombing which killed innocent civilians, including women and children.

The petitioners have therefore renewed their call for a criminal investigation and the already tattered reputation of the Supreme Court should now be in small pieces on the floor. A mass killing has implicitly been recognized as criminal and yet the Court is supine in the face of a cover up panel.

Meanwhile, the international view of the al-Daraj bombing was that it was unlawful and disproportionate. This view is certainly held by the British Government. The International Committee of the Red Cross (ICRC) issued a press release of 23 July 2002, entitled 'Civilians must not be attacked' [511] Several members of the UN Security Council condemned the bombing in those terms, including Jack Straw, the British Foreign Secretary, who was in the chair, at its meeting on 24 July 2002.[512] Before travelling to the UN, Jack Straw had told the House of Commons that he would ensure that Sir Patrick Cormack's views "which I think the whole house shares, about the unjustified and disproportionate nature of the attack and its consequences are conveyed to the ambassador and, through him, to the Israeli Government."[513]

Similarly, after the assassination of the spiritual leader of Hamas, Sheikh Yassin, by the Government of Israel, Jack Straw confirmed that the British Government considered the policy of "so-called assassinations – straightforward killings" as "unlawful, unjustified and self-defeating, and they damage the case that Israel makes in the world. The fact that the killings led to the deaths of not only those whom Israel holds responsible for terrorism, but entirely innocent bystanders, including children, simply emphasises the unlawful nature of that approach, and it's

511 http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/5CBJGJ

512 http://domino.un.org/UNISPAL.NSF/0/604c82baa09d068e85256c1a0064bda3?OpenDocument

513 Hansard, HC Deb 23 Jul 2002 c840 http://www.publications.parliament.uk/pa/cm200102/cmhansrd/vo020723/debtext/20723-03.htm

counter-productive effect."[514]

Despite the international view taken towards the criminal nature of the acts described above, it is clear that a climate of impunity has taken hold in Israel and it's occupying army, that is unchecked by its own criminal or civil justice system. One of the few ways to combat impunity is the practical application of universal jurisdiction.

Where anyone in chain of command in these cases is due to visit the UK (subject to issue of command responsibility) it is possible to seek an arrest by police, including by order of the court (i.e. a judicial arrest warrant). In the Almog case, the police failed to make a decision whether they would arrest Doron Almog under their 'general arrest' powers but adopted a neutral stance in relation to the complainants' application to Bow Street Magistrates' Court for an arrest warrant. A judicial arrest warrant can be issued without the consent of the police, the Director of Public Prosecutions (DPP) or the Attorney General (s25 Prosecution of Offences Act 1985), whereas a prosecution under the 1957 Act in principle requires all their involvement, and in practice the Attorney General must provide his consent for proceedings to be instituted.[515]

In the wake of the Almog case, the British Government decided to review the law following lobbying by the Government of Israel to try to ensure that in future similar arrest warrants cannot be issued at the request of complainants.[516] This pressure and the review continues to this day as confirmed in official answers to Parliamentary Questions during 2008.

The law[517]

The relevant provisions of the Fourth Geneva Convention 1949 can be found in Articles 146 and 147:

Article 146

The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.

514 Hansard, HC Deb 30 March 2004 c1043 http://www.parliament.the-stationery-office.co.uk/pa/cm200304/cmhansrd/vo040330/debtext/40330-01.htm

515 The Prosecution of Offences Act 1985 created the Crown Prosecution Service (CPS), which is headed up by the DPP. The Attorney General is a member of the cabinet of the Government of the day, has final responsibility for enforcing criminal law and 'superintends' the DPP. Section 1A(3) of the 1957 Act provides that 'proceedings for an offence shall not be instituted…except by or with the consent of the Attorney General'.

516 See Hansard : HC 29 Nov 2005 c298W and HC 7 Dec 2005 c1363W.

517 See also 'The UK's duty to 'universal jurisdiction', The Times, 4 October 2005, by Daniel Machover and Kate Maynard.

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case.

Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article.

In all circumstances, the accused persons shall benefit by safeguards of proper trial and defence, which shall not be less favourable than those provided by Article 105 and those following of the Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949.

Article 147

Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly."

The duty to search

The authoritative commentary on the Fourth Geneva Convention published by the International Committee of the Red Cross (edited by Dr Jean Pictet) says as to the active duty to search for alleged offenders of all nationalities:-

> "As soon as a contracting party realises that there is on its territory a person who has committed....a [grave] breach, its duty is to ensure that the person concerned is arrested and prosecuted with all speed. The necessary police action should be taken spontaneously, therefore, not merely in pursuance of a request from another State." [518]

518 Volume IV Geneva Convention relative to the Protection of Civilian Persons in Time of War: commentary, ICRC, Geneva, 1958, 598. Although commonly referred to as 'Pictet's Commentary' the commentary on IVGC was written mainly by Oscar Uhler and Henri Coursier, with the participation of F. Siordet, C. Pilloud, J.-P. Schoenholzer, R.-J. Wilhelm and R. Boppe.

The ICRC commentary confirms that a High Contracting Party is not entitled to sit back and do nothing but has an active obligation to search. It follows that this duty should include maintaining border controls that enable a state to ensure that known suspects seeking to enter the jurisdiction are arrested on arrival. In the British context, common sense dictates that the necessary spontaneous police action can only occur where alleged war crimes have been investigated to the point where the police are able to decide whether there are reasonable grounds to arrest a suspect who arrives in or is discovered in the jurisdiction.

For me the deterrence value of this Article hinges largely on this obligation. There is certainly no question under the Convention that the nationality of the individual concerned or of any victim is relevant to the exercise of jurisdiction. The ICRC Commentary, following the passage referred to above, states:-

> "The Court proceedings should be carried out in a uniform manner whatever the nationality of the accused. Nationals, friends, enemies, all should be subject to the same rules of procedure and judged by the same Courts."

The duty to prosecute or extradite

The unequivocal wording of the duty of each High Contracting Party in article 146 of IVGC indicates that once a suspect is located in the territory of a High Contracting Party, the state has a duty to either prosecute or extradite the alleged war criminal to enable a prosecution.[519] The duty to 'prosecute or extradite' has been emphasised by the UN on several occasions. Notably, the UN General Assembly Resolution Principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity[520] specifically states:

> "War crimes and crimes against humanity, wherever they are committed, shall be subject to investigation and the persons against whom there is evidence that they have committed such crimes shall be subject to tracing, arrest, trial and, if found guilty, to punishment."[521]

The resolution goes on to provide that:

> "States shall not take any legislative or other measures which may be prejudicial to the international obligations they have assumed in regard to the detection, arrest,

519 M. Scharf "The Letter of the Law: The Scope of the International Legal Obligation to Prosecute Human Rights Crimes" (1996) 59 Law & Contemp. Probs. 41 at 43

520 G.A. Res. 3074 (XXVIII), 28 GAOR Supp No. (30A), UN Doc. A/9030/Add.1 (1973)

521 Ibid paragraph 1

extradition and punishment-of persons guilty of war crimes and crimes against humanity."[522]

Further, according to the General Assembly Resolution adopted by the UN, two years earlier, in 1971, a refusal by states to co-operate in fulfilling their obligations under the Geneva Conventions including the arrest, extradition, trial and punishment of those accused of war crimes, "is contrary to the general purposes and aims of the UN Charter and recognized norms of international law."[523]

Arguably, the maxim aut dedere aut judicare[524] also applies to grave breaches/war crimes by virtue of their nature as universally reprehended offences and because such offences are "of concern to all states and all states ought therefore to cooperate in bringing those who commit such offences to justice."[525] The practice of states is not in fact generally consistent with this duty[526], but there is nonetheless a strong case for assuming that there is a customary international law duty to prosecute war crimes in light of existing treaties, declarations and practice in relation to crimes committed during the Second World War.[527]

The British police have discretion as to whether or not to investigate particular criminal allegations. That discretion has to be exercised lawfully. The law of England and Wales does not entitle the police a 'get out clause' not to investigate any allegations of such offences, as that would amount to an absolute discretion to ignore the duty to uphold the law. So, which cases should it investigate? What is the future for universal jurisdiction in England and Wales?

Quite simply, the police in different countries need to allocate resources to investigate credible allegations of war crimes and torture.

In the past the police in the UK were given resources specifically to pursue investigations under the War Crimes Act 1991. More than £11 million was reportedly spent by the Home Office (the majority of which was allocated to the police) on the investigation of alleged war criminals resident in Britain, resulting in only two prosecutions and only one conviction.[528] It was stated during a Parliamentary

522 Ibid paragraph 8

523 G.A. Res 2048 (XXVI), 27 UN GAOR Supp (No. 29), UN Doc. A/8429 (1971)

524 See generally M. Cherif Bassiouni and Edward M. Wise "Aut Dedere Aut Judicare The Duty to Extradite or Prosecute in International Law" (M. Nijhof, 1995).

525 Ibid. at 24.

526 See M. Cherif Bassiouni "Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice" 42 Va. J. Int'l L. 81 at 117 and C. Edelenbos "Prosecution of Human Rights Violations" (1994) 7 LJIL 5 at 15-16 & 20.

527 Ibid Edelenbos at 15.

528 A case against Szymon Serafinowicz, a collaborationist police chief allegedly personally responsible for hundreds of killings, collapsed in 1997 after the jury decided he was not fit to plead. Twenty elderly witnesses were brought to Britain and more than £2m spent before the trial collapsed.

debate in March 1997 that the Metropolitan police would receive a total of £1.7 billion in 1997-98 for all their policing needs, including war crimes investigations.[529]

The investigative resources (police officer time and expenses) required to prepare evidence files for advice from the CPS in some of these cases is relatively modest.

For example, in each of the Gaza cases provided to the police the suspect has been identified, witnesses identified etc. No great difficulties are posed in obtaining further evidence locally in relation to the cases now with the police. Anyhow, it would be perverse if a State, such as Israel, were to be 'rewarded' (i.e. by police inaction) for making it more difficult for the British police to investigate alleged crimes committed under military occupation.

These will clearly be much cheaper cases to investigate than those investigated under the 1991 Act referred to above. Indeed, in some cases the investigative burden is minimal and the case will revolve primarily around legal issues (i.e. as to 'military necessity').

In this context the comments of DAC Peter Clarke on 19 July 2005, just after the conviction of Mr Zardad (reported to have been the first for any international crime of this kind i.e. torture) under s134 Criminal Justice Act, are relevant:-

> "We had to find witnesses in remote parts of Afghanistan and give them the confidence to come forward to give evidence in a British court. The fact that they did so is testament to their courage and to the skill of the police officers who supported them. It was a huge challenge, in the prevailing circumstances in Afghanistan, to investigate and find evidence to the standard demanded by the British courts. Today's verdict shows what can be achieved, and that the UK is not a safe haven for people like Zardad." [530]
>
> These comments suggest that there will not be impunity in England and Wales for torturers or war criminals, even allowing for the investigative burden placed on the police on anti-terrorism work, particularly since the London bombings of 7 July 2005.

Accordingly, police forces in third party states, including in this country, will continue to be given evidence to consider on a case by case basis. The task facing victims and their legal advisers is to persuade police forces across the world to conduct expeditious and robust preliminary

529 Hansard HC Deb, 5 Mar 1997 c1004, regarding the expenditure under the 1991 Act.

530 http://cms.met.police.uk/news/convictions/terrorism/afghan_warlord_jailed_following_anti_terrorist_investigation

investigations so that decisions can be made in each case whether to arrest the suspect on arrival in their jurisdiction. Police forces will in that way put themselves in a position where arriving suspects can actually be arrested and charged, where the evidence permits.

If the police engage with these issues in a serious way, the very prospect of alleged war criminals being brought to justice in Britain or any other country is likely to provide a deterrent to future perpetrators of war crimes.

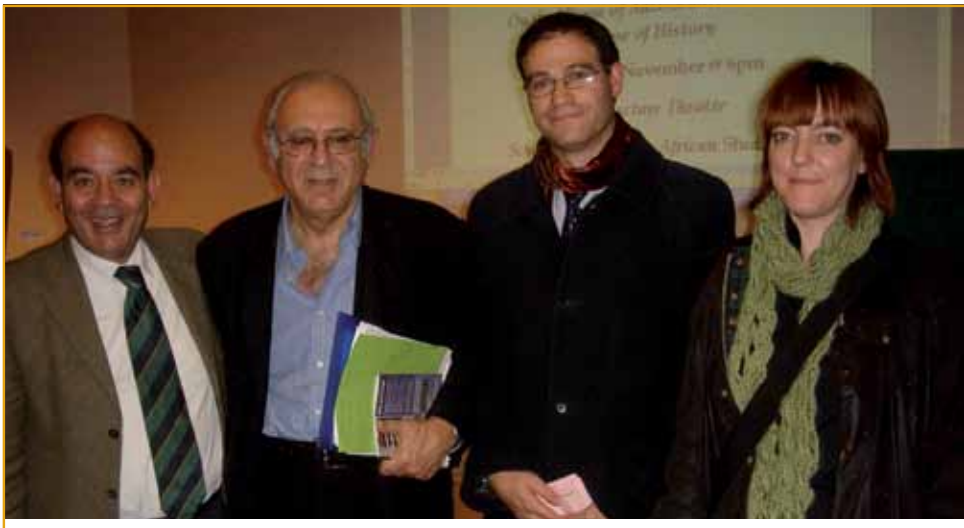
If Israel wins its battle against universal jurisdiction, I am sure it would be another disaster for the Palestinians.

Conversely, criminal trials in any country would certainly provide genuine deterrence and begin to provide justice for victims, where justice has eluded them at home. The end of impunity would then be in sight.

Raji Sourani, Marcel Bossonet
Press Conference, Geneva, 2003

Raji Sourani and Marcel Bosonnet
Press Conference, Geneva 2003

Anne-Catherine Menetrey-Savary, Raji Sourani
Press Conference, Geneva, 2003



Raji Sourani, Judge Eugene Cotran, Daniel Machover, Kate Maynard, London 2005

Daniel Machover, Raji Sourani, Kate Maynard
London 2005

Kate Maynard, Eyad Al Alami
Gaza Strip 2006

Kate Maynard, Eyad Al Alami
Gaza Strip 2006

Kate Maynard of Hickman and Rose Solicitors, and PCHR Lawyers
Gaza Strip 2006

Kate Maynard meets victims
Gaza Strip 2006

Universal Jurisdiction Conference
Malaga, 2006

Universal Jurisdiction Conference
Malaga, 2006

Universal Jurisdiction Conference
Malaga, 2006

Universal Jurisdiction Conference
Malaga, 2006

Universal Jurisdiction Conference
Malaga, 2006

Dr Anis F. Kassim, Cristina Ruiz, and Raji Sourani

Panel on Tranistional Justice, Universal Jurisdiction Conference
Cairo, November 2008

Universal Jurisdiction Conference
Cairo, November 2008

Universal Jurisdiction Conference
Cairo, November 2008

Universal Jurisdiction Conference
Cairo, November 2008

The Independent Fact Finding Mission of the League of Arab States, Feb 2009

Prof. Dugard and Raelene Sharp, Independend Fact Finding Mission of the League of Arab States, Feb 2009

Independent Fact Finding MIssion surveys destruction in the Gaza Strip, Feb 2009

Gonzalo Boye, Independent Fact Finding Mission of the League of Arab States, Feb 2009

Independent Fact Finding Mission survey destruction to UNRWA warehouses, Feb 2009

Members of the Independent Fact Finding Mission with PCHR Director, Raji Sourani, Feb 2009

Independent Fact Finding Mission interview victims
Feb 2009

Independent Fact Finding Mission interview victim
Feb 2009

Independent Fact Finding Mission debriefed in PCHR›s offices
Gaza City, Feb 2009

Independent Fact Finding Mission interviewing victim
Feb 2009

Independent Fact Finding Mission meet with Karen Abu Zayd,
UNRWA, Feb 2009

Gonzalo Boye, and PCHR lawyers
Feb 2009

Gonzalo Boye, and PCHR lawyers

UN Fact Finding Mission in PCHR›s offices
June 2009

UN Fact Finding Mission on Gaza Conflict
June 2009

UN Fact Finding Mission on the Gaza Conflict and PCHR
June 2009

UN Fact Finding Mission on the Gaza Conflict, PCHR
June 2009

PCHR debrief UN Fact Finding Mission
June 2009

UN Fact Finding Mission on the Gaza Conflict, and PCHR
June 2006

Raji Sourani, Justice Goldstone, Anne Ramberg, Stockholm
December 2009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Y DE COOPERACIÓN
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