



مركز الميزان لحقوق الإنسان  
AL MEZAN CENTER FOR HUMAN RIGHTS



Adalah The Legal Center for Arab Minority Rights in Israel  
مركز الميزان القانوني لحقوق الأقليات العربية في إسرائيل  
מרכז המזן החוקי לתאוריית זכויות האזרחים הערבים בישראל

## Gaza 2 Years On: Impunity Over Accountability

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

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

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

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

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

On March 2016, the UN High Commissioner for Human Rights (HCHR) released an initial report on the implementation of the Col's recommendations on the 2014 Gaza conflict. In light of the information presented to the HCHR regarding Israel's handling of investigations, the HCHR reiterated "serious concerns regarding the lack of accountability related to past cycles of violence and escalation in Gaza and to incidents in the West Bank, including East Jerusalem, and in the access-restricted areas of the Gaza Strip".<sup>5</sup> He asserted that, "the situation continues to deteriorate" and urged all parties to urgently implement all recommendations made by the Col.<sup>6</sup>

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

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

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

<sup>4</sup> UN Col report, para. 633.

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

<sup>6</sup> Ibid, para. 96-99.

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

**Complaints filed to the MAG and AG**

Between July and September 2014, Adalah and Al Mezan filed complaints jointly to the MAG and the AG regarding 28 incidents of suspected IHL and IHRL violations during OPE, demanding that the authorities open independent criminal investigations into each of the cases and to prosecute and hold to account those found to be responsible.

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

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

The table below summarizes the status of these complaints based on the responses of the MAG:<sup>8</sup>

<b>Military's response</b>	No investigation opened	Investigation closed	Still under examination (by the FFA mechanism)	Still under investigation by the Military Police	No response to date
<b>Number of cases/incidents</b>	13 (2 appeals pending)	1 (appeal pending)	6	2	6

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

<sup>8</sup> See Adalah's updated detailed list of all complaints submitted to the MAG and AG and their status: [https://www.adalah.org/uploads/uploads/Gaza\\_Case\\_List\\_Updated\\_14\\_Mar\\_2017.pdf](https://www.adalah.org/uploads/uploads/Gaza_Case_List_Updated_14_Mar_2017.pdf).

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

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

### **The Fact-Finding Assessment Mechanism**

The results show that more than two and a half years after the Gaza offensive, 46.4% (13 of 28) of the complaints filed by Adalah and Al Mezan were referred to Israel's FFAM for examination and then closed, without opening a criminal investigation or ordering further action against those involved. 43% of the complaints (12 of 28) remain under examination by the FFAM or received no response.

Concerning Al Mezan's individual submissions, the MAG and FFAM confirmed the receipt of 96 of the additional 107 complaints. In 62 cases, the authorities requested more information concerning the times and locations of the incidents, and then informed Al Mezan that the 62 cases would be subject to preliminary examinations by the FFAM. In another 12 complaints, the Israeli military police investigations unit asked for witnesses to provide statements at Erez crossing; nine witnesses gave their statements with support from Al Mezan. Al Mezan was informed afterwards that all nine cases were being closed, either without giving reasons or claiming they were due to lack of evidence. On 26 September 2016, Al Mezan requested additional information on the closure of three of the cases that concerned torture, and two cases that concerned looting. No response has been received. Since 26 August 2016, Al Mezan has not received notice of any additional examinations being made.

To date, Al Mezan has been informed that an additional 15 cases have been closed, bringing the total number of closed cases to 24 out of 107. The notifications from the MAG stated that the authorities decided to "stop dealing with the incident without opening a criminal investigation and without taking any additional steps".<sup>11</sup>

In response to reminders sent to the MAG concerning the status of some of Al Mezan complaints, the MAG replied on 22 August 2016 that it had not received eight of the 107 complaints. The MAG had previously confirmed receipt of three of those eight complaints and sent their file numbers. Al Mezan re-sent all eight complaints, which were first sent in early 2015. The MAG's loss of files raises serious questions about the management of the complaints.

In sum, not a single criminal investigation has been opened by the MAG or FFAM into any of the 107 cases. Notably, the only cases processed relatively swiftly by the authorities concern incidents of looting by Israeli military personnel and the abuse of civilians in military detention.

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<sup>9</sup> HCHR, *supra* note 5, para. 38.

<sup>10</sup> UN CoI, para. 293-299.

<sup>11</sup> Unofficial translation by Al Mezan of notices received.

The FFAM, established after the 2014 operation, is purportedly the result of the state's efforts to implement the recommendations of a 2013 report by the Turkel Commission. The Israeli government formed the Commission in 2010, in part, to examine its mechanisms for investigating IHL violations.<sup>12</sup>

The FFAM's purpose is reportedly to collect information and relevant materials limited only to "exceptional incidents" that occurred during OPE, where the MAG has decided that "additional information is required".<sup>13</sup> These materials are then referred to the MAG, the body that determines whether or not to open a criminal investigation into the cases. In theory, the FFAM was supposed to work thoroughly and promptly, in as close a timeframe as possible to the date of the incident in question, in order to ensure that the investigation is prompt and effective. In fact, most of the complaints filed are effectively frozen under the FFAM's purview, whereas most of them are closed after a claimed investigation by the FFAM without opening a criminal investigation and without disclosing any materials as required.

The UN Board of Inquiry (BoI) was established after the 2014 OPE to review and investigate incidents affecting or involving UN personnel and premises. The Israeli government cooperated with the UN BoI, in contrast to its refusal to cooperate with the UN Col.

In the summary of its findings, the BoI concluded that Israel was responsible for striking seven UNRWA sites used as civilian shelters, in which 44 Palestinians were killed and 227 others were injured. In a cover letter accompanying the summary, UN Secretary-General condemned the attacks stating: "It is a matter of the utmost gravity that those who looked to them for protection and who sought and were granted shelter there had their hopes and trust denied."<sup>14</sup> Responding to the release of the BoI report, the Israeli government stated that the UNRWA incidents have been subject to thorough examinations, and criminal investigations have been launched where relevant.<sup>15</sup> However, as noted, it appears that these cases are being closed without any investigation and are still under the review of the FFAM, more than two and a half years on.

On 24 August 2016, the MAG issued a press release with updates on a few cases under examination, in which it informed that it decided to close these cases without opening criminal investigations.<sup>16</sup> No further press releases or updates appear on the website of the MAG; Update No. 5 was the last public document issued by the MAG.

One of the cases closed by the MAG concerned the attack nearby a UNRWA school in Rafah, in which 15 people were killed, including eight children, and wounding at least 25.<sup>17</sup> About 3,000 people were taking shelter in the school at the time. The military announced that it was aware of the fact that the school served as a shelter for civilians. However, it claimed that it was targeting three military operatives riding on a motorbike, and at the time of firing against the motorbike, it was "not able to discern in real-time the group of civilians that were outside the school" and that "it was not possible to divert the munitions" after the motorbike started to travel among the road bordering the wall,

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<sup>12</sup> Adalah Briefing Paper on the Turkel Report, Part II, by Adalah Attorney Fatmeh El-Ajou: [adalah.org/uploads/oldfiles/Public/files/English/Publications/Articles/2013/BriefingPaper-Turkel-II-El-Ajou.pdf](http://adalah.org/uploads/oldfiles/Public/files/English/Publications/Articles/2013/BriefingPaper-Turkel-II-El-Ajou.pdf).

<sup>13</sup> UN Col report, para. 612. The UN High Commissioner noted the limited scope of this mechanism. See HCRC, supra note 6, para. 32.

<sup>14</sup> See Summary by Secretary-General of the Report of the UN Headquarters Board of Inquiry into certain incidents that occurred in the Gaza Strip between 8 July 2014 and 26 August 2014, S/2015/286, 27 April 2015.

<sup>15</sup> See Israel Ministry of Foreign Affairs, Israel receives summary of UN report on Gaza conflict, 27 April 2015: <http://mfa.gov.il/MFA/PressRoom/2015/Pages/Israel-receives-summary-of-UN-report-on-Gaza-conflict-27-Apr-2015.aspx>.

<sup>16</sup> See "Decisions of the IDF MAG regarding Exceptional Incidents that Allegedly Occurred During Operation 'Protective Edge' - Update No. 5," 24 August 2016, available at: <http://www.law.idf.il/163-7596-en/Patzar.aspx>.

<sup>17</sup> UN Col report, para. 440.

which surrounded the school. Thus, the MAG found that the targeting process accorded with international and domestic law, and thus, there was no reasonable suspicion of criminal conduct.

In October 2016, Adalah and Al Mezan appealed against the MAG's decision not to open an investigation arguing that the Israeli military committed serious violations of the laws of war, which amount to war crimes.<sup>18</sup> The UN COI also examined this case and found that imprecise weapons were used, concluding that:

"The use of such weapons in the immediate vicinity of an UNRWA school sheltering civilians is highly likely to constitute **an indiscriminate attack which, depending on the circumstances, may qualify as a direct attack against civilians,**<sup>19</sup> and may therefore amount to a war crime".<sup>20</sup>

Human Rights Watch, which also carried out an in-depth documentation and investigation of three UNRWA school attacks, found that in this attack, the munitions used by the Israeli military in fact allows the operator to see the target even after the missile is launched and divert it in mid-course.<sup>21</sup> Al Mezan, which has also documented this case, has identified the two people (and not three as stated by the Israeli authorities) on the motorbike as civilians and not combatants.

This case—which clearly indicates contrary findings by the UN and international and local human rights organizations from that of the Israeli military—also demonstrates the need for a more thorough and transparent investigation, and not a closure of the case file after two years without investigation. The findings show that this incident may be an unlawful, indiscriminate and disproportionate attack. However, the FFAM and MAG seem to merely make assertions about the targets, the timing of the munitions' firing, and the selection of ammunition, concluding that there was nothing wrong with any of these decisions, and that lessons were learned. Moreover, in the words of the Col, "Even though the attack against the UNRWA schools may not have been deliberate, the IDF is bound by the obligation of precautionary measures and verification of targets to avoid attacks directed by negligence at civilians or civilian objects".<sup>22</sup>

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

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

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<sup>18</sup> Adalah and Al Mezan press release, "Adalah and Al Mezan Appeal Israeli Military's Decision not to Investigate Civilian Killings near UNRWA School in Gaza in 2014", 27 October 2016, [adalah.org/en/content/view/8942](http://adalah.org/en/content/view/8942).

<sup>19</sup> See also International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Galic*, case No. IT-98-29-T, Judgement, 5 December 2003, para. 57.

<sup>20</sup> UN Col report, para. 446.

<sup>21</sup> See Human Rights Watch, In-Depth Look at Gaza School Attacks, 11 September 2014, <https://www.hrw.org/news/2014/09/11/israel-depth-look-gaza-school-attacks>.

<sup>22</sup> UN Col, para. 447.

### **Appeal against Case Closure: The Bakr Boys Case**

A high-profile case in which the MAG opened an investigation was the killing of four boys from the Bakr family while they were playing football on the beach. The case garnered extensive international media and public attention, especially due to its occurrence near a hotel where many foreign journalists were staying. In conducting its investigation, the Israeli military did not collect testimonies from these journalists or from Palestinian witnesses who were on site at the time of the killing. The MAG closed the file in June 2015, contending that the area in which the boys were killed amounted to a justified, military target.<sup>23</sup>

The Col was deeply disturbed by the closure of this case, stating that there were "strong indications that the actions of the IDF were not in conformity with international humanitarian law and that the investigation does not appear to have been carried out in a thorough manner."<sup>24</sup>

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

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

### **Appeal against Case Closure: The Abu Dahrouj Family Case**

The case of the Abu Dahrouj family provides another illustration of Israel's unwillingness to investigate. In this case, on the night of 22 August 2014, an Israeli warplane fired two missiles at a home belonging to the Abu Dahrouj family in central Gaza. The Israeli missile strike killed five members of the Abu Dahrouj family, including two children, and wounded multiple civilians and caused extensive damage to neighboring homes. Although the MAG acknowledged that the missile attack was carried out directly on a civilian home and did not target any combatant or military object, no investigation was opened and the case was closed without any action against those involved. In this case, the MAG used vague and indecisive terminology, stating that "for an unclear reason, likely an unexpected technical malfunction", the missile hit the home of the family. This language indicated that the MAG did not conduct a thorough and independent examination that was sufficient to determine whether or not it was necessary to open an investigation. The Israeli military also refused to provide any of the results of its probe or to detail the reason for its decision to refuse to open a criminal investigation, claiming that all case materials are classified. Adalah and Al Mezan submitted

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<sup>23</sup> Adalah and Al Mezan press release, "Israeli military closes investigation into killing of four children on Gaza beach," 15 June 2015: [adalah.org/en/content/view/8581](http://adalah.org/en/content/view/8581). See also Peter Beaumont, "Gaza beach killings: no justice in Israeli exoneration, says victim's father," The Guardian, 15 June 2015: [theguardian.com/world/2015/jun/12/gaza-beach-killings-no-justice-in-israeli-exoneration-says-victims-father](http://theguardian.com/world/2015/jun/12/gaza-beach-killings-no-justice-in-israeli-exoneration-says-victims-father).

<sup>24</sup> UN Col report, para. 663.

an appeal in January 2017 against the decision not to conduct an investigation into the killing, reiterating that it constitutes a serious violation of IHL.<sup>25</sup>

### **Obstacles to Investigations**

IHL and IHRL require states to investigate allegations of suspected violations committed during armed conflict. The duty to investigate requires that any investigation follow the international standards of **independence, impartiality, effectiveness, promptness and transparency** and to prosecute those allegedly responsible in accordance with domestic and international law.<sup>26</sup>

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

- There is a lack of an independent and impartial investigatory mechanism, since the military is still the authorized body to investigate its own conduct. The MAG still performs a "dual role": It provides the military with legal advice prior to and during military operations and subsequently decides whether to initiate a criminal investigation. This dual role could lead to a situation in which the MAG would need to decide whether to investigate its own conduct or that of its subordinates. Such a situation would clearly violate the requirement of independence.
- The MAG dismisses complaints by providing vague arguments and explanations about the existence of military necessity and military targets;
- In many cases, the FFAM is not investigating non-military witnesses and has stated that there is no need for such investigations;
- The MAG is unwilling to disclose information on any investigative materials, witnesses and testimonies, which reinforces concerns about the lack of transparency;
- There is no timeframe for examinations and investigations;
- There is an unreasonable amount of time and stalling in the examination and investigation processes, and thus the process is not prompt, but unnecessarily lengthy;
- There are still no guidelines under which a criminal investigation should be opened in cases involving alleged IHL and IHRL violations.

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

- To date, the Israeli Supreme Court has never issued any order to the MAG to open a criminal investigation or to indict any individual regarding alleged suspicions of war crimes in Gaza. In the "Adalah case", which demanded investigations into the killings and injury of civilians and the extensive damage to homes in the Gaza Strip in 2004, the Court rejected the petition and reiterated its previous decisions in ruling in 2011 that intervention in the decisions of the chief military prosecutor is rare, and should occur only in very exceptional circumstances;<sup>27</sup>
- There is still an absence of war crimes legislation in domestic Israeli law and there is no Israeli penal law imposing direct criminal liability on military commanders and political leaders for international law violations;

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<sup>25</sup> Adalah and Al Mezan press release, "Israeli army admits missiles failed to hit intended target, killing five members of Gaza family", 12 January 2017: <https://www.adalah.org/en/content/view/8990>.

<sup>26</sup> See General Assembly Resolution A/RES/60/147 of 16 December 2005, which adopted the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*.

<sup>27</sup> HCJ 3292/07, *Adalah – The Legal Center for Arab Minority Rights in Israel v. Attorney General* (decision delivered 1 December 2011).

- The 2013 recommendations of the Turkel Commission do not fully comply with the international standards of the duty to investigate;
- Even with the flaws of the Turkel Commission's recommendations, Israel has implemented almost none of the recommendations;
- Israel refused to cooperate with international investigating bodies, most recently the UN Col into the 2014 war, and thus, UN investigators had no access to Israel and the OPT. This lack of cooperation thwarts attempts to gather information first-hand and view the scenes of relevant incidents in order to properly investigate violations of IHL and IHRL.

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