

Israel: Ensure Full Compliance with the International Covenant on Civil and Political Rights

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I. Introduction.....	2
II. Emergency regulations during the COVID-19 pandemic.....	2
i. State of emergency	2
ii. The Israeli Government’s tracking programme	4
iii. Respect for the rights to counsel and to family visits of detainees.....	5
III. Settlements and annexation	6
i. Settlements.....	6
ii. Annexation	7
IV. Excessive use of force in response to the “Great March of Return”.....	9
i. The legal basis for the use of potentially lethal force	10
ii. The notions of “key instigator” and “key rioter”	11
iii. The use of force in practice during Israel’s response to the “Great March of Return”.....	12
V. Lack of accountability	14
i. Superior responsibility	14
ii. The Military Advocate General (MAG).....	14
iii. Threshold to open an investigation	15
iv. Operational debriefings	16
v. The Fact-Finding Assessment Mechanism (FFAM).....	16

I. Introduction

June 2020 marks the 53rd year of Israel's occupation of the Palestinian territory. The entrenchment and protracted duration of the occupation, which began in 1967 following the Six-Day War, have given rise to a reality of systematic human rights violations against the Palestinians, such as house demolitions, forced evictions and displacement, restriction on freedom of movement, and arbitrary deprivations of life and liberty.¹ Despite local and international efforts geared towards promoting international law and accountability, Israel has willfully and constantly failed to meet its international obligations under international human rights law and international humanitarian law vis-à-vis the Palestinian population, and to comply with relevant UN Security Council's resolutions, including Resolution 242, which required Israel's complete withdrawal from the Occupied Palestinian Territory (OPT).² On the contrary, the newly formed Israeli Government might take the step of formally annexing portions of the West Bank and incorporate Israeli settlements and additional areas, such as the Jordan Valley, into its own territory,³ in plain violation of the UN Charter and the right to self-determination of the Palestinian people.⁴

In this briefing, the International Commission of Jurists (ICJ) examines Israel's failure to implement and comply with certain obligations under international law. In particular, the briefing employs the International Covenant on Civil and Political Rights (ICCPR or Covenant) as the framework of reference to examine a number of human rights violations as they arise in the following contexts: (a) emergency regulations adopted during the COVID-19 pandemic; (b) the annexation of portions of the OPT; (c) excessive use of force in the context of Israel's response to the "Great March of Return" in Gaza; and (d) the accountability gaps within the Israeli military justice system. In this respect, the briefing also considers Israel's failure to comply with the recommendations made by the Human Rights Committee in its 2014 Concluding Observations as relevant to the above-mentioned contexts.

II. Emergency regulations during the COVID-19 pandemic

Since March 2020, the Israeli Government has adopted a number of "emergency regulations" with the purported aim of tackling the COVID-19 pandemic.⁵ In this context, Israel has failed to comply with its obligations under the ICCPR with regard to: (i) the formal and substantive requirements under article 4 of the ICCPR with respect to the adoption of measures derogating from its Covenant obligations; (ii) the protection of the right to privacy with regard to the "tracking programme" of Israeli citizens under article 17 of the ICCPR; and (iii) the respect for detainees' rights to counsel and to family visits under articles 2(3), 7, 9, 10, 14 and 17 of the ICCPR.

i. State of emergency

Domestically, a purported "state of emergency" is in effect in Israel since 1948. In its 2014 concluding observations, the Human Rights Committee recommended Israel to expedite the review process of the legislation governing the "state of emergency" and to revisit the modalities

¹ UN Office for the Coordination of Humanitarian Affairs (OCHA), *Occupied Palestinian Territory*, at <https://www.ochaopt.org/>.

² Resolution 242 S/RES/242 (1967).

³ Haaretz, *Israeli Annexation Explained: What Is Netanyahu Planning for the West Bank and What Does It Mean*, 26 May 2020, at <https://www.haaretz.com/israel-news/.premium-israeli-annexation-explained-what-is-netanyahu-planning-for-the-west-bank-1.8873260>.

⁴ ICJ, *The Road to annexation: Israel's maneuvers to change the status of the Occupied Palestinian Territory*, November 2019, at <https://www.ici.org/wp-content/uploads/2019/11/Israel-Road-to-Annexion-Advocacy-Analysis-brief-2019-ENG.pdf>.

⁵ For a comprehensive list of such measures, see Adalah – The Legal Center for Arab Minority Rights in Israel, at <https://www.adalah.org/en/content/view/9939>; Association for Civil Rights in Israel (ACRI), at <https://www.english.acri.org.il/post/152>.

concerning its renewal.⁶ According to Israel's fifth periodic report, this review process is still ongoing.⁷

After the start of the spread of COVID-19 in Israel, the Government adopted specific "emergency regulations" with the stated aim of tackling the pandemic.⁸ Such measures, however, do not comport with the requirements under article 4 of the Covenant for the adoption of measures derogating from Israel's obligations under the ICCPR.

Article 4 of the ICCPR requires states of emergency to be "officially proclaimed."⁹ While Israel's Supreme Court affirmed that the spread of the COVID-19 pandemic could be qualified as a threat to "national security" under domestic law,¹⁰ the Government did not "officially proclaim" that the COVID-19 pandemic constituted a public emergency "threatening the life of the nation."¹¹

The adoption of derogations must be communicated to the UN Secretary-General, as prescribed by paragraph 3 of article 4, and such communications should include "full information about the measures taken and a clear explanation of the reasons for them, with full documentation attached regarding their law", in order to allow other States Parties and the Human Rights Committee to monitor compliance with the ICCPR.¹² Israel has not filed the required communication with the UN Secretary-General, failing to explain why the COVID-19 pandemic meets the criteria of a state of emergency.

Article 4 allows the adoption of derogating measures "to the extent strictly required by the exigencies of the situation", a condition requiring that "States parties provide careful justification not only for their decision to proclaim a state of emergency but also for any specific measures based on such a proclamation."¹³ The mere existence of a "public emergency" under domestic law, which is not justified in accordance with article 4, does not – in and of itself – render automatically lawful under the Covenant any measure taken with the stated intention of tackling the pandemic that derogates from obligations under the ICCPR. Accordingly, Israel should have explained in detail the "strict necessity and proportionality" of each and every emergency regulation adopted to face the COVID-19 pandemic.¹⁴

Derogating measures must also be non-discriminatory. As shown below, the emergency regulations limiting detainees' rights to legal counsel and to family visits disproportionately affect in a negative manner Palestinian detainees, amounting to indirect discrimination prohibited under article 4.

⁶ *Concluding Observations: Israel* CCPR/C/ISR/CO/4 (2014), para. 10; *Concluding Observations: Israel* CCPR/C/ISR/CO/3 (2010), para. 7; *Concluding Observations: Israel* CCPR/CO/78/ISR (2003), para. 12; *Concluding Observations: Israel* CCPR/C/79/Add.93 (1998), para. 11.

⁷ *Israel: Fifth Period Report* CCPR/C/ISR/5 (2019), para. 36.

⁸ On 6 April 2020, Adalah filed a petition with the Supreme Court challenging the constitutionality of emergency regulations. See *Adalah and the Joint List v. The Prime Minister* HCJ 2399/20 (pending). Moreover, it is reported that, in a letter sent to Prime Minister Benjamin Netanyahu in early April 2020, Israel's Attorney General affirmed that the adoption of emergency regulations to deal with the COVID-19 pandemic raises "constitutional problems" and "contradicts the rule of law." See Adalah, *Joint List, Adalah petition Israeli Supreme Court against government's continuous approval of emergency coronavirus regulations without Knesset oversight*, 6 April 2020, at <https://www.adalah.org/en/content/view/9967>.

⁹ *General Comment No. 29: States of Emergency (Article 4)* CCPR/C/21/Rev.1/Add.11 (2001), para. 2.

¹⁰ Such qualification does not refer to article 4 of the ICCPR but to article 7 of the General Security Services Law of 2002, which regulates the functions of the Shin Bet (the civilian intelligence service). See Adalah, *Initial Analysis of the Shin Bet ("Shabak") Coronavirus Cellphone Surveillance Case*, 4 May 2020, pp. 2-3, at <https://www.adalah.org/uploads/uploads/Adalah Initial Analysis Shin Bet Corona Surveillance Case Final 04.05.20 20.pdf>.

¹¹ *Ibid.*

¹² *General Comment No. 29*, para. 17.

¹³ *Ibid.*, para. 5.

¹⁴ *Statement on derogations from the Covenant in connection with the COVID-19 pandemic* CCPR/C/128/2 (2020), para. 2.

Furthermore, the same regulations, which allow detainees to consult a lawyer by telephone only, may indirectly infringe upon non-derogable rights in violation of article 4. Due process guarantees, including the right to legal counsel, cannot be derogated from to the extent they infringe upon non-derogable rights, including the principle of legality and the rule of law.¹⁵

By not complying with the formal and substantive requirement prescribed by article 4, the state of emergency and related regulations adopted by the Israeli Government are in breach of the ICCPR.

ii. The Israeli Government's tracking programme

In March 2020, the Israeli Government adopted emergency regulations authorizing the Shin Bet (the civilian intelligence service) and the police to track and monitor, including through cell phone surveillance and other technological means, Israeli citizens who tested positive to COVID-19, as well as those who had been in their vicinity.¹⁶ Following the petitions filed by numerous NGOs,¹⁷ on 26 April 2020 the Supreme Court decided that the Government could not continue to employ the Shin Bet to implement the tracking programme, unless the Knesset passed dedicated legislation assigning such a task to the Shin Bet; this is due to the fact that, under existing domestic law, the Shin Bet is entrusted to deal exclusively with threats to "national security" *sensu stricto*.¹⁸ More specifically, the Supreme Court affirmed that: (i) in the early days of the spread of the pandemic, when the Government faced an immediate threat and there was no time to pass primary legislation, the Shin Bet's surveillance programme was justified in light of the unique circumstances; and (ii) for the continuation of such programme to be legal beyond 30 April 2020, primary legislation had to be passed by the Knesset.¹⁹

To be lawful under the Covenant, any interference with the right to privacy must be regulated by domestic law.²⁰ The Israeli Government's tracking programme encroaches upon article 17 of the ICCPR, which guarantees people's freedom from "arbitrary or unlawful interference with [their] privacy" and "protection of the law against such interference." Therefore, under article 17, until the Knesset – at the very least – passes relevant legislation, the Israeli Government's tracking programme is *ipso facto* unlawful.

Even when a domestic legal basis exists, article 17 nonetheless requires any interference not to be "arbitrary", i.e., "even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances."²¹ As a result, the relevant legislation should: (i) specify in detail the precise circumstances in which interferences with the right to privacy are permitted; (ii) prohibit generalized surveillance, by any means; (iii) authorize solely the collection of information "the knowledge of which is essential in the interests of society as understood under the Covenant;" (iv) safeguard the integrity and confidentiality of the collected information; (v) regulate the gathering, holding and storage of data; (vi) explain to any interested individuals whether, for what purposes, and by which State authority relevant data have been collected, and ensure access to such data; (vii) ensure that interested individuals have the right to rectify or eliminate any information which is

¹⁵ *Ibid.*, para. 2(d); *General Comment No. 29*, para. 16.

¹⁶ Adalah, *Initial Analysis of the Shin Bet ("Shabak") Coronavirus Cellphone Surveillance Case*, 4 May 2020, p. 1, at https://www.adalah.org/uploads/uploads/Adalah_Initial_Analysis_Shin_Bet_Corona_Surveillance_Case_Final_04.05.20_20.pdf.

¹⁷ *Adv. Shahar Ben Meir v. Knesset* HCJ 2109/20; *ACRI v. Prime Minister* HCJ 2135/20; *Adalah and the Joint List v. The Prime Minister et.al* HCJ 2141/20; *The Journalists' Union in Israel v. Prime Minister* HCJ 2187/20.

¹⁸ General Security Service Law (2002), art. 7.

¹⁹ Adalah, *Initial Analysis of the Shin Bet ("Shabak") Coronavirus Cellphone Surveillance Case*, p. 3.

²⁰ *General Comment No. 16: The right to respect of privacy, family, home and correspondence, and protection of honour and reputation (Article 17)* HRI/GEN/1/Rev.9 (1988), para. 3.

²¹ *Ibid.*, para. 4.

incorrect or gathered unlawfully, as well as the right to an effective remedy in cases of violations of their right to privacy.²²

In light of the above, pending the adoption of a domestic legal framework, the ICJ is concerned that, in any event, the Israeli Government's tracking programme is "arbitrary" under article 17 and, therefore, unlawful under the Covenant because: (a) it is a generalized form of surveillance against the concerned individuals; and (b) in absence of a legal basis, it does not ensure the respect for any of the safeguards required under article 17. Moreover, any future legislation passed by the Knesset, should it fail to conform to the above requirements, will be in breach of article 17.

iii. Respect for the rights to counsel and to family visits of detainees

On 15 March 2020, the Israeli Government adopted emergency regulations that allowed the Israeli public security minister, at the recommendation of the Israel Prison Service director or the Israeli police commissioner, to: (i) prohibit family visits to detainees; and (ii) limit their right to consult with a lawyer to telephone consultations only. While applying to all detainees, such restrictions are particularly stringent in respect of individuals designated by Israel as "security prisoners" who, for the most part, are Palestinians from the OPT. As a rule, "security prisoners" have no access to phone communications, meaning that the ban on family visits will render them completely isolated from the outside world. Moreover, under the emergency regulation "security prisoners" are allowed phone consultations with their lawyers only ahead of a scheduled court hearing.²³

Under the Covenant, persons deprived of liberty must have access to legal counsel, as well as adequate time to consult their lawyer in confidence and have them present during questioning, at all times.²⁴ The right to a legal counsel is critical in ensuring the protection of the right of access to court, due process guarantees and the right of victims to obtain an effective remedy, which the Human Rights Committee has defined as essential to safeguarding non-derogable rights, the principle of legality and the rule of law.²⁵ The Human Rights Committee also affirmed that "[c]ertain conditions of detention (such as denial of access to counsel and family) may result in procedural violations of paragraphs 3 and 4 of article 9."²⁶ By denying detainees access to legal counsel, the above-mentioned emergency regulations violate articles 2, 7, 9, 10 and 14 of the ICCPR.

Persons deprived of their liberty also have the right to family visits.²⁷ No specific limitation is set upon this right, except from "appropriate supervision when the legitimate purpose of the detention so requires, to family members."²⁸ The Human Rights Committee expressly affirmed that denial of access to family "may result in procedural violations of paragraphs 3 and 4 of article 9."²⁹ Denial or limitations on the right to family visit may amount to a prohibited interference with the right to

²² Ibid., paras. 6-10.

²³ Adalah, *Urgent petition filed with Israeli Supreme Court calls for cancellation of coronavirus emergency regulations banning prisoners from meeting with lawyers, family*, 23 March 2020, at <https://www.adalah.org/en/content/view/9929>.

²⁴ ICCPR, art. 14(3)(d); *Concluding Observations: Netherlands* CCPR/C/NLD/CO/4 (2009), para. 11; *General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)* HRI/GEN/1/Rev.9 (1992), para. 11; *General Comment No. 32: Right to Equality before Courts and Tribunals and to a Fair Trial (Article 14)* CCPR/C/GC/32 (2007), paras. 32-34; *General Comment No. 35: Liberty and Security of Person (Article 9)* CCPR/C/GC/35 (2014), paras. 35, 46; *Basic Principles on the Role of Lawyers* (1990), principles 8, 22.

²⁵ *Statement on derogations from the Covenant in connection with the COVID-19 pandemic*, para. 2(d); *General Comment No. 29*, paras. 11, 16.

²⁶ *General Comment No. 35*, para. 59. See also paras. 45-46, 66-67.

²⁷ *General Comment No. 35*, paras. 58-59; *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* A/RES/43/173 (1988), principle 19; *United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)* A/RES/70/175 (2015), rule 58.

²⁸ *General Comment No. 35*, para. 59.

²⁹ Ibid.

family under article 17. The deprivation of the right to family visits may even constitute cruel, inhuman or degrading treatment,³⁰ which would infringe upon articles 7, 9 and 10.

In light of the above, by denying detainees access to family visits under the above-mentioned emergency regulations Israel violates articles 7, 9, 10 and 17 of the Covenant. The fact that the more stringent restrictions imposed by Israel on "security prisoners" disproportionately affect Palestinians may also amount to prohibited discrimination in breach of article 2(1) and 4.

In light of the above, the ICJ calls on the Israeli authorities to:

- **Ensure that emergency regulations and any related derogating measures adopted with the stated intention of tackling the COVID-19 pandemic are fully consistent with article 4 of the ICCPR;**
- **Cease any unlawful and/or arbitrary interference with the right to privacy of Israeli citizens;**
- **Regulate by law any "tracking programme" purportedly aimed at countering the spread of the COVID-19 pandemic in accordance with the ICCPR, and ensure that any interferences in the right to privacy be non-arbitrary;**
- **Repeal the emergency regulations limiting the right to legal counsel and denying the right to family visits of all detainees. If necessary, relevant sanitary measures should be adopted to ensure detainees' full and safe enjoyment of such rights during the COVID-19 pandemic.**

III. Settlements and annexation

Since 1967, Israel's occupation of the OPT, which comprises the West Bank, including East Jerusalem, and the Gaza Strip, has been characterized by a process of *de facto* annexation.³¹ This has been effected through the establishment and continuous expansion of Israeli settlements and related infrastructures, as well as the construction of a "Separation Wall" within the West Bank. These actions, combined with Israel's legislation extending its territorial jurisdiction to the settlements, constitute important evidence of Israel's intention to appropriate some parts of the OPT in disregard of international law,³² including the ICCPR.³³

i. Settlements

In its 2014 Concluding Observations, the Human Rights Committee called on Israel to cease the construction and expansion of settlements in the West Bank and East Jerusalem, as well as the transfer of its own population thereto, and to reroute the "Separation Wall" in accordance with the International Court of Justice's 2004 advisory opinion.³⁴ Not only has Israel failed to implement the Human Rights Committee's recommendations, but it has continued to expand the settlements and to transfer its own population into the OPT.³⁵

³⁰ Inter-American Court of Human Rights, *Suárez Rosero case v. Ecuador* OAS/Ser.L/V/III.39 (1997), para. 91; African Commission on Human and Peoples' Rights, *Civil Liberties Organisation v. Nigeria* 151/96 (1999), para. 27.

³¹ *Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied since 1967* A/73/447 (2018), para. 25.

³² The acquisition of territory from another State through the use of force, i.e., annexation, violates the prohibition on the use of force under article 2(4) of the Charter of the United Nations and customary international law. See International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* Advisory Opinion (2004), para. 87.

³³ ICJ, *The Road to annexation: Israel's maneuvers to change the status of the Occupied Palestinian Territory*, November 2019, at <https://www.icj.org/wp-content/uploads/2019/11/Israel-Road-to-Annexion-Advocacy-Analysis-brief-2019-ENG.pdf>.

³⁴ *Concluding Observations: Israel* CCPR/C/ISR/CO/4 (2014), para. 17; International Court of Justice, *Wall* Advisory Opinion, para. 151.

³⁵ *Report of the High Commissioner for Human Rights on Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem, and in the occupied Syrian Golan* A/HRC/34/39 (2017), para. 11.

As the Human Rights Committee noted with concern in 2014, Israel's settlements and related infrastructure violate various Covenant rights, including the right to self-determination under article 1 of the ICCPR.³⁶ By failing to dismantle the settlements and related infrastructure, including the portions of the "Separation Wall" located in the West Bank, and withdrawing all settlers, Israel continues to violate articles 1, 2, 9, 12, 17, 18 and 26 of the ICCPR.

ii. Annexation

East Jerusalem is the only area of the OPT that has been formally annexed by Israel.³⁷ In 1967, Israel enacted a number of laws aimed at expanding its jurisdiction over East Jerusalem and its adjacent areas, effectively annexing the city.³⁸ In 1980, with a view to further consolidating its annexation over East Jerusalem, the Knesset adopted a Basic Law (a quasi-constitutional law) declaring Jerusalem, complete and united, as the capital of Israel.³⁹ The UN General Assembly and Security Council condemned such acts of annexation as contrary to international law, declaring them null and void.⁴⁰

Besides East Jerusalem, until 2015, Israel did not attempt to apply its sovereignty to the West Bank, keeping the two territorial entities – the State of Israel and the West Bank – as distinct, one subject to Israel's sovereignty and jurisdiction, the other subject to Israel's military rule under the military commander's jurisdiction. During the 20th legislature (31 March 2015 – 28 April 2019), however, sixty bills extending Israeli law to the West Bank,⁴¹ or laying the foundation for some form of future annexation, were introduced in the Knesset, eight of which were approved and entered into force.⁴²

In February 2017, the Knesset adopted the *Law for the Regulation of Settlements in Judea and Samaria* ("Regularization Law") with the objective of expropriating Palestinian private land in the West Bank and retroactively "legalizing" Israeli "outposts" and settlements unlawfully established on it.⁴³ On 9 June 2020, the Israeli Supreme Court, sitting as the High Court of Justice (HCJ), declared the "Regularization Law" unconstitutional.⁴⁴ This decision should come as no surprise since even Israel's Attorney-General, "during the Law's legislation process, ... expressed his opinion that it was unconstitutional."⁴⁵

The *Higher Education Law*, adopted in February 2018 and entered into force on 15 February 2019, aimed at dissolving the Council for Higher Education operating in the West Bank – which was up until then headed by the OPT's military commander – and at placing higher education institutions based in the Israeli settlements under the authority of the Council for Higher Education operating in

³⁶ *Concluding Observations: Israel* CCPR/C/ISR/CO/4 (2014), para. 17.

³⁷ In 1981, Israel formally annexed the Golan Heights as well, which are part of Syria. Security Council Resolution 497 declared this act of annexation "null and void and without international legal effect." See S/RES/497 (1981).

³⁸ *Law and Administration Ordinance (Amendment No. 11) Law* (1967); *Municipal Corporation Ordinance (Amendment) Law* (1967).

³⁹ *Basic Law: Jerusalem, Capital of Israel* (1980).

⁴⁰ Resolution 2253(ES-V) A/RES/2253(ES-V) (1967); Resolution 2254(ES-V) A/RES/2254(ES-V) (1967); Resolution 252 S/RES/252 (1968); Resolution 478 S/RES/478 (1980).

⁴¹ Since the late 1970s, Israeli domestic law has applied to the Israeli settlers living in the West Bank on a personal and extraterritorial basis. Israel had never attempted to proceed to a territorial application of the law in the OPT, knowing that this would have amounted to prohibited annexation. See Association for Civil Rights in Israel (ACRI), *One Rule, Two Legal Systems: Israel's Regime of Laws in the West Bank* (2014), pp. 15–18, at <https://law.acri.org.il/en/wp-content/uploads/2015/02/Two-Systems-of-Law-English-FINAL.pdf>.

⁴² Yesh Din, *Annexation Legislation Database*, at <https://www.yesh-din.org/en/about-the-database/>.

⁴³ *Law for the Regulation of Settlements in Judea and Samaria* (2017).

⁴⁴ *Head of the Ein Yabrud Village Council v. Knesset HCJ 2055/17* (2020); *Adalah, Israeli Supreme Court strikes down law allowing Israel to expropriate private West Bank Palestinian lands for settlements*, 10 June 2020, at <https://www.adalah.org/en/content/view/10024>.

⁴⁵ *Israel: Fifth Period Report* CCPR/C/ISR/5 (2019), para. 69.

Israel. The Law placed higher education institutions located in the settlements on an equal footing with all other Israeli universities and colleges to “normalize” their illegal presence in the West Bank. Furthermore, through this Law the Knesset went beyond its authority by abrogating the military commander’s authority in the OPT and transferring it to an official Israeli institution.⁴⁶

In July 2018, the Ministry of Justice drafted a legal memorandum amending the *Law on the Administrative Affairs Court*, transferring to the Jerusalem District Court, as opposed to the HCJ, the authority to adjudicate petitions by Palestinians residing in the West Bank. The memorandum refers to petitions submitted by Palestinians and by Israeli settlers relating to four issues: freedom of information, planning and building, entry to and exit from the West Bank, and administrative restraining orders. While the HCJ’s competence as appellate court in such matters is preserved, the *Law on the Administrative Affairs Court* directs the litigation for all practical matters from the HCJ to the Jerusalem District Court. As a result, the Law extends the jurisdiction of an Israeli domestic court to the OPT, in contravention of international law.⁴⁷

Israeli law-makers also proposed a number of bills with clearly-stated annexation aims. In August 2016, a few members of the Knesset introduced a bill with the stated purpose to annex Maale Adumim, one of the biggest settlements in the vicinities of Jerusalem. The bill was presented to the Knesset for a preliminary reading but the legislative process was stopped because of the end of the Knesset term. Similarly, the *Greater Jerusalem Bill*, presented in October 2017, aims to formally annex five major settlements located in the West Bank into the Jerusalem municipality. This Bill would add around 120,000 Israeli settlers to Jerusalem, altering the demographics of the city by enhancing its Jewish majority.⁴⁸ Additional Bills were introduced with the intention to annex all settlements and outposts located in the West Bank (January 2016), the Etzion Bloc (June 2016), the entire West Bank (May 2018), the Jordan Valley (December 2018), just to name a few.⁴⁹ While these attempts do not constitute *per se* acts of annexation, they signal future risks of *de jure* annexation should they be realized in the future.

Calls in favour of the *de jure* annexation of the West Bank, or portions thereof, have been made by several Israeli state officials.⁵⁰ The annexation of portions of the West Bank was also part of the agreement between Prime Minister Benjamin Netanyahu and Kahol Lavan Chairman Benny Gantz, which led to the formation of the new Israeli government in April 2020. Relevant legislation, whose

⁴⁶ Yesh Din, *Annexation Legislation Database*.

⁴⁷ For more information see ACRI, *Transfer of OPT petitions from the High Court to the Court for Administrative Affairs in Jerusalem* (2018), at <https://law.acri.org.il/en/2018/02/25/transfer-of-opt-petitions-from-the-high-court-to-the-court-for-administrative-affairs-in-jerusalem/>; ACRI, *Memorandum on Administrative Affairs Courts Law (amendment – a decision of an authority in the area) 5768 – 2018* (2018), at <https://law.acri.org.il/en/wp-content/uploads/2018/02/ACRI-Position-on-Legal-Memorandum-Administrative-Affairs-Courts-Law.pdf>.

⁴⁸ *Report of the UN Special Rapporteur on the Situation of human rights in the Palestinian territories occupied since 1967 A/73/45717* (2018), para. 42.

⁴⁹ Yesh Din, *Annexation Legislation Database*.

⁵⁰ In the aftermath of the adoption of the “Regularization Law”, the former Minister of Education Naftali Bennett declared: “[t]oday, the Israeli Knesset moved from heading toward establishing a Palestinian state to heading toward sovereignty in Judea and Samaria ... The outpost regulation bill is the tip of the iceberg in applying sovereignty.” See *Report of the UN Special Rapporteur on the Situation of human rights in the Palestinian territories occupied since 1967 A/73/45717* (2018), para. 54. Ayelet Shaked, former Minister of Justice, said: “I think we should apply the Israeli law to the Israeli towns and villages [settlements], and to normalize the life there, and in the far future, to apply the Israeli law in Area C [occupied West Bank]. In Area C, there are a half-million Israelis [settlers] and 100,000 Palestinians; they will have citizenship with full rights, of course, like myself. And that Area A and B will be part of a confederation with Gaza, with Jordan.” See Hamodia, *Exclusive Interview With Israeli Justice Minister Ayelet Shaked*, 7 March 2018, at <http://hamodia.com/2018/03/07/exclusive-interview-justice-minister-ayelet-shaked/>. Ze’ev Elkin, the Minister for Jerusalem Affairs, stated: “Halas [‘enough’ in Arabic] with the story of two states. There is no other option but the State of Israel, certainly between the Jordan [River] to the [Mediterranean] sea there will be one State.” See Middle East Monitor, *Israel minister: We must plan for a million settlers in the West Bank*, 15 November 2017, at <https://www.middleeastmonitor.com/20171115-israel-minister-we-must-plan-for-a-million-settlers-in-the-west-bank/>.

adoption would lead to *de jure* annexation of the West Bank, is supposed to be introduced before the Knesset in July 2020.⁵¹

Annexation, *de facto* or *de jure*, violates the right to self-determination under article 1 of the ICCPR.⁵² By formally annexing East Jerusalem, and appropriating on a permanent basis portions of the West Bank, including the natural resources present therein, Israel impedes the Palestinians to “freely determine their political status and freely pursue their economic, social and cultural development”, as well as to “freely dispose of their natural wealth and resources”, as guaranteed by the right of self-determination enshrined in article 1 of the Covenant. As the Human Rights Committee stated, the right to self-determination is “an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights.”⁵³ Annexation also infringes other Covenant rights, including freedom of movement (article 12) and the rights to home, property and family life (article 17). For example, the above-mentioned “Regularization Law” (now declared unconstitutional) would have had the effect of depriving Palestinians in the West Bank of their right to protection of private property from confiscation and destruction in violation of article 17 of the ICCPR. By effecting acts of annexation, Israel contravenes its obligations under the ICCPR.

In light of the above, the ICJ calls on the Israeli authorities to:

- **Dismantle all the settlements and related infrastructure, including the “Separation Wall”, in the West Bank and East Jerusalem, and withdraw all settlers;**
- **Abide by relevant UN General Assembly and Security Council resolutions declaring the annexation of East Jerusalem as “null and void” under international law, and renounce its sovereignty claims over East Jerusalem;**
- **End any conduct aiming at annexing parts or all of the West Bank, and refrain from taking legislative steps to that end.**

IV. Excessive use of force in response to the “Great March of Return”

In its 2014 Concluding Observations, the Human Rights Committee expressed concern over the Israeli Defence Force’s (IDF) excessive use of lethal force during law enforcement operations in the OPT, recommending that rules of engagement or “open fire regulations” comply with article 6 of the ICCPR and the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.⁵⁴ With respect to this, the ICJ highlights the fact that, according to the UN Office for the Coordination of Humanitarian Affairs (OCHA), as a result of Israel’s response to the “Great March of Return” in Gaza, which started on 30 March 2018 and continued throughout 2019, “214 Palestinians, including 46 children, were killed, and over 36,100, including nearly 8,800 children have been injured. One in five of those injured (over 8,000) were hit by live ammunition.”⁵⁵ In light of the above, the ICJ considers that the way Israel employed potentially lethal force in its response to the “Great March of Return” demonstrates its failure to implement the Committee’s recommendation and comply with its obligations under the ICCPR.

⁵¹ Haaretz, *Netanyahu, Gantz Agree on West Bank Annexation Proposal as Unity Deal Nears*, 6 April 2020, at <https://www.haaretz.com/israel-news/elections/.premium-netanyahu-gantz-agree-on-west-bank-annexation-as-unity-deal-nears-1.8745742>.

⁵² The right to self-determination of peoples is a norm *jus cogens* that has *erga omnes* effects. See *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* Advisory Opinion (2019), paras. 150–153, 180; *Draft articles on the law of treaties with commentary* Yearbook of the International Law Commission (1966), p. 248.

⁵³ *General Comment No. 12: Right to self-determination (Article 1)* HRI/GEN/1/Rev.9 (1984), para. 1.

⁵⁴ *Concluding Observations: Israel* CCPR/C/ISR/CO/4 (2014), para. 13.

⁵⁵ OCHA, *Two years on: people injured and traumatized during the “Great March of Return” are still struggling*, 6 April 2020, at <https://www.ochoapt.org/content/two-years-people-injured-and-traumatized-during-great-march-return-are-still-struggling#ftn3>.

Domestic law must protect the right to life from any “intentional or otherwise foreseeable and preventable life-terminating harm or injury, caused by an act or omission.”⁵⁶ The use of potentially lethal force for law enforcement purposes must be regulated by law; any grounds for deprivation of life must be “defined with sufficient precision to avoid overly broad or arbitrary interpretation or application.”⁵⁷ To comply with the ICCPR, potentially lethal force by law enforcement officers must be employed in a non-arbitrary manner, that is: (i) as a last resort measure for the sole purpose of protecting life or preventing serious injury from an imminent threat; (ii) only if strictly necessary, when less harmful means would be ineffective to achieve a legitimate result; and (iii) with maximum restraint and in a manner which is proportionate to the threat that needs to be countered.⁵⁸ These requirements must be incorporated into domestic law and be applied in practice by law enforcement officers. All law enforcement operations must be “adequately planned in a manner consistent with the need to minimize the risk they pose to human life.”⁵⁹ Any deprivation of life that does not comply with the requirements of article 6 of the ICCPR is arbitrary and therefore in breach of the Covenant.

Under Israeli domestic law, when undertaking law enforcement operations the IDF can resort to potentially lethal force only to “remove a real danger to human life or bodily integrity, and subject to necessity and proportionality.”⁶⁰ These principles have been translated into the rules of engagement employed in the context of Israel’s response to the “Great March of Return”,⁶¹ meaning that Israel has technically complied with article 6 of the ICCPR in this respect. However, Israel has failed to comply with its obligations under the ICCPR where: (i) it asserted that the legal basis for using potentially lethal force during law enforcement operations is international humanitarian law, rather than article 6; (ii) it created the category of “key instigator” or “key rioter” as individuals targetable even when they do not pose an imminent threat to life or bodily integrity; and (iii) it did not ensure the practical adherence by IDF members to the principles governing the use of potentially lethal force under the ICCPR.

i. The legal basis for the use of potentially lethal force

According to Israel, the ICCPR does not apply either extraterritorially, beyond Israel’s boundaries, or in situations of armed conflict, where international humanitarian law applies, purportedly displacing the Covenant. Israel therefore asserts that it is not bound by the ICCPR in the OPT, including in relation to its response to the “Great March of Return.”⁶² While the Human Rights Committee has previously recommended the Israeli authorities to review this position,⁶³ Israel continues to maintain it.⁶⁴

To circumvent the ICCPR in the context of its response to the “Great March of Return” in Gaza, Israel contended that international humanitarian law provided for rules on the use of potentially lethal force for law enforcement purposes that are similar to the criteria for such a use of force under the Covenant.⁶⁵ This position, however, is merely instrumental to Israel’s rejection of the

⁵⁶ *General Comment No. 36: The Right to Life (Article 6) CCPR/C/GC/36* (2018), para. 6.

⁵⁷ *Ibid.*, para. 19.

⁵⁸ *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials* (1990), principles 4-5, 9; *Code of Conduct for Law Enforcement Officials* (1979), art. 3; *General Comment No. 36*, paras. 12-13.

⁵⁹ *General Comment No. 36*, para. 13.

⁶⁰ *Summary of the Government of Israel’s Submissions to the Israeli Supreme Court (HCJ 3003/18)* (2018), at <https://www.idf.il/media/48315/petition-qaza-border-events-summary-of-state-position.pdf>, para. 56.

⁶¹ *Report of the detailed findings of the independent international Commission of inquiry on the protests in the Occupied Palestinian Territory A/HRC/40/CRP.2* (2019), paras. 401-402.

⁶² *Summary of the Government of Israel’s Submissions to the Israeli Supreme Court (HCJ 3003/18)*, para. 33.

⁶³ *Concluding Observations: Israel CCPR/C/ISR/CO/4* (2014), para. 5.

⁶⁴ *Israel: Fifth Period Report CCPR/C/ISR/5* (2019), paras. 23-26.

⁶⁵ *Summary of the Government of Israel’s Submissions to the Israeli Supreme Court (HCJ 3003/18)*, para. 51: “... it is Israel’s longstanding position that IHL does not apply extraterritorially and that it is displaced by LOAC [law of armed conflict], which is the *lex specialis* in times of armed conflict. Accordingly, Israel believes that the ‘law enforcement’

applicability of the ICCPR extraterritorially and during armed conflict. By denying the applicability of the ICCPR to the OPT, Israel, by implication, refuses to adhere to the detailed guidance on the use of potentially lethal force the Human Rights Committee has set out in its General Comment No. 36, which should always be followed in the design of rules of engagement, the planning of law enforcement operations, and by law enforcement officers in practice.

Furthermore, Israel characterized the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials as “legally irrelevant”, declaring them a “non-binding policy statement”, and contending that the Principles are applicable only to “domestic, crime-related scenarios, whereas the border events [the “Great March of Return” demonstrations] are of a different character.”⁶⁶ Israel’s position plainly contradicts the Human Rights Committee’s specific recommendation that Israel abide by the Principles during law enforcement operations,⁶⁷ and overlooks the fact that the Principles are designed to apply to any type of law enforcement operations, including violent demonstrations.⁶⁸

Israel should acknowledge that its obligations under the ICCPR, including article 6, apply in respect of “all persons subject to its jurisdiction, that is, all persons over whose enjoyment of the right to life it exercises power or effective control”, and in situations of armed conflict, including occupation, where it applies concurrently with international humanitarian law.⁶⁹ Additionally, Israel should incorporate the principles and guidance detailed in the Human Rights Committee’s General Comment No. 36, the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials and the Code of Conduct for Law Enforcement Officials into its domestic rules governing the use of potentially lethal force during law enforcement operations.

ii. The notions of “key instigator” and “key rioter”

The rules of engagement employed by the IDF in the context of Israel’s response to the “Great March of Return” are classified. However, the State of Israel confirmed that they provided that “where a violent riot poses a real and imminent danger to the life or bodily integrity of IDF forces or Israeli civilians”, and all other means have been exhausted, “precise fire below the knees of a key rioter or a key instigator, in order to remove the real and imminent danger the riot poses” is allowed subject to the principles of necessity and proportionality.⁷⁰ The HCJ did not seem to question the legality of this position.⁷¹ This ground for using potentially lethal force was based on an expanded interpretation of what constitutes an “imminent threat” to human life or bodily integrity, which in the IDF and the HCJ’s view encompasses the ability of protestors to breach the separation fence between Gaza and Israel, and cross into the vicinity of Israeli towns.⁷²

paradigm is regulated within LOAC. However, violent riots posing a real and imminent danger to human life or bodily integrity may be quelled by using potentially lethal force, subject to strict conditions of necessity and proportionality. In the specific circumstances of the border events, IHRL’s requirements are identical to those of LOAC’s ‘law enforcement’ paradigm, and it is therefore of no practical significance which of the two normative frameworks is applied.”. See also *Yesh Din et al. v. The IDF Chief of Staff and The Military Advocate General* HCJ 3003/18 & HCJ 3250/18 (2018), para. 40.

⁶⁶ *Summary of the Government of Israel’s Submissions to the Israeli Supreme Court (HCJ 3003/18)*, para. 47; HCJ *Yesh Din et al. Case*, para. 53.

⁶⁷ *Concluding Observations: Israel* CCPR/C/ISR/CO/4 (2014), para. 13.

⁶⁸ *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, principle 14.

⁶⁹ *General Comment No. 36*, paras. 63-64; *General Comment No. 31: Nature of the General Legal Obligation on States Parties to the Covenant* CCPR/C/21/Rev.1/Add.13 (2004), paras. 10-11.

⁷⁰ *Summary of the Government of Israel’s Submissions to the Israeli Supreme Court (HCJ 3003/18)*, para. 69.

⁷¹ HCJ *Yesh Din et al. Case*, paras. 50, 57. In its concurring opinion, Justice Hayut acknowledged that, based on the available information, the categories of “key instigator” and “key rioter” had not “been grounded in international law;” yet, he did not exclude their possible compatibility with international and Israeli law, depending on the facts of the case. See *ibid.*, Concurring Opinion of President E. Hayut, paras. 12-13. See also *Al-Masri v. The Military Advocate General* HCJ 1971/15 (2017), para. 23.

⁷² HCJ *Yesh Din et al. Case*, paras. 52, 56-57 ; *Summary of the Government of Israel’s Submissions to the Israeli Supreme Court (HCJ 3003/18)*, para. 56.

According to the IDF, “key instigators’ may be persons who direct or order activities within the mob, such as coordinating the tactical placement and setting on fire of tires, coordinating people to contribute towards pulling back parts of the security infrastructure and so on.” In turn, “key rioters’ are those who by virtue of their actions incite the mob, influence their behavior or provide the conditions for which mass breach or infiltration may occur. For example, a person who successfully breaches the security infrastructure and carries out attacks on IDF positions, exciting the mob into following his lead. Another example could be a person who works to connect wires to the security infrastructure so that it may be pulled backwards and made ineffective by the crowds.”⁷³ The IDF has affirmed that using potentially lethal force against “key instigators” and “key rioters” is “an effective method for contending with the very real threats posed by violent crowds. By acting against an individual who contributes towards the actions of the crowd, the IDF is often able to repel the threats posed by the collective without having to use more substantial force against the crowd itself.”⁷⁴ The IDF has contended that potentially lethal force can be used against “key instigators” and “key rioters” even when they are not actively part of the action: “[k]ey instigators’ and ‘key rioters’ are often conducting activities within the violent riots for a lengthy period of time, and snipers face a challenge in identifying a time which provides the necessary circumstances for carrying out their fire while reducing the risk of hitting above the knee or hitting someone else. For example, snipers may act as a person temporarily moves away from the crowd or rests before continuing his activity.”⁷⁵ Accordingly, in the IDF’s view, the rationale for shooting “key instigators” and “key rioters” is not the imminent threat they pose, but the end result of causing the rest of the protestors to withdraw.⁷⁶

The notions of “key instigators” and “key rioters” contravene article 6 of the ICCPR. First, as asserted by the IDF itself, the use of potentially lethal force against these individuals does not respond to the purpose of protecting life or preventing serious injury from an imminent threat, which is the applicable principle under the ICCPR. Any use of force that fails to adhere to this principle is arbitrary and thus in breach of the Covenant. Second, the notions of “key instigator” and “key rioter” purport to justify the use of potentially lethal force based on status, i.e. their membership of a category, rather than their conduct of posing an imminent threat. Status-based targeting is prohibited under article 6. Unless it is proved on a case-by-case basis that an individual poses an imminent threat to the life or bodily integrity of another, potentially lethal force against them cannot be used.

iii. The use of force in practice during Israel’s response to the “Great March of Return”

While the events surrounding the “Great March of Return” were still unfolding, the HCJ assessed that, on the basis of the materials available to it, it appeared that the IDF had employed potentially lethal force against Palestinians demonstrators in accordance with the rules governing the use of force under international and Israeli law, and as incorporated into the rules of engagement.⁷⁷ The HCJ, however, decided not to consider the actual implementation of these rules on the ground due to: (i) its general restraint with respect to reviewing military operational matters, which, it considers, exceed the judicial and legal realm; and (ii) the fact that the protests and law enforcement operations were still ongoing.⁷⁸

⁷³ IDF, *Gaza Border Events: Questions & Answers*, p. 84, at <https://www.idf.il/media/48555/gaza-border-events-questions-and-answers.pdf>.

⁷⁴ *Ibid.*, p. 85.

⁷⁵ *Ibid.*, p. 87.

⁷⁶ *Report of the detailed findings of the independent international Commission of inquiry on the protests in the Occupied Palestinian Territory A/HRC/40/CRP.2* (2019), para. 314.

⁷⁷ HCJ *Yesh Din et al. Case*, para. 57.

⁷⁸ *Ibid.*, paras. 60-64.

The independent international Commission of Inquiry on the protest in the OPT assessed the use of potentially lethal force by the IDF in the context of the military assaults on the large-scale civilian protests, taking into account the distance between the demonstrators and the IDF soldiers, as well as the protection measures set up by Israel ahead of the demonstrations.⁷⁹ According to the Commission of Inquiry, the IDF failed to adhere in practice to the principles governing the use of potentially lethal force. First, the Commission found that, based on the concrete circumstances and the information it had reviewed, protestors who had resorted to violent means, including throwing stones and other non-explosive objects and burning tyres, had nonetheless not posed an imminent threat to the life or bodily integrity of IDF soldiers or Israeli civilians. On the other hand, the Commission conceded that certain tools, such as slinging stones and incendiary kites, may pose an imminent threat, while concluding that the possibility of using potentially lethal force against individuals employing such means had to be assessed on a case-by-case basis.⁸⁰

Second, the Commission of Inquiry affirmed that, in respect of the incidents it had reviewed, the use of less-lethal force, including sponge-tipped bullets and tear gas, had been sufficient to avert the possibility of protestors approaching the separations fence or to counter any eventual threat they could pose. In light of this, it concluded that in all those instances the use of potentially lethal force could not be justified. The Commission of Inquiry also noted that the use of potentially lethal force against individual “key instigators” or “key rioters” is inherently unnecessary as long as they do not concretely pose an imminent threat. Furthermore, it stated that, while defending the separation fence may in itself be a legitimate aim, and deploying non-lethal means for this purpose may be justified, employing potentially lethal force to protect the fence as such does not meet the necessity criterion of averting an imminent threat to life or bodily integrity.⁸¹

The Commission also opined with regard to the choice of the bullets employed. The IDF justified the use of 7.62 sniper bullets, which may cause serious permanent and life-changing injuries, based on the fact that smaller caliber bullets are not as accurate when employed to fire from a distance of over 250 meters from the intended target. The Commission, however, noted that an individual located more than 250 meters away from the shooter is unlikely to be posing an imminent threat to her or him, hence raising doubts on the necessity to use 7.62 bullets that can cause greater damage than smaller bullets. Moreover, the Commission observed that the IDF had generally applied potentially lethal force to avert a threat from becoming imminent, rather than to prevent an existing imminent threat, calling into question the IDF’s adherence to the principle of proportionality.⁸²

The UN Commission of Inquiry’s findings confirmed that Israel had failed to ensure that the IDF respected in practice the principles governing the use of potentially lethal force in its response to the “Great March of Return”, and hence had violated article 6 of the ICCPR.

In light of the above, the ICJ calls on the Israeli authorities to:

- **Acknowledge that Israel is bound by the ICCPR both in the context of its engagement in armed conflict and that the Covenant applies to its operations extraterritorially, including in the OPT;**
- **Incorporate into the rules of engagement governing the use of potentially lethal force the principles and guidance set out in the Human Rights Committee’s General Comment No. 36, the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials and the Code of Conduct for Law Enforcement Officials;**

⁷⁹ *Report of the detailed findings of the independent international Commission of inquiry on the protests in the Occupied Palestinian Territory A/HRC/40/CRP.2* (2019), paras. 328-342.

⁸⁰ *Ibid.*, paras. 343-374.

⁸¹ *Ibid.*, paras. 383-385.

⁸² *Ibid.*, paras. 388-390.

- **Ensure that Israeli security forces' operations strictly comply with these principles and guidance;**
- **Repeal the category of "key instigators" and "key rioters" from the rules of engagement regulating the use of potentially lethal force;**
- **Ensure that law enforcement officers, including IDF members, use potentially lethal force in accordance with article 6 of the ICCPR to guarantee the right to life and bodily integrity.**

V. Lack of accountability

In its 2014 concluding observations, the Human Rights Committee recommended that Israel reform its investigative system and ensure accountability for the human rights violations committed during the 2008-2009, 2012 and 2014 military operations in Gaza.⁸³ While it has adopted some limited reform,⁸⁴ Israel has failed to undertake a major overhaul of its military justice system. Failure to investigate and prosecute gross human rights violations, including arbitrary deprivations of life, torture and other ill-treatment, and enforced disappearance, constitute violations of the ICCPR, including articles 2(3), 6, 7, 9, 10 and 16.⁸⁵ Accountability gaps in Israeli domestic law regard both the legal and institutional frameworks, particularly: (i) the lack of legislation concerning superior responsibility; (ii) the office of the Military Advocate General; (iii) the threshold to open an investigation; (iv) operational debriefings; and (v) the fact-finding assessment mechanism.

i. Superior responsibility

No provision in Israeli criminal law establishes criminal liability and corresponding sanctions consistent with the superior responsibility doctrine,⁸⁶ according to which superiors are responsible for failure to prevent or punish crimes under international law by their subordinates, when they have the requisite knowledge that such crimes are about to be, are being, or have been committed.⁸⁷

Israel has an obligation under the ICCPR to establish the responsibility of superiors with regard to those violations amounting to crimes under international law, including violations of the right to life, torture and other ill-treatment, and enforced disappearance.⁸⁸

ii. The Military Advocate General (MAG)

The MAG heads the MAG Corps, the Israeli legal institution in charge of both deterring possible violations of international law committed by the IDF and holding soldiers accountable. The MAG acts as a legal adviser to the IDF Chief of General Staff and all other military authorities, while at the same time enforces law and order within the IDF as the head of the Military Prosecution System with the support of the Military Police Criminal Investigative Division (MPCID).⁸⁹ This dual role of the

⁸³ *Concluding Observations: Israel* CCPR/C/ISR/CO/4 (2014), para. 6.

⁸⁴ *Israel: Fifth Period Report* CCPR/C/ISR/5 (2019), paras. 97-99.

⁸⁵ *General Comment No. 31*, paras. 15, 18; *General Comment No. 36*, paras. 27-28; *Boucherf v. Algeria* CCPR/C/86/D/1196/2003 (2006), para. 9.2.

⁸⁶ The Turkel Commission specifically recommended that Israel amend the law and impose criminal liability in accordance with the superior responsibility doctrine, yet this recommendation has remained unimplemented. See *The Public Commission to Examine the Maritime Incident of 31 May 2010, Second Report: Israel's Mechanisms for Examining and Investigating Complaints and Claims of Violations of the Laws of Armed Conflict According to International Law* (2013) (Turkel Commission, *Second Report*), p. 369.

⁸⁷ *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity* E/CN.4/2005/102/Add.1 (2005), principle 27(b).

⁸⁸ *General Comment No. 31*, para. 18; *General Comment No. 36*, para. 27.

⁸⁹ The MAG is also responsible for the legal supervision of disciplinary proceedings, and for carrying out every other function prescribed by law and army regulations. See *Report of the detailed findings of the independent international Commission of inquiry on the protests in the Occupied Palestinian Territory* A/HRC/40/CRP.2 (2019), para. 718.

MAG Corps compromises the independence and impartiality of the military investigative system: she or he is in charge of providing legal advice to the military bodies whose activities she or he may successively investigate. For instance, the MAG approved the rules of engagement governing the use of potentially lethal force employed by the IDF during its response to the “Great March of Return” in Gaza,⁹⁰ while also being in charge of the possible investigation into the incidents that occurred during such demonstrations. Moreover, the MAG, being a military officer, is not endowed with the institutional competence to investigate civilian authorities, such as members of the Government, who may be responsible for crimes under international law committed by IDF members. In light of the strict hierarchical relationship characteristic of any armed forces, it is likewise difficult to have confidence in the MAG’s ability and commitment to investigate higher-ranking officers, such as the chief of staff, or peers in rank.

The MAG does not satisfy the requirements of independence and impartiality required under the ICCPR.⁹¹ As set out in the Minnesota Protocol, “[i]nquiries into serious human rights violations, such as extrajudicial executions and torture, must be conducted under the jurisdiction of ordinary civilian courts.”⁹² The MAG’s competence to enforce criminal jurisdiction against IDF members should be limited to military and disciplinary offences committed by IDF personnel not constituting human rights violations.⁹³

iii. Threshold to open an investigation

Pursuant to a 2011 policy, approved by the HCJ,⁹⁴ every death of a Palestinian resulting from the IDF operations in the West Bank will trigger the duty to open an immediate investigation except in “cases where it is clear that the operations during which the Palestinian inhabitant was killed were of a *real combat nature*.”⁹⁵ In the latter case, the decision by the MAG of whether to open an investigation or not will be taken after the submission of an operational debriefing and other relevant material.⁹⁶

In the context of Israel’s obligation to ensure respect for the right to life under article 6 of the ICCPR, the concept of “real combat nature” is of concern as the 2011 policy fails to define it. Law enforcement operations, such as “disturbances of the peace” or “riots at checkpoints”, have explicitly been defined by the IDF as of non-combat nature, which restricts the application of the policy to instances occurring in the conduct of hostilities. However, figures point out that in 2016 at least 79% of the incidents in which Palestinians have been killed in the West Bank by IDF gunfire were defined by the MAG as incidents of “a real combat nature”, which, therefore, did not trigger an immediate investigation.⁹⁷ Accordingly, there is considerable cause to be concerned about the overbroad definition of the notion of “real combat nature” adopted by the MAG.

The “real combat nature” exception does not comply with Israel’s obligations under the ICCPR, particularly for the lack of clarity regarding its meaning and scope, which adversely affects the fulfillment of Israel’s duty to investigate. When potentially unlawful deaths occur in connection with the conduct of hostilities, an investigation should be opened whenever “reasonable grounds to

⁹⁰ Israel’s HCJ 3003/18 Submission, para. 66.

⁹¹ *General Comment No. 31*, para. 15.

⁹² *The Minnesota Protocol on the Investigation of Potentially Unlawful Death* (2016), para. 28; *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, principle 29.

⁹³ *Concluding Observations: Colombia* CCPR/C/79/Add.2 (1992), paras. 5-6.

⁹⁴ *B’Tselem – Israeli Information Center for Human Rights in the Occupied Territories v the Chief Military Prosecutor*, HCJ 9594/03 (2011), paras. 10-11.

⁹⁵ *Letter of Major-General Avichai Mandelblit, the MAG, to Yehuda Weinstein, Attorney-General, Investigations Policy of IDF operations in the West Bank*, 4 April 2011, p. 8 (emphasis added) cited in Turkel Commission, *Second Report* (2013), at https://www.gov.il/BlobFolder/generalpage/alternatefiles/he/turkel_eng_b1-474_0.pdf, p. 322.

⁹⁶ *Ibid.*

⁹⁷ Yesh Din, *Position Paper submitted to the UN Independent Commission of Inquiry on the 2018 protests in the OPT* (2018), pp. 10-11.

suspect that a war crime was committed” exist.⁹⁸ In all other cases, Israeli authorities should open an investigation “where they know or should have known of potentially unlawful deprivations of life”⁹⁹ of Palestinians. More generally, as recommended by the Human Rights Committee, Israeli authorities should open an investigation “into all incidents involving the use of firearms by law enforcement officers.”¹⁰⁰

iv. Operational debriefings

Unless the death of a Palestinian occurs during law enforcement operations (as opposed to operations of a “real combat nature”), or there is a “reasonable suspicion” regarding the commission of a war crime during the conduct of hostilities (e.g. rape), the MAG will postpone its decision on the opening of a criminal investigation until she or he receives the findings of an “operational debriefing”.¹⁰¹ According to Israeli military law, the operational debriefing is an “inquiry made by the army, based on army orders, concerning an incident that occurred during training or military operations, or with regard thereto.”¹⁰² Operational debriefings are confidential reviews of incidents and operations conducted by soldiers from the same unit or line of command, together with a superior officer. They are meant to serve operational purposes and examine the performance of the forces, in order to learn what should be retained and what should be improved.¹⁰³ The MAG uses the findings of such debriefings in deciding whether to open an investigation; however, if an investigation is open and a criminal trial ensues, operational debriefings cannot be used as evidence.¹⁰⁴ An operational debriefing is fundamentally different, in its purpose and procedure, from a criminal investigation.¹⁰⁵

The operational debriefing is conducted by military officers, instead of trained investigators, with the aim of avoiding the recurrence of problematic scenarios, rather than uncovering the truth regarding an incident and ensuring accountability.¹⁰⁶ Moreover, the operational debriefing lacks the necessary independence since it is carried out by the IDF into its own members’ conduct, and does not usually include evidence from the plaintiffs or witnesses; it is normally based on soldiers’ testimony only.¹⁰⁷

Operational debriefings fall short of the international standards governing investigations into human rights violations, particularly in respect of the required independence of investigators from the persons whose conduct is under scrutiny. By relying on operational debriefings to decide whether or not to open a criminal investigation into an incident, the procedure followed by the MAG does not comply with Israel’s obligations under the ICCPR.

v. The Fact-Finding Assessment Mechanism (FFAM)

Shortly after the commencement of the 2014 Operation “Protective Edge”, the IDF Chief of General Staff established a FFAM, headed by a Major General who was not part of the chain of command during the Operation. The FFAM’s task was to gather “information and relevant materials in order to assess the facts of individual incidents”, in order to “provide the MAG with as much factual

⁹⁸ *The Minnesota Protocol on the Investigation of Potentially Unlawful Death*, para. 21.

⁹⁹ *General Comment No. 36*, para. 27.

¹⁰⁰ *Concluding Observations: Israel* CCPR/C/ISR/CO/4 (2014), para. 13.

¹⁰¹ Turkel Commission, *Second Report*, pp. 335-336.

¹⁰² The Military Justice Law, art. 539A(a).

¹⁰³ *Report of the United Nations Fact-Finding Mission on the Gaza Conflict* A/HRC/12/48 (2009), para. 1795.

¹⁰⁴ The Military Justice Law, art. 539A(a).

¹⁰⁵ *Report of the detailed findings of the independent international Commission of inquiry on the protests in the Occupied Palestinian Territory* A/HRC/40/CRP.2 (2019), para. 720.

¹⁰⁶ M. Sfar, *Investigations*, in O. Ben-Naftali, M. Sfar and H. Viterbo, *The ABC of the OPT: A Legal Lexicon of the Israeli Control over the Occupied Palestinian Territory* (Cambridge University Press 2018), p. 192.

¹⁰⁷ Turkel Commission, *Second Report*, pp. 32, 381.

information as possible in order to enable the MAG to reach decisions regarding whether or not to open a criminal investigation."¹⁰⁸ Similarly, during the "Great March of Return" in Gaza, the IDF Chief of Staff entrusted the FFAM with examining "exceptional incidents allegedly occurring during the Gaza border events" and providing the relevant findings and materials to the MAG for review. A dedicated team was formed within the FFAM, comprising "senior active duty and reservist officers with relevant professional military expertise ... accompanied by legal advisors", who were all outside the chain of command of the "Great March of Return" events.¹⁰⁹

The FFAM was established following the recommendations of the Turkel Commission, which suggested its use in relation to incidents occurring during the conduct of hostilities, whenever no "reasonable suspicion" that a war crime has been committed exists but, the available information being only partial or circumstantial, "there is a need to ascertain the circumstances of the event."¹¹⁰ Similarly, the Minnesota Protocol requires the undertaking of a "post-operation assessment to establish the facts, including the accuracy of the targeting", when during the conduct of hostilities casualties result from an attack and it is necessary to ascertain whether a criminal investigation should be opened.¹¹¹

Israel's State Comptroller, in its capacity as the ombudsperson, found numerous flaws with regard to the FFAM's inquiry into Operation "Protective Edge." First, the FFAM remains subordinated to the IDF Chief of General Staff, of which it is therefore not independent. Second, shortcomings existed in respect of the impartiality of the FFAM as well as the thoroughness and effectiveness of its work. Third, in 80 percent of cases the length of time necessary to the FFAM to examine the events exceeded the time limits provided by law. Fourth, it was not envisaged that the MAG's decision on the opening of investigations and their findings be published.¹¹² The Office of the High Commission for Human Rights (OHCHR) raised concern regarding the "quality of the Military Advocate General's decisions concerning possible criminal behaviour in relation to the cases referred to him", also in light of the fact that the FFAM examination does not encompass whether IDF orders and procedures comply with international law.¹¹³ In light of this, the OHCHR questioned whether the FFAM "meets accountability requirements under international law", raising concern about its employment in relation to the "Great March of Return" in Gaza as well.¹¹⁴

The FFAM fails to meet the requirements of independence, impartiality, promptness, thoroughness and transparency required for inquiries that may lead to a full investigation of potential violations of the Covenant. Although the inquiry of the FFAM differs from a full criminal investigation, in certain circumstances it remains a necessary step to ascertain whether the grounds for opening an investigation exist. Hence, the FFAM should be completely independent of the IDF, and its inquiries should be conducted impartially and with the necessary promptness and thoroughness.

In light of the above, the ICJ calls on the Israeli authorities to:

- **Enact domestic legislation to establish criminal liability and corresponding sanctions consistent with the doctrine of superior responsibility;**
- **Transfer the institutional competence to investigate and prosecute alleged crimes under international law committed by IDF members from the MAG to a civilian authority, and limit the MAG's competence in respect of enforcing criminal**

¹⁰⁸ IDF, *Operation Protective Edge: Investigation of exceptional incidents* (2015), at <https://mfa.gov.il/MFA/ForeignPolicy/IsraelGaza2014/Pages/Operation-Protective-Edge-Investigation-of-exceptional-incidents-Update-4.aspx>.

¹⁰⁹ IDF, *Gaza Border Events: Questions & Answers*, p. 93.

¹¹⁰ Turkel Commission, *Second Report*, pp. 102-103, 378-384.

¹¹¹ *The Minnesota Protocol on the Investigation of Potentially Unlawful Death*, para. 21.

¹¹² Israel State Comptroller, *Report on Operation "Protective Edge"* (2014), pp. 129-130.

¹¹³ *Ensuring accountability and justice for all violations of international law in the Occupied Palestinian Territory, including East Jerusalem* A/HRC/40/43 (2019), para. 12.

¹¹⁴ *Ibid.*, para. 15.

- jurisdiction against IDF members to military and disciplinary offences not constituting human rights violations;**
- **Reform the laws and institutions governing the initiation of an investigation, in particular:**
 - **Prescribe the opening of an investigation into all incidents involving the use of firearms by the IDF in the OPT, particularly when resulting in a potentially unlawful death or serious injury;**
 - **Repeal the “real combat nature” clause as a ground to exclude the initiation of an investigation;**
 - **Ensure that “operational debriefings” do not hinder the decision on whether to open a criminal investigation into crimes allegedly committed by IDF members;**
 - **Reform the FFAM to guarantee its independence from the IDF, as well as the impartiality, promptness and thoroughness of its inquiries.**