

---

# **EXTRAJUDICIAL KILLING WITH NEAR IMPUNITY: EXCESSIVE FORCE BY ISRAELI LAW ENFORCEMENT AGAINST PALESTINIANS**

**Emily Schaeffer Omer-Man\***

---

I.	INTRODUCTION .....	116
II.	RECENT ALLEGED EXTRAJUDICIAL KILLINGS IN ISRAEL- PALESTINE .....	119
III.	A PATTERN OF EXCESSIVE FORCE AGAINST PALESTINIANS .....	135
	A. <i>Arenas of Excessive Violence against Palestinians</i> .....	136
	B. <i>The Disparity in Law Enforcement Responses to Palestinians versus Jews</i> .....	140

---

\* The author holds a JD from the University of California, Berkeley School of Law (Boalt), and is an American-Israeli human rights attorney at the Michael Sfard Law Office in Tel Aviv, where she currently serves as senior counsel and acting director. She has been a member of the legal team of Israeli human rights NGO, Yesh Din, for over a decade, and for the last eight years has served as Legal Director of the organization's Accountability of Security Personnel project. In that capacity, she has represented over 500 Palestinian victims of alleged crimes committed against them or their property by Israeli police, soldiers, and other security personnel. The author is also a legal advisor to Israeli NGOs Breaking the Silence and Peace Now, among others, and represents individuals and communities in bringing human rights claims before the Israeli courts, specializing in International Humanitarian Law and International Human Rights Law and their application to the territories occupied by Israel in 1967. The author wishes to express her gratitude to Shelley Cavalieri, Miri Sharon and Michael Schaeffer Omer-Man for their excellent comments and feedback on previous drafts of this Article, as well as to the remarkable editors of the Boston University International Law Journal for their collaboration on this project and their dedication to bringing this important issue to light. This Article is based on the author's presentation as part of a panel on March 24, 2016, "Police Violence against Ethnic/Racial Minorities," co-sponsored by Harvard's Black Law Students Association and organized by Roi Bachmutsky, to whom she owes a personal debt of thanks. The Symposium was co-sponsored by the Boston University International Law Journal, along with the Dean of Students Grant Fund, the HLS International Human Rights Clinic, the Harvard Women's Law Association, and the Harvard Black Law Students Association. The analysis and opinions expressed in this Article do not represent those of any organization or institution but rather reflect those of the author alone.

<b>IV. LACK OF ACCOUNTABILITY FOR VIOLENCE AGAINST PALESTINIANS .....</b>	<b>143</b>
A. <i>The Duty to Investigate under International Humanitarian Law and International Human Rights Law .....</i>	145
B. <i>Israel's Mechanisms of Investigation and Accountability .....</i>	148
C. <i>Improved Accountability or Cushioning from External Scrutiny? .....</i>	151
D. <i>Lack of Accountability Perpetuates Violence .....</i>	155
<b>V. CONCLUSION .....</b>	<b>156</b>

## I. INTRODUCTION

In the midst of the debate in the United States over police killings of people of color reinforced by the Black Lives Matter movement, the news media outlets have been ablaze since the fall of 2015 over alleged extrajudicial killings of Palestinians suspected of attacking Israelis.<sup>1</sup> The current wave of violence in Israel and the occupied Palestinian territories<sup>2</sup>—often dubbed the “Knife Intifada,” or the “Intifada of Individuals,” because it is primarily characterized by unorganized, “lone-wolf” stabbings and stabbing attempts by non-affiliated individuals—purportedly began on October 1, 2015.<sup>3</sup> Since then, and as of this writing, these

<sup>1</sup> See e.g., Samira Said, Jethro Mullen & Greg Botelho, *At least 7 people reported killed, 90 injured in Israel-Palestinian violence*, CNN (Oct. 9, 2015), <http://www.cnn.com/2015/10/09/middleeast/israeli-palestinian-violence/>; *Israeli Police Say They Killed Palestinian Attempting Ramming Attack*, NBC News (Dec. 25, 2015), <http://www.nbcnews.com/news/world/israeli-police-say-they-killed-palestinian-attempting-ramming-attack-n485951>.

<sup>2</sup> In addition to the various wars that have taken place on Israeli and Palestinian soil since Israel’s founding in 1948, the region regularly undergoes periods of increased violence, including during Israeli military operations in Gaza or the West Bank, Israeli civilian attacks against Palestinians, and Palestinian attacks against Israelis by either organized militant groups or unorganized, ideologically motivated individuals. See, e.g., Peter Beaumont, *Israel-Palestine: Outlook bleak as wave of violence passes six-month mark*, THE GUARDIAN (Mar. 31, 2016), <https://www.theguardian.com/world/2016/mar/31/israel-palestine-violence-knife-attacks-west-bank-gaza> (lamenting latest “deadly wave of violence between Palestinians and Israelis that has been referred to as the ‘knife intifada’ shows no sign of ending”).

<sup>3</sup> This latest wave of violence is considered by most to have been ignited on October 1, 2015, with the murder of two Jewish Israeli residents of the Northern West Bank Settlement of Neria by Palestinian gunmen near the West Bank town of Beit Furik. Judah Ari Gross & Times of Israel Staff, *Israeli mother and father shot dead in West Bank terror attack*, TIMES OF ISR. (Oct. 1, 2015), <http://www.timesofisrael.com/two-seriously-wounded-in-west-bank-terror-attack/>. The gunmen allegedly told interrogators that they had sought revenge for the recent arson murder of a Palestinian family in the West Bank. See ISRAEL MINISTRY OF FOREIGN AFFAIRS,

Palestinian attacks have killed some thirty-five Israelis and two foreign citizens.<sup>4</sup> The vast majority of these attacks have taken place in the West Bank or East Jerusalem, and while civilians represent a majority of the victims, police and soldiers have been more frequently targeted in the attacks.<sup>5</sup> In response, at least 155 Palestinians, who Israel claims carried out or attempted stabbing or similar attacks, have been killed, many of whom were minors.<sup>6</sup>

---

*Wave of Terror 2015/16* (Nov. 1, 2016), [hereinafter Israel MFA, *Wave of Terror*] <http://mfa.gov.il/MFA/ForeignPolicy/Terrorism/Palestinian/Pages/Wave-of-terror-October-2015.aspx>; Elisha Ben Kimon, Itay Blumental & Rotem Elizera, *Eitam and Na'ama Henkin murdered in West Bank terror attack*, YNET News (Oct. 1, 2015), <http://www.ynetnews.com/articles/0,7340,L-4706203,00.html>; Times of Israel Staff, *Henkin Killers: Murders were revenge for Duma attack*, TIMES OF ISR. (Nov. 2, 2015), <http://www.timesofisrael.com/henkin-killers-murders-were-revenge-for-duma-attack/>; *Palestinian baby burned to death in settler attack*, AL JAZEERA (July 31, 2015), <http://www.aljazeera.com/news/2015/07/palestinian-baby-burned-death-extremist-attack-150731035331224.html> (discussing the Duma arson murder of the Dawabshe family).

<sup>4</sup> Israeli civilians killed by Palestinians in the West Bank, after operation Cast Lead, B'TSELEM [hereinafter B'TSELEM, Israeli Civilians Killed by Palestinians in the West Bank], <http://www.btselem.org/statistics/fatalities/after-cast-lead/by-date-of-event/westbank/israeli-civilians-killed-by-palestinians> (last visited Nov. 30, 2016); Israeli civilians killed by Palestinians in Israel, after operation Cast Lead, B'TSELEM [hereinafter B'TSELEM, Israeli Civilians Killed by Palestinians in Israel], <http://www.btselem.org/statistics/fatalities/after-cast-lead/by-date-of-event/israel/israeli-civilians-killed-by-palestinians> (last visited Nov. 30, 2016); Israel MFA, *Wave of Terror*, *supra* note 3; Chloe Benoit, *Death in Numbers: A year of violence in the occupied Palestinian territory and Israel*, MA'AN News (Oct. 4, 2016), [hereinafter MA'AN News, *Death in Numbers*] <http://www.maannews.com/Content.aspx?id=773407>.

<sup>5</sup> B'Tselem data (based primarily on media reports and IDF Spokesperson announcements) indicates at least a 2:1 ratio of Palestinian attackers and allegedly targeting security personnel versus civilians. B'TSELEM, *Israeli Civilians Killed by Palestinians in the West Bank*, *id*; B'TSELEM, *Israeli Civilians Killed by Palestinians in Israel*, *id*; Israeli security force personnel killed by Palestinians in the West Bank, after operation Cast Lead, B'TSELEM, <http://www.btselem.org/statistics/fatalities/after-cast-lead/by-date-of-event/westbank/israeli-security-force-personnel-killed-by-palestinians> (last visited Nov. 30, 2016); Israeli security force personnel killed by Palestinians in Israel, after operation Cast Lead, B'TSELEM, <http://www.btselem.org/statistics/fatalities/after-cast-lead/by-date-of-event/israel/israeli-security-force-personnel-killed-by-palestinians> (last visited Nov. 30, 2016); Israel MFA, *Wave of Terror*, *supra* note 3.

<sup>6</sup> Between October 1, 2015 and November 30, 2016, B'Tselem reported 156 killings of Palestinians who allegedly attempted or committed attacks against Israelis in the West Bank and East Jerusalem, not including during clashes or exchanges of fire, 122 of which allegedly took place during stabbings specifically. Among those Palestinians killed during alleged attacks, primarily stabbings and some vehicular attacks, 37 were minors. *Fatalities after Operation Cast Lead*, B'TSELEM, <http://www.btselem.org/statistics/fatalities/after-cast-lead/by-date-of-event> (noting numbers of Palestinians killed by Israeli security forces and by Israeli civilians in the West Bank and Israel). As of Nov. 30, 2016, six of these killings were committed by Israeli civilians in Israel,

The situation certainly warrants a robust security response. Yet, while the circumstances of each incident must be examined separately, reports by media, human rights organizations, and even the police elicit concern about whether many of the killings of Palestinian assailants were necessary or lawful under International Law and Israeli domestic legal standards. In other words, real questions arise about whether the use of force was warranted—whether the suspect posed such a threat at the time she or he was shot as to justify extrajudicial killing or could instead have been neutralized and granted judicial process.

However, despite the recent attention paid to this issue because of the frequency, of media coverage, and criticism of these incidents,<sup>7</sup> none of these questions is new. Israeli security personnel—within Israel and in the occupied territories—have long used excessive force against Palestinians in ways that are not only disproportionate, but unfathomable in comparison to the manner in which the vast majority of Jewish citizens are treated. At the same time, law enforcement personnel remain largely unaccountable for their actions, and Palestinians have few means of challenging the patterns of excessive force against them. Public outcry over the April 2016 indictment and subsequent conviction of Israeli Sergeant

---

the West Bank, and East Jerusalem in response to attacks by Palestinians, and nine were killed by private security guards rather than by state security forces; in one case the source of the fatal force is unknown as border police, private guards and civilians fired simultaneously. *Id.* Ma'an News Agency reported the killing of 235 Palestinians in total between October 1, 2015 and October 4, 2016 (including in the West Bank, East Jerusalem, Israel and Gaza), among whom 159 were killed during alleged attacks, 122 of which were reportedly stabbing attacks. According to Ma'an's figures, a quarter (sixty) of the Palestinians killed during the same time period were minors; these figures do not differentiate between deaths during clashes or exchanges of fire and stabbing/vehicular attacks. MA'AN NEWS, *Death in Numbers*, *supra* note 4.

<sup>7</sup> See, e.g., Memorandum: Lethal Force and Accountability for Unlawful Killings By Israeli Forces in Israel and the Occupied Palestinian Territories, AMNESTY INT'L (Sept. 28, 2016), <https://www.amnesty.org/en/documents/mde15/4812/2016/en/>; Israeli forces in Occupied Palestinian Territories must end pattern of unlawful killings, AMNESTY INT'L (Oct. 27, 2015), <https://www.amnesty.org/en/latest/news/2015/10/israeli-forces-must-end-pattern-of-unlawful-killings-in-west-bank/>; World Report 2016, Israel/Palestine: Events of 2015, HUM. RTS. WATCH (Jan. 2016), <https://www.hrw.org/world-report/2016/country-chapters/israel/palestine>; U.N. expert decries Israeli soldier's killing of Palestinian attacker, REUTERS (Mar. 30, 2016), <http://www.reuters.com/article/us-israeli-palestinians-un-idUSKCN0WW204>; Michael Wilner & Lahav Harkov, US senator calls on Kerry to probe Israel for rights violations, THE JERUSALEM POST (Mar. 30, 2016), <http://www.jpost.com/Israel-News/Netanyahu-answers-US-senator-IDF-soldiers-dont-execute-palestinians-449752>; Sweden demands probe of Israeli 'extrajudicial executions,' TIMES OF ISR. (Jan. 12, 2016), <http://www.timesofisrael.com/sweden-demands-probe-of-israeli-extrajudicial-executions/>.

Elor Azaria for the killing of a Palestinian assailant<sup>8</sup> highlights both the rarity of prosecution of these incidents and the sense of impunity it creates among security forces tasked with policing Palestinians.

In this Article, I consider the extrajudicial killing of, and use of excessive force against, Palestinians within the framework of International Law relevant to a situation of occupation. This Article challenges the oft-spoused axiom that “it’s different” in the Israeli-Palestinian context because coping with terrorism requires different rules and means of quelling violence. Ultimately, this Article raises the question of whether Palestinians’ lack of security is a precondition for Israelis’ security.

Part I provides an overview of the cultural and legal issues relevant to extrajudicial killing in the Israeli-Palestinian context, highlighting as examples the facts of several cases of killings of Palestinians who had attacked or who allegedly had planned to attack security personnel or Israeli civilians. Part II surveys the broader context of violence perpetrated against Palestinians under occupation in the West Bank and East Jerusalem, emphasizing how Israel fails to provide Palestinians with protection from such violence and its implications under International Law. Part II also reviews the relevant rules of engagement, in theory and in practice, and discusses their disparate implementation toward Palestinians versus Israelis. Part III evaluates the limited extent to which Israeli security personnel are held accountable for causing harm to Palestinian civilians. It compares the tools for accountability and deterrence available in Israel with international legal standards of investigation and prosecution, and also discusses the dearth of genuine attempts to reform the system. This Article closes by drawing conclusions about the feasibility of a state of protection for Palestinians under International Humanitarian Law (“IHL”), in the context of a near-half-century of Israeli occupation.

## II. RECENT ALLEGED EXTRAJUDICIAL KILLINGS IN ISRAEL-PALESTINE

According to its most basic definition, extrajudicial killing is the intentional killing of a person by a state actor without express authorization from a court of law following full due process, or outside the framework

<sup>8</sup> See, e.g., Yotam Berger, *Clashes as Hundreds Protest, Block Roads Outside of Hebron Shooter Elor Azaria's Trial*, HAARETZ (Jan. 4, 2017), <http://www.haaretz.com/israel-news/1.762959>; Peter Beaumont, *Netanyahu backs calls for convicted Israeli soldier to be pardoned*, THE GUARDIAN (Jan. 4, 2017), <https://www.theguardian.com/world/2017/jan/04/israeli-soldier-guilty-manslaughter-shooting-palestinian-elor-azar-ia-abdel-fattah-al-sharif>; Rami Amichai, *Thousands rally to call for release of Israeli soldier who shot Palestinian assailant*, REUTERS (Apr. 19, 2016), <http://www.reuters.com/article/us-israel-palestinians-soldier-idUSKCN0XG2N2>; Lisa Goldman, *Israel Rallies Around ‘Killer’ Soldier*, THE DAILY BEAST (Apr. 4, 2016), <http://www.thedailybeast.com/articles/2016/04/04/israel-rallies-around-killer-soldier.html>.

of permitted killing under International Law.<sup>9</sup> According to section 1350 (Alien's action for tort) of the U.S. Torture Victims Protection Act, extrajudicial killing is defined as:

[A] deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples. Such term, however, does not include any such killing that, under international law, is lawfully carried out under the authority of a foreign nation.<sup>10</sup>

By contrast, International Law does not contain a specific definition for the term, but arbitrary killing, or killing without proper legal authority, is generally condemned by the international community, and the prohibition thereof can be found in the various bodies of IHL and International Human Rights Law ("IHRL").<sup>11</sup>

As such, extrajudicial killing excludes a killing that is considered legal under the circumstances, such as out of necessity in a law enforcement context or in a situation of war or occupation where the killing falls under the rules of IHL—the present context. For a killing to be considered legal under IHL, the subject of the killing must fall into one of three categories.

The first category, where the subject of the killing is a legitimate military target because she is a combatant or a civilian directly participating in hostilities ("DPHing"), is considered a legal killing.<sup>12</sup> According to

<sup>9</sup> Torture Victim Protection Act, Pub. L. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 (2006)) (providing the definition for extrajudicial killing under § 3(a)).

<sup>10</sup> *Id.*

<sup>11</sup> See, e.g., Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention]; Universal Declaration of Human Rights art. 3, Dec. 10, 1948 G.A. Res. 217, U.N. GAOR, 3d Sess., U.N. Doc. A/810 [hereinafter UDHR]; International Covenant on Civil and Political Rights art. 6, Dec. 16, 1966, 999 U.N.T.S. 174-75 [hereinafter ICCPR]. Similar expression of the prohibition is contained in the following regional agreements: American Declaration on the Rights and Duties of Man art. 1, May 2, 1948, OAS Res. XXX, the American Convention on Human Rights art. 4, Nov. 22, 1969, O.A.S.T.S. No. 36; Convention for the Protection of Human Rights and Fundamental Freedoms art. 2, Nov. 4, 1950, 23 U.N.T.S. 221 [hereinafter ECHR]; African Charter on Human Rights and Peoples' Rights art. 4, June 27, 1981, 1520 U.N.T.S. 217. Scholars have discussed extrajudicial killings generally under International Law. See Michael N. Schmitt, *State Sponsored Assassination in International and Domestic Law*, 17 YALE J. INT'L L. 609 (1992); Erin Creegan, *Criminalizing Extrajudicial Killings*, 185 DENV. J. INT'L L. & POL'Y 41 (2013) [hereinafter Creegan, *Criminalizing Extrajudicial Killings*].

<sup>12</sup> Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 3, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.S.T. 31; INT'L COMM. OF THE RED CROSS, Civilians' Loss of Protection from Attack, *Customary IHL Database* (Oct. 2, 2016), <https://ihl-databases.icrc.org/customary-ihl/eng/docs/>

IHL, a civilian who is not a member of an organized armed force, but who directly participates in, assists, or otherwise joins the hostilities taking place between warring, or “belligerent,” parties loses her protection as a civilian and becomes a legitimate military target for the duration of the specific act of participation in hostilities.<sup>13</sup> A civilian who is DPHing differs from a member of an organized armed group, whom IHL considers a legitimate military target for the entire period in which she holds her continuous combat function.<sup>14</sup> This rule represents a unique exception to the supreme “principle of distinction” of IHL, which obligates the parties to an armed conflict to distinguish between combatants and civilians at all times.<sup>15</sup> It is important to note in the present context that individual attacks committed by unaffiliated assailants, whether against civilians or security personnel (with few possible exceptions) do not meet the definition of civilians DPHing.<sup>16</sup> Thus, these situations need to be analyzed as law enforcement incidents, as explored below.<sup>17</sup>

The second category rendering a killing legal under IHL involves a situation in which a civilian constitutes “reasonable” and proportionate collateral damage in a military act that itself was legitimate under IHL and which represented the least harmful means of achieving the legitimate

---

v1\_rul\_rule6; NILS MELZER, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW (2010) [hereinafter ICRC Interpretive Guidance]. *C.f.* HCJ 769/02 Public Committee Against Torture in Israel v. Government of Israel, PD 62, 507 (2006) (Isr.) [hereinafter PCATI Targeted Killings Case].

<sup>13</sup> See sources cited *supra* note 12.

<sup>14</sup> *Id.*

<sup>15</sup> Distinction in this context means that military operations are to be directed against military targets only (combatants and enemy property considered legitimate targets under the related rules). See Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts art. 48, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I]; CIHL Rule 1, *ICRC Customary IHL Database* (Oct. 2, 2016) [hereinafter CIHL Rule 1]; Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996, I.C.J. Rep. 1996, 226 [hereinafter ICJ Nuclear Weapons Case].

<sup>16</sup> See ICRC Interpretive Guidance, *supra* note 12. Even in cases in which a Palestinian assailant in the current context in the West Bank or East Jerusalem might be properly considered a DPH, she is only subject to direct attack for the limited time during which she is participating in the hostilities. See PCATI Targeted Killings Case, *supra* note 12, at ¶ 40. Additionally, the force used against her must be limited to what is absolutely necessary in order to prevent harm to security personnel and those in the vicinity, as in any military necessity and proportionality assessment. *Id.* According to international legal scholars, IHL text, and *opinio juris*, when a civilian’s status is in question, the burden is on the attacking force to carefully assess whether the civilian is a legitimate target, and when doubt remains, she must be treated as a civilian. *Id.*; ICRC Interpretive Guidance, *supra* note 12, at 16; AP I, *supra* note 15, at art. 50(1).

<sup>17</sup> ICRC Interpretive Guidance, *supra* note 12.

military objective.<sup>18</sup> This situation arises regularly in armed conflict situations where civilians are present near combatants or military targets, such as bases, armories, or infrastructure of military significance.<sup>19</sup>

The third category of legitimate killings under IHL are those that take place in a policing context, namely under occupation, in which the use of lethal force against a civilian is justified because she posed an immediate threat to the life or limb of law enforcement personnel or others in direct proximity.<sup>20</sup> This legitimization of killing in the context of occupation is counterbalanced by the Occupying Power's authority and duty to police the occupied territory,<sup>21</sup> a fundamental principle of IHL.<sup>22</sup> Enshrined in Article 43 of the Hague Regulations, this principle obligates the Occupying

<sup>18</sup> In order to constitute reasonable collateral damage under IHL, the following situations must be cumulatively met: First, a legitimate military target (either a person or object) must have been attacked as part of a legitimate military objective. See CIHL Rules 13-15, *ICRC Customary IHL Database* (Oct. 2, 2016); AP I, *supra* note 15, at arts. 48, 51 (and especially 51 (5)(b)), 57, and 58; Fourth Geneva Convention, *supra* note 11, at art. 3; ICJ Nuclear Weapons Case, *supra* note 15, at 587.

Second, the principle of distinction between military targets and civilians must have been followed to the fullest extent possible. See CIHL Rules 13-15, *ICRC Customary IHL Database* (Oct. 2, 2016); AP I, *supra* note 15, at arts. 48, 51 (and especially 51 (5)(b)), 57, and 58; Fourth Geneva Convention, *supra* note 11, at art. 3; ICJ Nuclear Weapons Case, *supra* note 15, at 587;

Third, precautionary measures must have been taken in order to reduce injury and loss of civilian life to the greatest extent feasible. See CIHL Rules 13-15, *ICRC Customary IHL Database* (Oct. 2, 2016); AP I, *supra* note 15, at arts. 48, 51 (and especially 51 (5)(b)), 57, and 58; Fourth Geneva Convention, *supra* note 11, at art. 3; ICJ Nuclear Weapons Case, *supra* note 15, at 587.

Fourth and finally, the degree of damage or deaths caused to the civilians must have not exceed the concrete and direct military advantage that was to be gained by carrying out the operation, and the particular operation must have been the least harmful means of achieving the objective. See CIHL Rules 13-15, *ICRC Customary IHL Database* (Oct. 2, 2016); AP I, *supra* note 15, at arts. 48, 51 (and especially 51 (5)(b)), 57, and 58; Fourth Geneva Convention, *supra* note 11, at art. 3; ICJ Nuclear Weapons Case, *supra* note 15, at 587. When these elements are not present, the act may constitute a violation of IHL and even a grave breach of article 85(3)(b) of the Additional Protocol I.

<sup>19</sup> See generally Bruce Cronin, *Reckless endangerment warfare: Civilian casualties and the collateral damage exception in international humanitarian law*, 50 J. PEACE RES. 175, 175-187 (Feb. 12, 2013).

<sup>20</sup> See Philip Alston, Report of the Special Rapporteur on extrajudicial, summary, or arbitrary executions: Study on Police Oversight Mechanisms, ¶ 8 U.N. Doc. A/HRC/14/24/Add.8 (2010) [hereinafter *Study on Police Oversight Mechanisms*]. This point is explored in greater detail later in the article. See discussion *infra* Part III.

<sup>21</sup> The Occupying Power may police the occupied territory via its military or police subordinate thereto. Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (Oct. 18, 1907) [hereinafter Hague Regulations]. According to several scholars, the term "safety" was a mistranslation from the French "la vie publics" and therefore

ing Power “to restore and ensure, as far as possible, public order and safety.”<sup>23</sup> Numerous judgments from the Israeli High Court of Justice reflect the position that the West Bank (excluding East Jerusalem) is occupied and that the Hague Regulations of 1907 and the “humanitarian provisions” of the Fourth Geneva Convention apply, both from the perspective of the State and that of the Court.<sup>24</sup>

The debate on extrajudicial killing in Israel over the last two decades has focused primarily on what have been euphemized as “targeted killings,” referring to the planned execution of selected leaders of terrorist cells based on intelligence information.<sup>25</sup> This practice is well known in the American context as well, conjuring images of drone assassinations in

---

should be replaced with “civil life.” See EYAL BENVENISTI, THE INTERNATIONAL LAW OF OCCUPATION 7 (1993).

<sup>22</sup> See sources cited *supra* note 21.

<sup>23</sup> *Id.*

<sup>24</sup> See, e.g., HCJ 3278/08, HaMoked-Center for the Defence of the Individual v. IDF Commander in the West Bank, 57(1) PD 385, 396-97 (2002) (Isr.); HCJ 5591/02, Yasmin v. The Commander of Ketziot Military Camp, 57(1) PD 403, 413 (2002) (Isr.); HCJ 7015/02, Kifah Mohammed Ahmed Ajuri v. IDF Commander in the West Bank, 57(6) PD 352, 364 (2002) (Isr.); HCJ 7957/04, Zaharn Yunnes Mohammed Marabe v. The Prime Minister of Israel, 60(2) PD 477, ¶ 14 (2005) (Isr.) [hereinafter Marabe]; PCATI Targeted Killings Case, *supra* note 12 at ¶ 20. Cf., e.g., *DISPUTED TERRITORIES: Forgotten Facts About the West Bank and Gaza Strip*, ISRAEL MINISTRY OF FOREIGN AFFAIRS (Feb. 1, 2003), <http://www.mfa.gov.il/MFA/MFA-Archive/2003/Pages/DISPUTED%20TERRITORIES-%20Forgotten%20Facts%20About%20the%20We.aspx>; *Israeli Settlements and International Law*, ISRAEL MINISTRY OF FOREIGN AFFAIRS (Nov. 30, 2015), <http://www.mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/israeli%20settlements%20and%20international%20law.asp>; *The Levy Commission Report on the Legal Status of Building in Judea and Samaria* (June 21, 2012) (Isr.), <http://pmo.gov.il/Documents/doch90712.pdf>.

<sup>25</sup> See, e.g., Philip Alston, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions: Addendum Study on Targeted Killings, U.N. Doc. A/HRC/14/24/Add.6 (May 28, 2010) [hereinafter *UN Addendum Study on Targeted Killings*]; Yossi Melman, *The pros and cons of targeted killings*, THE JERUSALEM POST (Aug. 22, 2014), <http://www.jpost.com/Not-Just-News/DIPLOMACY-The-pros-and-cons-of-targeted-killings-371921>; Roni Sofer, *Report: Shehadeh killing legitimate; civilian deaths due to intel failure*, YNET News (Feb. 27, 2011), <http://www.ynetnews.com/articles/0,7340,L-4035172,00.html>; Dani Izenberg, *Petitioners agree to gov't inquiry into Shehadeh assassination*, THE JERUSALEM POST (Oct. 29, 2007), <http://www.jpost.com/Israel/Petitioners-agree-to-govt-inquiry-into-Shehadeh-assassination>; *Debate in Israel on the Question of Gestures to the Palestinian Government*, NANA 10 NEWS (May 9, 2003), <http://news.nana10.co.il/Article/?ArticleID=64605>; Gil Sedan, *More debate over Israel's 'targeted killings'*, JEWISH TELEGRAPHIC AGENCY (Oct. 22, 2001), <http://www.jta.org/2001/10/22/life-religion/features/more-debate-over-israels-targeted-killings>; Moshe Goreli, *Assassinations Like Shaking*, GLOBES (Aug. 5, 2001), <http://www.globes.co.il/news/article.aspx?did=511241>.

Pakistan, Yemen, Syria, and elsewhere.<sup>26</sup> In addition to doubts about the legality under IHL of the assassination of an individual at a time when she is not engaged in any form of combat, both the United States and Israel have been subject to harsh criticism for the deaths of innocent bystanders to these operations and unjustified killings based on misinformation regarding identity or targets.<sup>27</sup>

The practice of targeted killings of civilians was challenged before the Israeli Supreme Court in 2002 in a case brought by the Public Committee against Torture in Israel and the Palestinian Society for the Protection of Human Rights and the Environment (“LAW”).<sup>28</sup> In a 2006 judgment, the Court upheld the legality of the policy under International and domestic law but narrowed its permissible scope, reasoning that the policy could be justified only where Israeli security forces had no opportunity to apprehend the target.<sup>29</sup> In a landmark judgment, the Court rejected the State’s contention that terrorists were “unlawful combatants” subject to legitimate attack at any time.<sup>30</sup> Instead, the Court held that terrorists are civilians and therefore targeting them for attack is only permitted under IHL when they are DPHing.<sup>31</sup> The Court also expanded the “for such time” rule regarding civilians DPHing in cases of repeated or “revolving door” direct participation.<sup>32</sup> The Court concluded that targeted killing could be

<sup>26</sup> For more on this topic see Jeremy Scahill, *The Assassination Complex*, THE INTERCEPT (Oct. 15, 2015), <https://theintercept.com/drone-papers/the-assassination-complex/>; *United States of America Visits & Communications*, PROJECT ON EXTRAJUDICIAL EXECUTIONS: CTR. FOR HUM. RTS. AND GLOBAL JUST., NYU SCHOOL OF LAW, <http://www.extrajudicialexecutions.org/unitedstatesofamerica1.html> [hereinafter NYU PROJECT ON EXTRAJUDICIAL EXECUTIONS]. For legal analysis of US targeted killing programs see Philip Alston, *The CIA and Targeted Killings Beyond Borders*, 2 HARV. NAT’L SEC. J. 283 (2011); Afsheen John Radsan & Richard Murphy, *Measure Twice, Shoot Once: Higher Care for CIA-Targeted Killing*, 11 U. ILL. L. REV. 1201 (2011).

<sup>27</sup> See Yemen conflict: Wedding attack death toll rises to 130, BBC (Sept. 29, 2015), <http://www.bbc.com/news/world-middle-east-34388463>; Obama says U.S. drone strikes killed civilians ‘that shouldn’t have been,’ ASSOCIATED PRESS (Apr. 2, 2016), <http://pbs.org/newshour/rundown/obama-says-u-s-drone-strikes-killed-civilians-that-shouldnt-have-been/>. For a critique of US targeted killing policy see AMNESTY INT’L, United States of America: ‘Targeted killing’ policies violate the right to life, AI Index AMR 51/047/2012 (June 15, 2012). For challenges to Israel’s targeted killing policy, see HCJ 8794/03, Yoav Hass v. the Military Advocate General (2008) (published in Nevo) (Isr.); Orna Ben-Naftali & Keren Michaeli, “We Must Not Make a Scarecrow of the Law”: A Legal Analysis of the Israeli Policy of Targeted Killings, 36 CORNELL INT'L. L. J. 233 (2003).

<sup>28</sup> PCATI Targeted Killings Case, *supra* note 12.

<sup>29</sup> *Id. at passim*; *Id.* (Beinisch, J., concurring).

<sup>30</sup> *Id.*

<sup>31</sup> *Id. See AP I, supra* note 15; CIHL Rule 1, *supra* note 15; ICJ Nuclear Weapons Case, *supra* note 15.

<sup>32</sup> PCATI Targeted Killings Case, *supra* note 12, at ¶¶ 38-40.

determined to be legal under applicable law on a case-by-case basis upon fulfillment of four cumulative conditions. First, the IDF or targeting forces must have adequately verified the identity of the target and the factual basis for classifying the target under the “direct participation” standard. Second, the targeting forces must not kill the person if less harmful means exist (including arrest without presenting real risk to the targeting forces and a reduction in risk to innocent civilians). Third, any harm caused to civilians as collateral damage must meet the standards of proportionality according to IHL. Fourth, following each targeted killing, a thorough, independent investigation must analyze the accuracy in identification of the target and the circumstances of the attack.<sup>33</sup> Despite this ruling, in 2010, classified IDF documents obtained by Israeli whistleblower Anat Kamm suggested that the unlawful use of the practice had continued in several instances in the West Bank, under the guise of “failed arrest attempts” that resulted in circumstances leading to the death of the target.<sup>34</sup>

Of course, Israel does not hold the monopoly on extrajudicial killing, and the Palestinian Authority’s (“PA”) practice of executing Palestinians without trial or with inadequate due process, particularly those accused of collaborating with Israel, is well-documented.<sup>35</sup> While the practice has

---

<sup>33</sup> *Id. at passim; Id.*, (Beinisch, J., concurring).

<sup>34</sup> Since the December 2006 High Court decision, some seventy-seven Palestinians have been targeted in such assassinations in the Gaza Strip (this figure excludes civilian collateral damage). *Statistics: Fatalities after Operation Cast Lead*, B’TSELEM, <http://www.btselem.org/statistics/fatalities/after-cast-lead/by-date-of-event> (last visited Nov. 5, 2016); *Statistics: Fatalities during Operation Cast Lead*, B’TSELEM, <http://www.btselem.org/statistics/fatalities/during-cast-lead/by-date-of-event> (last visited Nov. 5, 2016); *Statistics: Fatalities before Operation Cast Lead*, B’TSELEM, <http://www.btselem.org/statistics/fatalities/during-cast-lead/by-date-of-event> (last visited Nov. 5, 2016). Although no targeted killings in the West Bank have been officially reported since the judgment, media reports of a secret targeted killings program in the West Bank, denied by Israeli officials, have been made based on the more than 2 thousand classified documents taken by former IDF soldier Anat Kamm during her military service. Uri Blau, *IDF Ignoring High Court on West Bank Assassinations*, HAARETZ (Nov. 26, 2008), <http://www.haaretz.com/idf-ignoring-high-court-on-west-bank-assassinations-1.258378>; Uri Blau, *License to Kill*, HAARETZ (Nov. 27, 2008), <http://www.haaretz.com/license-to-kill-1.258378>; Uri Blau, *IDF Rejects Claims it Killed Palestinians in Defiance of Court*, HAARETZ (Nov. 27, 2008), <http://www.haaretz.com/idf-rejects-claims-it-killed-palestinians-in-defiance-of-court-1.258323>. Kamm was subsequently charged with aggravated espionage and attempt to harm state security, and she was later convicted of possession and transfer of state secrets and sentenced to four and one-half years in prison. Ofra Edelman, *Ex-Soldier Charged with Espionage for Leaking Documents to Haaretz*, HAARETZ (Apr. 9, 2010), <http://www.haaretz.com/ex-soldier-charged-with-espionage-for-leaking-documents-to-haaretz-1.753>.

<sup>35</sup> See, e.g., “Collaborators” New Impetus for an Old Witch Hunt, PALESTINIAN HUM. RTS. MONITORING GRP. (2002), <http://www.phrmg.org/monitor2002/feb2002-9>

ceased over the last decade in the Fatah-controlled West Bank and under the PA in general,<sup>36</sup> several dozen of these executions have recently taken place under the Hamas government in Gaza, often publicly, via hanging or firing squads.<sup>37</sup> Their frequency increases each time hostilities with Israel renew.<sup>38</sup> During “Operation Protective Edge” in Gaza in July and August of 2014, for instance, the media and international human rights organizations, at the end of July, reported some thirty executions by

.htm; *Execution for Alleged Collaboration*, PALESTINIAN CTR. FOR HUM. RTS. (Dec. 12, 2006), <http://www.pchrgaza.org/Interventions/position%20paper%20-%20execution.pdf>; ABUSIVE SYSTEM: FAILURES OF CRIMINAL JUSTICE IN GAZA, HUM. RTS. WATCH (2012), [http://www.hrw.org/sites/default/files/reports/ipt1012ForUpload\\_0.pdf](http://www.hrw.org/sites/default/files/reports/ipt1012ForUpload_0.pdf).

<sup>36</sup> Since PA President Mahmoud Abbas took office in January of 2005, there have been no executions carried out by the PA. *Death Penalty in the Palestinian Authority and Under Hamas Control*, B’TSELEM (Oct. 16, 2013), [http://www.btselem.org/inter\\_palestinian\\_violations/death\\_enalty\\_in\\_the\\_pa](http://www.btselem.org/inter_palestinian_violations/death_enalty_in_the_pa); *Gaza: Do Not Resume Executions: Hamas Threatens First Use of Death Penalty in Gaza in 5 Years, Despite Unfair Trials*, HUM. RTS. WATCH (Apr. 6, 2010), <https://www.hrw.org/news/2010/04/06/gaza-do-not-resume-executions>. Death sentences continue to be handed down, including for alleged collaboration with Israel, however the sentences are not executed under the PA in the West Bank; such sentences are executed by the Hamas-government in Gaza. See, e.g., *EU lashes out against Palestinian use of capital punishment*, MA’AN NEWS AGENCY (Aug. 28, 2015), <http://www.maannews.com/Content.aspx?id=767306>.

<sup>37</sup> Examples of extrajudicial killing by Hamas gunmen or by hanging for alleged collaboration with Israel are abundant. See, e.g., *PCHR Condemns Extra-Judicial Killings of Persons in Gaza for Alleged Collaboration with Israel*, PALESTINIAN CTR. FOR HUM. RTS. (Nov. 21, 2012), <http://pchrgaza.org/en/?p=1866>; *Gaza: Halt Executions*, HUM. RTS. WATCH (Aug. 25, 2014), <https://www.hrw.org/news/2014/08/25/gaza-halt-executions>; Khaled Abu Toameh, *Five ‘collaborators’ sentenced to death in Gaza*, THE JERUSALEM POST (Apr. 19, 2016), <http://www.jpost.com/Arab-Israeli-Conflict/Five-collaborators-sentenced-to-death-in-Gaza-451642>.

<sup>38</sup> See, e.g., Elhanan Miller, *Hamas said to kill over 30 collaborators with Israel*, TIMES OF ISR. (July 28, 2014) [hereinafter Elhanan Miller, *Hamas killed over 30 collaborators*], <http://www.timesofisrael.com/hamas-said-to-kill-over-30-suspected-collaborators-with-israel/>; ‘Strangling Necks’ Abductions, torture and summary killings of Palestinians by Hamas forces during the 2014 Gaza/Israel conflict, AMNESTY INT’L (May 25, 2015) [hereinafter AMNESTY INT’L, *Strangling Necks*], <https://www.amnesty.org/en/documents/mde21/1643/2015/en/>. Regarding Operations “Cast Lead” and “Pillar of Defense,” of 2008-9 and 2012, respectively, see *Palestinian Authority: Hamas’ deadly campaign in the shadow of the war in Gaza*, AMNESTY INT’L (Feb. 10, 2009), <http://www.amnesty.org/en/library/asset/MDE21/001/2009/en/9f210586-f762-11dd-8fd7-f57af21896e1/mde210012009en.html>; *Under Cover of War*, HUM. RTS. WATCH (Apr. 20, 2009), <http://www.hrw.org/he/node/82437/section/3>; Elior Levy, *‘Collaborators’ executed in Gaza, corpse dragged in street*, YNET (Nov. 20, 2012), <http://www.ynet.co.il/articles/0,7340,L-4309327,00.html>.

Hamas of Palestinians in Gaza suspected of collaborating with the Israeli government.<sup>39</sup>

Israeli and Palestinian human rights NGOs,<sup>40</sup> international organizations,<sup>41</sup> and foreign government representatives,<sup>42</sup> including U.S. members of Congress,<sup>43</sup> have brought accusations of Israel's extrajudicial killing of Palestinians to light. Granted, the lethal responses by law enforcement agents to undeniably stressful situations generally do not contain the extent of planning and deliberation typically present in other extrajudicial killings, such as targeted assassinations or executions without fair trial. Israeli police and soldiers on the scene are required to make split-second assessments of the danger posed by the subject to themselves and others in the vicinity while erring on the side of caution, as a mistake in judgment could cause the loss of life. When it is reasonable to conclude that the subject is capable of, and intends to, cause immediate physical harm to those within close proximity, lethal force is justified and legal under both international and Israeli domestic law.<sup>44</sup>

---

<sup>39</sup> Elhanan Miller, *Hamas killed over 30 collaborators with Israel*, *supra* note 38; AMNESTY INT'L, *Strangling Necks*, *supra* note 38.

<sup>40</sup> See, e.g., TAL DAHAN, SITUATION REPORT: THE STATE OF HUMAN RIGHTS IN ISRAEL AND THE OPT 2015, ASS'N FOR CIVIL RIGHTS IN ISRAEL (Yoana Gonen trans., Dec. 10, 2015), <http://www.acri.org.il/en/wp-content/uploads/2015/12/ACRI-HR-REPORT-2015.pdf>; see also Press Release, Human Rights Organizations in Israel: Politicians' calls to police and soldiers to shoot rather than arrest endorse the killing of Palestinians, B'TSELEM (Oct. 14, 2015) [hereinafter Press Release, B'TSELEM, Israeli Human Rights Groups' Oct. 2015 Statement], [http://www.btselem.org/press\\_releases/20151014\\_summary\\_execution\\_joint\\_statement](http://www.btselem.org/press_releases/20151014_summary_execution_joint_statement); *The Killing of Al-Sharif and Al-Qasrawi in Hebron*, AL-HAQ (Apr. 2, 2016), <http://www.alhaq.org/documentation/weekly-focuses/1037-the-killing-of-al-sharif-and-al-qasrawi-in-hebron>.

<sup>41</sup> See, e.g., AMNESTY INT'L, Israeli forces in Occupied Palestinian Territories must end pattern of unlawful killings, *supra* note 7; HUM. RTS. WATCH, Israel/Palestine: Events of 2015, *supra* note 7; Peter Beaumont, UN envoy condemns Palestinian attacker's 'gruesome' killing by Israeli soldier, THE GUARDIAN (Mar. 25, 2016), <https://www.theguardian.com/world/2016/mar/25/un-envoy-condemns-palestinian-killing-by-israeli-soldier-hebron> (highlighting a statement by Nickolay Mladenov, UN Special Envoy for the Middle East Peace Process, on the Mar. 24, 2016 killing of Abed Al-Fatah Al-Sharif in Hebron.); see also REUTERS, U.N. expert decries Israeli soldier's killing of Palestinian attacker, *supra* note 7.

<sup>42</sup> TIMES OF ISR., *Sweden demands probe of Israeli 'extrajudicial executions'*, *supra* note 7.

<sup>43</sup> Letter from Patrick Leahy et al., Senator, U.S. Congress, to John F. Kerry, Secretary, U.S. Dep't of State (Feb. 17, 2016), <http://www.politico.com/f/?id=00000153-c56c-d662-a75b-cfec6be0000>.

<sup>44</sup> See Hague Regulations, *supra* note 21, at art. 43; CIHL Rule 89, ICRC Customary IHL Database (Oct. 2, 2016), [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule89](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule89); U.N. Secretariat, Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Eighth U.N. Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 Aug. to 7 Sept. 1990, U.N. Doc. A/

However, when an analysis of the situation deduces that non-lethal force could be used to neutralize the subject, thereby preventing further threat and providing the assailant with due process, but the officer nonetheless deliberately uses lethal force, the term, “extrajudicial killing,” may apply to the killing, even without deliberation.<sup>45</sup>

Three salient examples from the past year serve to highlight the central question of whether the killings were justified. If they could have been averted, the question becomes whether the killings raise suspicion of extrajudicial killing. These issues also raise the more fundamental question of whether security personnel, consciously or unconsciously, employ different methods of de-escalation depending on the identity of the suspected or actual assailant, tolerating greater risk to their lives and the lives of those around them or immediately using lethal force depending on which assailant the security personnel is confronting.<sup>46</sup>

The first example occurred on October 4, 2015, mere days after the current wave of attacks began, when police officers repeatedly shot and killed a nineteen-year-old Palestinian teenager, Fadi Alloun, after he allegedly stabbed a fifteen-year-old Jewish boy in East Jerusalem.<sup>47</sup> According to video footage documenting the incident, moments before Alloun was killed, he had been followed by a mob of Jewish Israeli citizens accusing him of being a “terrorist” and shouting at police to shoot him.<sup>48</sup> Police allegedly shot Alloun several times from thirty feet away, without any prior attempt to communicate, warn or apprehend him, or otherwise deescalate the situation.<sup>49</sup> Following a formal complaint launched by the Alloun family, the Police Investigation Unit and State Attorney concluded that the police had acted according to regulation in

Conf.144/28/Rev.1 at 110 (1991) [hereinafter UN Basic Principles on the Use of Force by Law Enforcement 1990]; Special Rapporteur on extrajudicial, summary or arbitrary executions, *Civil and Political Rights, Including the Questions of Disappearances and Summary Executions*, Econ. and Soc. Council, U.N. Doc. E/CN.4/2006/53 ¶ 48 (Mar. 8, 2006) (by Philip Alston); ECHR, *supra* note 11.

<sup>45</sup> See sources cited *supra* note 44.

<sup>46</sup> See *infra* Part III(B).

<sup>47</sup> See, e.g., Omri Efraim & Itay Blumental, *Terror attack wounds teenager overnight*, YNET News (Oct. 4, 2015), <http://www.ynetnews.com/articles/0,7340,L-4706801,00.html>.

<sup>48</sup> See Nir Hasson, *Israel Police Refused to Release Body of Killed Palestinian to Family for Autopsy Before Burial*, HAARETZ (Oct. 11, 2015), <http://www.haaretz.com/israel-news/.premium-1.679831> (linking to footage from the incident); see also Boycottapartheid, *The Shooting of Fadi Alloun*, YOUTUBE (Oct. 9, 2015), <https://www.youtube.com/watch?v=AGGp4e2oUhk> (providing English subtitled video footage).

<sup>49</sup> See Boycottapartheid, *The Shooting of Fadi Alloun*, *supra* note 48; see also Complaint from Adalah & Addameer, local human rights organizations, to Police Investigation Unit, Ministry of Justice (Oct. 10, 2015) [hereinafter Adalah-Addameer Complaint], [http://www.adalah.org/uploads/Alun\\_Final\\_Suhad\\_October\\_2015.pdf](http://www.adalah.org/uploads/Alun_Final_Suhad_October_2015.pdf) (filed on behalf of the Alloun family).

responding to the threat that Alloun allegedly posed at the time he was killed, and, thus, the Police Investigation Unit and State Attorney undertook no criminal investigation.<sup>50</sup> The Alloun family continues to pursue a criminal investigation, claiming that the video footage of the incident suggests that no one was in immediate danger at the time the police shot and killed him and raises questions about whether non-lethal force could have been employed instead, allowing for his arrest and interrogation about the stabbing.<sup>51</sup> Indeed, this case highlights an additional aspect of extra-judicial killing; apart from the potential violation of the basic human rights of the deceased, extrajudicial killing may in fact pose a security risk to the community, as mistaken identity and hair-trigger responses by law enforcement may allow the actual violent assailant to escape.

The second example occurred on March 24, 2016, when two Palestinian men were shot in the West Bank Hebron neighborhood of Tel Rumeida after stabbing and lightly wounding a soldier.<sup>52</sup> One of the assailants, Abed Al-Fatah Al-Sharif, had been shot and neutralized but remained alive.<sup>53</sup> Some time later, unprovoked, another soldier, Sergeant Elor Azaria, shot Al-Sharif directly in the head.<sup>54</sup> The revealing video documentation of this incident led to the prosecution and eventual conviction of Azaria for manslaughter.<sup>55</sup> Following his arrest, segments of the Israeli

---

<sup>50</sup> See Family demands that Israeli Police Investigation Unit “Mahash” investigate police killing of Palestinian youth Fadi Alloun, ADALAH (Oct. 11, 2015), <http://www.adalah.org/en/content/view/8654> (reporting on the complaint filed on behalf of the Allound family). On Apr. 27, 2016, the family’s lawyers were informed that a decision had been made by the Israeli Police Investigation Unit that a criminal investigation would not be opened, *inter alia*: because Alloun’s Facebook profile suggested that he wished to become a “martyr;” because according to video footage and two eye witnesses Alloun approached and threatened the police who arrived on the scene; and, because following his shooting a bloody knife and tear gas canister were found next to his body. Letter from Asaf Savit, Assistant to the State Attorney, to Atty. Suhad Bashara of Adalah and Atty. Mohammed Mahmoud of Addameer (Apr. 27, 2016) (on file with author). Following the decision, Adalah and Addameer requested to review the materials gathered by the unit and on the basis upon which the decision was made not to open a criminal investigation. As of this writing, those materials have yet to be provided to the family’s lawyers. On Sept. 1, 2016, an appeal was filed on behalf of the family appealing the decision not to open an investigation. Letter from Atty. Suhad Badhara of Adalah to the Ministry of Justice, Department of Police Investigations (Sept. 1, 2016) (on file with author).

<sup>51</sup> See sources cited *supra* note 50; Adalah-Addameer Complaint, *supra* note 49.

<sup>52</sup> Indictment of Sergeant Elor Azaria, District Court-Martial, Central District, Case No. Cen./Dist./16, Apr. 18, 2016.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*; see also Video: Soldier executes Palestinian lying injured on ground after the latter stabbed a soldier in Hebron, B’TSELEM (Mar. 24, 2016), [http://www.btselem.org/firearms/20160324\\_soldier\\_executes\\_palestinians\\_attacker\\_in\\_hebron](http://www.btselem.org/firearms/20160324_soldier_executes_palestinians_attacker_in_hebron).

<sup>55</sup> See sources cited *supra* note 54. Hearings in the Azaria case began on May 9, 2016, and on January 4, 2017, he was convicted of manslaughter by the Tel Aviv

public began supporting Azaria and protesting his arrest and indictment, and later, his conviction.<sup>56</sup>

The third example occurred on April 27, 2016, when two young siblings, a twenty three-year-old mother of two, Maram Abu Isma'il, and her sixteen-year-old brother, Ibrahim Taha, were killed at Qalandia checkpoint outside Jerusalem after the former was suspected of attempting to stab security personnel manning the checkpoint.<sup>57</sup> According to the police, Abu Isma'il entered the vehicles-only lane of the checkpoint on foot, with her brother in tow.<sup>58</sup> Shortly after being warned over a loud-speaker to stop approaching, the two continued to walk forward and Abu Isma'il allegedly threw a knife at a police officer without wounding him.<sup>59</sup> In response, an Israeli police officer fired an initial warning shot, and a private security guard fired two shots directly at the two, killing them.<sup>60</sup> Eyewitness statements suggest that Abu Isma'il and Taha did not understand the warnings in Hebrew and were some distance away from the officers at the time that they were shot.<sup>61</sup> The Israel Police initially

military court-martial. Gili Cohen, *Israeli Soldier Convicted of Manslaughter for Lethal Shooting of Wounded Palestinian Assailant*, HAARETZ (Jan. 4, 2017) [hereinafter Cohen, *Israeli Soldier Convicted*] <http://www.haaretz.com/israel-news/1.762927>.

<sup>56</sup> See sources cited *supra* note 8. See also Eliyahu Kamisher, *Mothers of soldiers march in support of Elor Azaria*, THE JERUSALEM POST (July 31, 2016), <http://www.jpost.com/Arab-Israeli-Conflict/Mothers-of-soldiers-march-in-support-of-Elor-Azaria-462899>; Gili Cohen, Barak Ravid & Jonathan Lis, *Thousands Rally for Soldier Who Shot Palestinian Assailant; Netanyahu Urges Calm*, HAARETZ (Apr. 19, 2016), [http://www.haaretz.com/israel-news/.premium-1.715307?utm\\_source=dlvr.it&utm\\_medium=twitter](http://www.haaretz.com/israel-news/.premium-1.715307?utm_source=dlvr.it&utm_medium=twitter).

<sup>57</sup> Nir Hasson, *Two Palestinian Siblings Shot Dead After Attempted Knife Attack at West Bank Checkpoint*, HAARETZ (Apr. 27, 2016), <http://www.haaretz.com/israel-news/1.716623>; Daniel Douek et al., *Civilian guards grilled over fatal shooting of Palestinian siblings*, TIMES OF ISR. (May 8, 2016), <http://www.timesofisrael.com/guards-grilled-over-fatal-shooting-of-palestinian-siblings/>.

<sup>58</sup> Nir Hasson, *Israel: Private Contractors, Not Police, Killed Palestinian Siblings at Jerusalem Checkpoint*, HAARETZ (May 1, 2016), <http://www.haaretz.com/israel-news/.premium-1.717227>; Daniel Douek, *Police to probe killing of Palestinian siblings at Qalandiya*, TIMES OF ISR. (May 5, 2016) [hereinafter Douek, *Police To Probe*], <http://www.timesofisrael.com/police-to-probe-killing-of-palestinian-siblings-at-qalandiya/>.

<sup>59</sup> Hasson, *Two Palestinian Siblings Shot Dead After Attempted Knife Attack at West Bank Checkpoint*, *supra* note 57.

<sup>60</sup> Private security guards are professionally subordinate to the police. See generally sources cited *supra* note 58.

<sup>61</sup> See sources cited *supra* note 58; *Unwarranted killings at Qalandiya Checkpoint: Systemic legitimization of a trigger-happy approach continues to claim lives*, B'TSELEM (May 9, 2016), [http://www.btselem.org/firearms/20160509\\_killing\\_of\\_siblings\\_at\\_qalandia\\_checkpoint](http://www.btselem.org/firearms/20160509_killing_of_siblings_at_qalandia_checkpoint); Shlomi Eldar, *Are Israeli police covering up shooting of Palestinian siblings?*, AL-MONITOR (May 3, 2016), <http://www.al-monitor.com/pulse/originals/2016/05/israel-qalandia-checkpoint-shooting-siblings-police-footage.html>;

reported that the killings had taken place according to relevant arrest procedures.<sup>62</sup> A criminal investigation was opened following the incident, and in October 2016 the State Prosecutor closed the case on grounds of lack of culpability with regard to one guard and insufficient evidence to indict the other.<sup>63</sup> Although the charges were dropped, the family of Abu Isma'il and Taha, along with the media and members of the Israeli Knesset, continue to call on the police to release the security camera footage from the incident, thus far without success.<sup>64</sup>

From a legal perspective, the basic rules of engagement applicable in each of the attacks described above dictate that lethal force may be used only when the suspect poses a real and imminent danger to other civilians or security personnel. Israeli soldiers are trained to identify an imminent threat using a “means, intent and capability” analysis,<sup>65</sup> according to which the absence of any one of the three elements renders lethal force unjustifiable.<sup>66</sup> According to the IDF’s “Suspect Arrest Procedure,” an individual clearly suspected of attempting, committing, or assisting in the commission of a “serious offense” (including murder or attempted murder, a “terror attack” on persons or property, possession of an illegal weapon, active membership in a hostile organization, or throwing stones at a vehicle or person in a life-threatening way) may be apprehended via

---

Peter Beaumont, *Truth about Palestinian sibling deaths at Israeli checkpoint is elusive*, THE GUARDIAN (May 11, 2016), <https://www.theguardian.com/world/2016/may/11/truth-about-palestinian-sibling-deaths-at-israeli-checkpoint-is-elusive>.

<sup>62</sup> Chaim Levinson, *Israel Investigating Suspected Violations in Shooting of Palestinian Siblings at Qalandiyah Checkpoint*, HAARETZ (May 5, 2016), <http://www.haaretz.com/israel-news/.premium-1.718192>; see also Douek, *Police To Probe*, *supra* note 58.

<sup>63</sup> Raoul Wootliff, *Charges dropped in shooting of Palestinian siblings at checkpoint*, TIMES OF ISR. (Oct. 26, 2016), [hereinafter Wootliff, *Charges dropped*] <http://www.timesofisrael.com/charges-dropped-in-shooting-of-palestinian-siblings-at-qalandiya/>.

<sup>64</sup> Father of Palestinian siblings shot during alleged attack calls for release of video, JEWISH TELEGRAPHIC AGENCY (May 2, 2016), <http://www.jta.org/2016/05/02/news-opinion/israel-middle-east/father-of-palestinian-siblings-shot-during-alleged-attack-calls-for-release-of-video>; see also Nir Hasson & Jack Khoury, *Israel Police Refuse to Release Video of Thwarted West Bank Stabbing Attack*, HAARETZ (Apr. 30, 2016), <http://www.haaretz.com/israel-news/.premium-1.717110> (pointing out that in similar incidents in the past the Israel Police released the footage including captions explaining the events); Wootliff, *Charges dropped*, *supra* note 63.

<sup>65</sup> See, e.g., BREAKING THE SILENCE, THIS IS HOW WE FOUGHT IN GAZA 18 (2014) (providing testimony of former soldiers regularly discussing this triad basic rule although the IDF rules of engagement are classified).

<sup>66</sup> Id. Israeli police regulations are similar in this regard. See Israel Police, Order of the National [Police] Headquarters No. 06.02.14 – The Use of Firearms (Sept. 3, 2007); Israel Police Open-Fire Procedure No. 90.211.110.008 (Dec. 12, 2015) (Hebrew) [hereinafter Israel Police 2015 Open-Fire Regulations].

a series of escalated actions, should the previous prove ineffective.<sup>67</sup> These actions include calling out to the suspect to stop and warning that the soldier will otherwise shoot; cocking the soldier's weapon; shooting in the air; shooting at the legs to incapacitate; and, finally, if the suspect still poses a threat, shooting at the chest to injure or kill.<sup>68</sup> The Procedure explicitly states that, in apprehending a suspect after-the-fact (no longer performing the act or presenting a threat), the soldier may no longer open fire on the suspect, but rather may only resort to the Procedure up to and including shooting in the air.<sup>69</sup> Based on these rules and regulations, each of the three examples presented above raises *prima facie* questions as to whether lethal force was warranted because the suspect either no longer posed a threat to life or limb at the moment she was killed or because she seemingly could have been pacified with non-lethal force and then captured.<sup>70</sup> Therefore, subject to further analysis, there is support for a claim that these were unlawful killings according to applicable domestic and International Law.<sup>71</sup>

Although the ongoing violence in the West Bank and East Jerusalem,<sup>72</sup> and frequently inside Israel, is undeniably complex and requires appropriate security responses, it is generally not a situation of war that justifies invoking *jus in bello* (or IHL) rules pertaining to armed conflict, rather one of law enforcement under occupation, particularly protracted occu-

<sup>67</sup> The full Suspect Arrest Procedure is classified and thus not published, as is the case regarding the majority of IDF rules of engagement. However, the procedure is summarized in the General Staff/Operations Directorate, Central Command, Soldier's Open-Fire Regulation Card for Judea and Samaria, July 2006 (Hebrew; classified; on file with Author) [hereinafter: "2006 IDF West Bank Open-Fire Regulations"]. Relevant sections of the Arrest Procedure have also been revealed in legal proceedings, *see, e.g.*, CA (Jer.) 2163/01, *Hesham Yousef Abu Rian v. State of Israel* (judgment July 8, 2002), unofficial English translation available at [http://www.hamoked.org/items/333\\_eng.pdf](http://www.hamoked.org/items/333_eng.pdf). In 2015 the Procedure was updated, particularly regarding apprehending suspects after-the-fact. Statement to military police under warning in investigation of Binyamin Brigadier Commander Colonel Israel Shomer of Sept. 5, 2015, Military Police Central Division Case No. 150/15 (describing the change in open-fire regulations since July 2015) [hereinafter Shomer investigation statement]. *See also* August 2015 announcement by the IDF Commander of the West Bank clarifying existing open-fire regulations, namely the Suspect Arrest Procedure, Gili Cohen, *IDF Refines Orders: Soldiers Not to Fire at Fleeing Palestinian Attackers*, HAARETZ, (Aug. 12, 2015), <http://www.haaretz.com/israel-news/.premium-1.670796>.

<sup>68</sup> See sources cited *supra* note 67.

<sup>69</sup> Cohen, *IDF Refines Orders*, *supra* note 67; Shomer investigation statement, *supra* note 67.

<sup>70</sup> See generally sources cited *supra* notes 47-64.

<sup>71</sup> See sources cited *supra* note 44.

<sup>72</sup> This Article focuses on the West Bank and East Jerusalem and will refer to obligations under IHL as applicable to both locations. See sources cited *supra* note 24.

pation.<sup>73</sup> With the exception of occasional exchanges of fire, the types of violence witnessed in the occupied West Bank and East Jerusalem today fall under the general categories of popular protest, rioting, and sporadic acts of violence, both between Israeli and Palestinian civilians and between civilians and security forces.<sup>74</sup> Under IHL, these types of incidents, even when they may be considered “acts of terror,” necessitate law enforcement responses and norms—not those of combat.<sup>75</sup> As the Israeli Turkel Commission noted in 2013, “in a law enforcement context, legitimate use of force is the exception, and the use of deadly force (shooting to kill) is the most narrowly prescribed exception.”<sup>76</sup> The fact that Israeli soldiers and police officers operating in these areas are instructed to take precautions in assessing the degree of force to be used on a subject in any of the above scenarios, including when the subject has committed a violent attack, is testament to the fact that Israel has accepted this distinction into its laws.<sup>77</sup>

---

<sup>73</sup> See Second Report – The Turkel Commission, Public Commission to Examine the Maritime Incident of 31 May 2010, Israel’s Mechanisms for Examining and Investigating Complaints and Claims of Violations of the Laws of Armed Conflict According to International Law, 64-69, 109-10 (Feb. 2013) [hereinafter Turkel Commission Report], <http://www.turkel-committee.gov.il/files/newDoc3/The%20Turkel%20Report%20for%20website.pdf>; see also Alexander Orakhelashvili, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory: Opinion and Reaction*, 11 J. CONFLICT & SEC. L. 119, 137 (2006) [hereinafter Orakhelashvili, *Legal Consequences*].

<sup>74</sup> See Keren Greenblatt, “Gate of the Sun”: Applying Human Rights Law in the Occupied Palestinian Territories in Light of Non-Violent Resistance and Normalization, 12 Nw. U. J. INT’L HUM. RTS. 152, 183 (2014); Orakhelashvili, *Legal Consequences*, supra note 78, at 137; see also Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 1(2), June 8, 1977, 16 I.L.M. 1442 [hereinafter AP II]; INT’L COMM. OF THE RED CROSS, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, at 1354-56, para. 4471-79, (1987); ICRC Interpretive Guidance, supra note 12, at 41.

<sup>75</sup> ICRC Interpretive Guidance, *supra* note 12, at 62; Turkel Commission Report, *supra* note 73, at 109-10; Kenneth Watkin, *Use of Force during Occupation: Law Enforcement and Conduct of Hostilities*, 94 (885) INT’L REV. RED CROSS 267, 294-95, 310 (2012); *Study on Police Oversight Mechanisms*, *supra* note 20, at ¶ 8.

<sup>76</sup> Turkel Commission Report, *supra* note 73, at 105.

<sup>77</sup> See, e.g., text accompanying *supra* note 65, and the “Ankonina Rule,” deriving from the guiding Israeli Supreme Court judgment on this matter, CrimA. 486/88 Staff Sergeant David Ankonina v. The Chief Military Prosecutor 44(2) PD 353, 371 [1990] (Isr.), which stands for the principle that lethal force may only be used to stop a criminal in the act or from escaping when the force used is proportionate to the actual and immediate threat to life and limb. See also Turkel Commission Report, *supra* note 73, at ¶ 58. The decision in 2011 by the Israeli Military Advocate General (MAG) to change the policy of opening investigations into killings of Palestinians in the West Bank and Gaza in situations absent armed combat (such that investigations will be

That said, soldiers and police receive mixed messages because regulations prescribe one manner of conduct, but security culture within the force and in society encourages another. According to a poll conducted by the Israel Democracy Institute in August 2016, nearly half of the Jewish population in Israel, which comprises around 80% of the Israeli population, and nearly all of the security forces command structure and politicians charged with supervising and directing security forces, support a “shoot-to-kill” policy in handling suspected Palestinian assailants, “even if [they have] been apprehended and clearly [do] not [pose] a threat.”<sup>78</sup> Statements by the most senior Israeli political leaders, including the Prime Minister, Defense Minister, senior police and military officers, reflect similar attitudes either explicitly or impliedly.<sup>79</sup> These attitudes seemingly substitute legal punishment with extrajudicial killing by security personnel, a situation that Jelani Jefferson Exum called “the death penalty on the streets.”<sup>80</sup>

In the aforementioned case,<sup>81</sup> Sergeant Azaria’s lawyers went so far as to express their outrage and dismay at his “discriminatory” indictment

automatically opened) was based on acknowledgment of this same distinction of circumstances – between hostilities and law enforcement scenarios. It thus represents recognition by the Israeli military establishment of the distinct responses required by Israeli security forces in these scenarios. For more on the policy change, see discussion *infra* Part III(C).

<sup>78</sup> Israel Democracy Institute, Tel Aviv University, The Peace Index – August 2016 (Aug. 30-31, 2015), [http://www.peaceindex.org/files/Peace\\_Index\\_August\\_2016-Eng.pdf](http://www.peaceindex.org/files/Peace_Index_August_2016-Eng.pdf).

<sup>79</sup> See, e.g., Press Release, B’TSELEM, Israeli Human Rights Groups’ Oct. 2015 Statement, *supra* note 40; Judah Ari Gross, *As knife-wielders are subdued, questions on ‘shoot first, ask later,’* TIMES OF ISR. (Oct. 14, 2015), <http://www.timesofisrael.com/as-knife-wielders-are-subdued-questions-on-shoot-first-ask-later/>; Steven Klein, *Why Israel’s Unwritten ‘Shoot to Kill’ Policy Is So Dangerous*, HAARETZ (Oct. 20, 2015), <http://www.haaretz.com/opinion/.premium-1.681234>; Adalah, *Shoot to Kill*, PROTECT THE PROTEST (Nov. 29, 2015), [http://protect.adalah.org/material/shoot-to-kill/#\\_ftnref4](http://protect.adalah.org/material/shoot-to-kill/#_ftnref4); JPost.com Staff, *Liberman: Israel should revert to a military government to eradicate terror*, THE JERUSALEM POST (Oct. 13, 2015), <http://www.jpost.com/Arab-Israeli-Conflict/Liberman-Israel-should-revert-to-a-military-government-to-eradicate-terror-423821>; Times of Israel Staff, *Liberman: Israel should resume targeted assassinations*, TIMES OF ISR. (Nov. 28, 2015), <http://www.timesofisrael.com/liberman-israel-should-resume-targeted-assassinations/>; Times of Israel Staff, *Liberman: PM doing everything he can to not fight terror*, TIMES OF ISR. (Jan. 7, 2016), <http://www.timesofisrael.com/liberman-pm-doing-everything-he-can-to-not-fight-terror/>; Raoul Wootliff, *Ya’alon slams ‘gang leader’ Liberman for backing Hebron soldier*, TIMES OF ISR. (July 27, 2016), <http://www.timesofisrael.com/yaalon-slams-gang-leader-liberman-for-backing-hebron-soldier/>.

<sup>80</sup> Jelani Jefferson Exum, *The Death Penalty on the Streets: What the Eighth Amendment Can Teach About Regulating Police Use of Force*, 80 Mo. L. REV. 987 (2016).

<sup>81</sup> See sources cited *supra* notes 8, 52-56.

and conviction of manslaughter, claiming that other soldiers and police under similar circumstances are rarely prosecuted, and accusing the military of making an example of their client.<sup>82</sup> In response, the military prosecutor underscored the army's commitment to prosecuting egregious crimes of this sort, emphasizing the evidence and circumstances of the case, which were later underscored in the lengthy court-martial verdict.<sup>83</sup> The claims made by Azaria's lawyers highlighted a conspicuous reality, with regard to both the lack of accountability for excessive violence against Palestinians and the inherent contradiction in IDF culture. On the one hand, the IDF "purity of arms" doctrine and open-fire regulations are clear about the limited circumstances in which lethal force may be used against Palestinians and the risk of legal consequences associated with deviation.<sup>84</sup> On the other hand, soldiers and police officers in the field are told that their duty, first and foremost, is to protect Israel and Israelis.<sup>85</sup>

### III. A PATTERN OF EXCESSIVE FORCE AGAINST PALESTINIANS

Israel's duty to protect the Palestinian population living under its occupation derives explicitly and directly from the provisions of IHL.<sup>86</sup> Pro-

<sup>82</sup> See, e.g., Cohen, *Israeli Soldier Convicted*, *supra* note 55; Jonathan Lis and Gili Cohen, *Israeli Soldier Who Shot, Killed Palestinian in Hebron: Indictment Is Discriminatory*, HAARETZ (May 24, 2014), <http://www.haaretz.com/israel-news/.premium-1.721293>. Azaria is reported to have stated the following during his testimony to the Military Court-Martial on July 24, 2016: "Soldiers beat a bound Palestinian in front of their commanders and nothing came of it. It wasn't filmed." Yoav Zitun (@yoavzitun), TWITTER (July 24, 2016, 5:15 AM), <https://twitter.com/yoavzitun/status/757187349692440576>.

<sup>83</sup> See sources cited *supra* note 82; see also Gili Cohen, *Judges Take Issue with Azaria Defense, Saying Testimony Unreliable*, HAARETZ (Jan. 4, 2017), <http://www.haaretz.com/israel-news/1.762961>.

<sup>84</sup> Ruach Tzahal, ISRAEL DEFENSE FORCES (last visited Aug. 5, 2016), [http://www.chinuch.aka.idf.il/SIP\\_STORAGE/files/4/1554.pdf](http://www.chinuch.aka.idf.il/SIP_STORAGE/files/4/1554.pdf), translated in *IDF Code of Ethics*, ISRAEL DEFENSE FORCES, <https://www.idfblog.com/about-the-idf/idf-code-of-ethics/> (last visited Aug. 5, 2016); see also text accompanying *supra* note 73.

<sup>85</sup> See Eyal Hareveni, Yesh Din, *Standing Idly By: IDF Soldiers' Inaction in the Face of Offenses Perpetrated by Israelis against Palestinians in the West Bank*, 56-76 (May 2015) [hereinafter Hareveni, *Standing Idly By*], [http://files.yesh-din.org/user/files/Yesh%20Din\\_Omdim%20Mineged\\_Eng\\_Web.pdf](http://files.yesh-din.org/user/files/Yesh%20Din_Omdim%20Mineged_Eng_Web.pdf).

<sup>86</sup> See Hague Regulations, *supra* note 21, at art. 43 (the duty to preserve overall safety and order); AP I, *supra* note 15, at art. 48, 51 (protection from attack), 52 (protection of their personal property); Fourth Geneva Convention, *supra* note 11, at art. 3, 27, 32 (protection from attack, humane treatment), 53 (protection of their personal property); Hague Regulations, *supra* note 21, at art. 46 (protection of their personal property). For more on the duty to protect and the principle of distinction, see CIHL Rule 1, *supra* note 15; INT'L COMM. OF THE RED CROSS, Principle of Precautions against the Effects of Attacks, *Customary IHL Database* (Aug. 5, 2016), [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule22](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule22); see also HCJ 3114/

tection of civilians, their humanity, welfare, and property are any Occupying Power's ultimate duty, and served as the fundamental basis and impetus for the creation of IHL.<sup>87</sup> Naturally, this duty is not absolute, as it stands alongside an Occupying Power's parallel and legitimate authority to fulfill security needs regarding its army, territorial integrity, and citizens, within the parameters set by IHL.<sup>88</sup> Therefore, in certain cases, Palestinians may be injured or even killed, or their property destroyed, from the collateral damage resulting from military operations that meet the standards of military necessity and proportionality under occupation law.<sup>89</sup>

However, an analysis of the legality of harm caused to Palestinians and their property must be conducted through the lens of the degree of force required to maintain law and order, with deference to protection—limiting force to only what is necessary and reasonable. This Part intends to place the series of killings of suspected Palestinian assailants of the past year into the larger context of what this Article proposes is a pattern of excessive violence against Palestinians.

#### A. Arenas of Excessive Violence against Palestinians

Since the start of the Second Intifada in late 2000, Israeli security forces have killed more than 2 thousand Palestinians in the West Bank and Gaza in law enforcement scenarios alone (excluding those deemed by Israel to have been civilians DPHing, combatants, or collateral damage in military operations).<sup>90</sup> This figure does not include some 3 thousand official complaints of injuries to Palestinians by IDF soldiers alone during the same

02 MK Mohammed Barakeh v. Minister of Defense, ¶ 12 [2002] (Isr.), *translated in* [http://elyon1.court.gov.il/files\\_eng/02/140/031/A02/02031140.a02.htm](http://elyon1.court.gov.il/files_eng/02/140/031/A02/02031140.a02.htm) (referring to a line of its own cases as support for this position).

<sup>87</sup> Patryk I. Labuda, *Lieber Code*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, <http://opil.ouplaw.com/view/10.1093/epil/9780199231690/law-9780199231690-e2126>; Fourth Geneva Convention, *supra* note 11, at art. 3, 4, 27; see also Jean S. Pictet, *Commentary on Geneva Convention IV of 1949*, INT'L COMM. OF THE RED CROSS, 200-05 (1958).

<sup>88</sup> See, e.g., THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS 32-33 (Dieter Fleck ed., 3d ed., 1995); Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Reports 136 (July 9, 2004) (Buergenthal, J., declaring) [hereinafter ICJ Wall Advisory Opinion].

<sup>89</sup> See Hague Regulations, *supra* note 21 and accompanying text.

<sup>90</sup> Statistics: Fatalities after Operation Cast Lead, B'TSELEM, <http://www.btselem.org/statistics/fatalities/after-cast-lead/by-date-of-event> (last visited Nov. 30, 2016); Statistics: Fatalities during Operation Cast Lead, B'TSELEM, <http://www.btselem.org/statistics/fatalities/during-cast-lead/by-date-of-event> (last visited Nov. 30, 2016); Statistics: Fatalities before Operation Cast Lead, B'TSELEM, <http://www.btselem.org/statistics/fatalities/during-cast-lead/by-date-of-event> (last visited Nov. 30, 2016).

period.<sup>91</sup> According to IDF data, beatings and injury of Palestinians comprised more than half of all investigations into incidents raising suspicion of unlawful conduct by soldiers in 2015 (and roughly two-thirds of investigations over the previous decade).<sup>92</sup> Injuries from shooting and beatings in law enforcement contexts typically are documented during demonstrations and riots, at checkpoints throughout the West Bank and crossings to and from Israel, during arrests and searches of homes and businesses, and, in certain cases, after detention of suspects.<sup>93</sup>

Israeli and international NGOs have long reported a high incidence of excessive and disproportional use of force against Palestinians in law enforcement scenarios, particularly in IDF and Border Police responses to organized demonstrations and spontaneous riots in the West Bank and Jerusalem.<sup>94</sup> The Israeli police and army's rules of engagement for responding to these "disturbances of the peace" require a gradual escalation of crowd dispersal tactics, including tear gas, rubber bullets, and

---

<sup>91</sup> Yesh Din Volunteers for Human Rights, *Law Enforcement on IDF Soldiers Suspected of Harming Palestinians: Figures for 2015* (2017) [hereinafter *Law Enforcement on IDF Soldiers 2014*], <http://tinyurl.com/hwq5rhb>; Yesh Din Volunteers for Human Rights, *Law Enforcement upon IDF Soldiers in the Occupied Palestinian Territory: Figures for 2013* (2014) [hereinafter *Law Enforcement on IDF Soldiers 2013*], <http://tinyurl.com/jdzbn9u>; Yesh Din Volunteers for Human Rights, *Law Enforcement upon IDF Soldiers in the Territories: Figures for 2012* (2013) [hereinafter *Law Enforcement on IDF Soldiers 2012*], <http://tinyurl.com/ztv57t4>; IDF data on 2015 retrieved via Freedom of Information requests (on file with author). The actual number of injuries in scenarios that raise questions of legality is likely higher, as there are myriad reasons for which Palestinians refrain from filing complaints to the military for alleged violations by its own personnel. See Lior Yavne, Yesh Din Volunteers for Human Rights, *Alleged Investigation: The Failure of Investigations into Offenses Committed by IDF Soldiers Against Palestinians*, 96-100 (2011) [hereinafter *Alleged Investigation*], <http://tinyurl.com/hm7cz9e>.

<sup>92</sup> *Law Enforcement on IDF Soldiers 2015*, *supra* note 91; *Law Enforcement on IDF Soldiers 2014*, *supra* note 91; *Law Enforcement on IDF Soldiers 2013*, *supra* note 91.

<sup>93</sup> *Id.*; *Law Enforcement on IDF Soldiers 2013*, *supra* note 91; Yesh Din data (unpublished, on file with author).

<sup>94</sup> See, e.g., Rohini J. Haar & Vincent Iacopino, International Network of Civil Liberties Organizations ("INCLO") & Physicians for Human Rights ("PHR"), LETHAL IN DISGUISE: THE HEALTH CONSEQUENCES OF CROWD-CONTROL WEAPONS (2016) [hereinafter LETHAL IN DISGUISE], <http://www.acri.org.il/pdf/Lethal-in-Disguise-INCLO2016.pdf>; Sarit Michaeli, *Crowd Control: Israel's Use of Crowd Control Weapons in the West Bank*, B'TSELEM, (2013) [hereinafter Michaeli, *Crowd Control*], [http://www.btselem.org/download/201212\\_crowd\\_control\\_eng.pdf](http://www.btselem.org/download/201212_crowd_control_eng.pdf); AdminC (Jer) Administrative Petition 23001-12-15, Adalah v. Israel Police (2015) (Isr.); AMNESTY INT'L, *Trigger-happy: Israel's use of excessive force in the West Bank*, AI Index MDE 15/002/2014 (Feb. 27, 2014); AMNESTY INT'L, Annual Report: *Israel and Occupied Palestinian Territories 2015/2016* (2016).

sponge rounds.<sup>95</sup> Indeed, this gradual use of crowd control weapons (“CCWs”) comports with international standards of law enforcement and crowd control.<sup>96</sup> However, CCWs are only non-lethal when used properly,<sup>97</sup> and cases of serious injury or death from CCWs raise concern over the use of force exceeding what is required to maintain safety and order. Since 2002, five cases of Palestinian civilians having been killed with tear gas canisters in the West Bank and East Jerusalem have been documented.<sup>98</sup> Since 2000, at least eighteen Palestinians, twelve of whom were minors, have been killed by rubber-coated bullets.<sup>99</sup> Numerous other incidents have been documented in recent years, in which sponge

<sup>95</sup> See sources cited and accompanying text *supra* note 67; Instruction 8, Open Fire Regulations for Soldiers in Judea, Samaria and the Gaza Strip, January 2012, § 7.2.4.1 [Hebrew; classified] [hereinafter IDF Open Fire Regulations Jan. 2012]; Israel Police, Police Procedure for Handling Disturbances of the Peace at Demonstrations, No. 90.221.111.001, § 6(B)4(c) (2012) [Hebrew]. See also INCLO & PHR, LETHAL IN DISGUISE, *supra* note 94; Michaeli, *Crowd Control*, *supra* note 94.

<sup>96</sup> See G.A. Res. 34/169 (Dec. 17, 1979); UN Basic Principles on the Use of Force by Law Enforcement 1990, *supra* note 44, at ¶ 4.

<sup>97</sup> IDF Open Fire Regulations Jan. 2012, *supra* note 95, at §§ 4.2, 7.2; Israel Police, Police Procedure for Handling Disturbances of the Peace at Demonstrations, No. 90.221.012, § 5(A)(3) (2003) (this procedure was replaced in May 2012 by Procedure No. 90.221.111.001, *supra* note 95, which does not contain a section warning of the dangers of misuse of CCWs). The standing orders prohibit the firing of aluminum tear gas canisters directly at demonstrators and prescribe firing them at certain angles and distances in order to avoid endangering the lives of demonstrators. See Letter from Colonel Sharon Afek, former Legal Advisor in Judea and Samaria, to Ms. Jessica Montel, Executive Director, B’Tselem (Apr. 30, 2009) (on file with author); HCJ 2295/15, Subhiya Abu Rahma v. Mil. Advoc. Gen. (filed March 31, 2015) [hereinafter Abu Rahma HCJ petition 2015] (commanders’ testimonies summarized).

<sup>98</sup> Statistics: Fatalities after Operation Cast Lead, B’TSELEM, <http://www.btselem.org/statistics/fatalities/after-cast-lead/by-date-of-event> (last visited Nov. 30, 2016); Statistics: Fatalities during Operation Cast Lead, B’TSELEM, <http://www.btselem.org/statistics/fatalities/during-cast-lead/by-date-of-event> (last visited Nov. 30, 2016); Statistics: Fatalities during Operation Cast Lead, B’TSELEM, <http://www.btselem.org/statistics/fatalities/during-cast-lead/by-date-of-event> (last visited Nov. 30, 2016); Statistics: Fatalities before Operation Cast Lead, B’TSELEM, <http://www.btselem.org/statistics/fatalities/during-cast-lead/by-date-of-event> (last visited Nov. 30, 2016). See Abu Rahma HCJ petition 2015, *supra* note 97. Following two High Court of Justice petitions, additional appeals were filed to the State Attorney and the Attorney General against the decision of the Military Advocate General (“MAG”) to close the case without indictment, including expert opinions on behalf of the Abu Rahma family concluding that Abu Rahma’s death was caused by tear gas fired against regulations (appeal from May 26, 2015 on file with author). See also Chaim Levinson, *When Israeli Soldiers Kill Palestinians, Even a Smoking Gun Doesn’t Lead to Indictments*, HAARETZ (July 7, 2016), <http://www.haaretz.com/israel-news/.premium-1.729602>.

<sup>99</sup> Michaeli, *Crowd Control*, *supra* note 94, at 21.

rounds have resulted in severe injury and even death of demonstrators, particularly minors.<sup>100</sup>

Additionally, live ammunition has allegedly been used excessively against Palestinians in demonstrations and riots, under circumstances in which the use of lethal force was not justified and the rules of engagement were violated.<sup>101</sup> Until recently, as a general rule, the use of live ammunition was prohibited in West Bank and East Jerusalem demonstrations, including against stone-throwers, absent actual and imminent threat to the life of the security personnel or others in the vicinity.<sup>102</sup> Updated police open-fire regulations allow for the use of live ammunition at demonstrations, but fulfilling the test required to justify shooting-to-kill still necessitates that the demonstrator or rioter be willing and able to injure or kill a soldier or police officer or other individual in the vicinity with a stone, Molotov cocktail, or other object.<sup>103</sup> Where the demonstrator has merely picked up a stone, for instance, and has yet to aim to throw it, or where she has already hurled a stone and shows no indication of preparing to throw another one, she is no longer a legitimate target, and it is illegal to use lethal force against her.<sup>104</sup> Yet, numerous cases in which

---

<sup>100</sup> See, e.g., THE ASSOCIATION FOR CIVIL RIGHTS IN ISRAEL, *Injuries caused by sponge bullets in East Jerusalem* (Mar. 16, 2016), <http://www.acri.org.il/en/2016/03/16/injuries-caused-by-sponge-bullets-in-east-jerusalem/>; THE ASSOCIATION FOR CIVIL RIGHTS IN ISRAEL, REPORT TO THE UN SPECIAL RAPPORTEUR ON THE USE OF LESS-LETHAL WEAPONS IN EAST JERUSALEM (2015), <http://www.acri.org.il/en/wp-content/uploads/2015/07/UN-Report-Less-Lethal-Weapons-in-East-Jerusalem.pdf>; *Blind Spot*, HAARETZ (July 15, 2016), <http://www.acri.org.il/he/wp-content/uploads/2016/07/blind-spot.pdf>; Nir Hasson, *State Investigators Admit Palestinian Teen Killed by Sponge-tipped Bullet, but Won't Charge Israeli Officer*, HAARETZ (May 17, 2016), <http://www.haaretz.com/israel-news/.premium-1.720106>.

<sup>101</sup> Michaeli, *Crowd Control*, *supra* note 94, at 29-33. For specific recent examples, see, e.g., Elior Levi & Yoav Zitun, *Suspended: IDF Officer Filmed Firing at Stone-Throwers*, YNET (June 12, 2012) [Hebrew], <http://www.ynet.co.il/articles/0,7340,L-4241526,00.html>; Peter Beaumont, *Video footage indicates killed Palestinian youths posed no threat*, THE GUARDIAN (May 20, 2014), <https://www.theguardian.com/world/2014/may/20/video-indicates-killed-palestinian-youths-no-threat-israeli-forces>; Amos Harel, *Killing of Palestinian Youth in Bethlehem Was 'Unintentional,' Preliminary IDF Inquiry Finds*, HAARETZ (Oct. 6, 2015), [http://www.haaretz.com/israel-news/.premium-1.679057?utm\\_campaign=Echobox&utm\\_medium=Social&utm\\_source=Facebook](http://www.haaretz.com/israel-news/.premium-1.679057?utm_campaign=Echobox&utm_medium=Social&utm_source=Facebook).

<sup>102</sup> See IDF Open Fire Regulations, Jan. 2012, *supra* note 95, at § 8; Israel Police Procedure for Disturbances of the Peace 2003, No. 90.221.012, § 3(D)(h).

<sup>103</sup> Israel Police 2015 Open-Fire Regulations, *supra* note 66, at Annex A, Procedure for Opening Fire Against Molotov Cocktail-Hurlers, Fireworks-Shooters, and Stone-Throwers in Life-Threatening Situations, § 3(a) and (b) [Hebrew].

<sup>104</sup> *Id.* at Annex A, § 3(b)(3); see sources cited *supra* note 95; IDF Open Fire Regulations, Jan. 2012, *supra* note 95, at § 7-8.

police and soldiers allegedly opened live fire against demonstrators who did not meet the criteria for shoot-to-kill have been documented.<sup>105</sup>

### B. *The Disparity in Law Enforcement Responses to Palestinians versus Jews*

The level of restraint and protection demonstrated by law enforcement personnel in the West Bank and East Jerusalem toward the more than 585 thousand Israeli civilians living in those territories<sup>106</sup> contrasts starkly with the force exhibited toward Palestinians—including situations when Israeli civilians are the perpetrators of violence against Palestinians. The rules of engagement, both officially and in practice, differ greatly based on ethnicity or “nationality”—i.e., Palestinian or Israeli.<sup>107</sup> For instance, the “Suspect Arrest Procedure,” in which every IDF soldier is trained, requires a soldier to conduct an arrest in stages as necessary, beginning with verbal warnings, followed by warning shots into the air, graduating to shooting the suspect’s legs in order to neutralize and, in the case of imminent mortal danger, permitting the soldier to shoot to kill.<sup>108</sup> The Suspect Arrest Procedure applies whether responding to Jewish civilian suspects or Palestinian suspects. However, with regard to the former, soldiers are trained not to escalate the procedure beyond the firing of a warning shot.<sup>109</sup> Additionally, although official regulations applicable to

<sup>105</sup> Michaeli, *Crowd Control*, *supra* note 94, at 29-33. Since 2005, and as of Nov. 30, 2016, at least 74 Palestinian stone-throwers were killed with live ammunition in the West Bank. *Id.* at 5; *Statistics: Palestinians killed by Israeli security forces in the West Bank, after Operation Cast Lead*, B’TSELEM, <http://www.btselem.org/statistics/fatalities/after-cast-lead/by-date-of-event/westbank/palestinians-killed-by-israeli-security-forces> (last visited Nov. 30, 2016).

<sup>106</sup> ISRAEL CENTRAL BUREAU OF STATISTICS, Data Sheet 2.18, Localities and Population by District, Sub-District and Religion, Statistical Abstract of Israel 2016 Data as of Dec.31, 2015, [http://www.cbs.gov.il/reader/shnaton/templ\\_shnaton.html?num\\_tab=st02\\_18x&CYear=2016](http://www.cbs.gov.il/reader/shnaton/templ_shnaton.html?num_tab=st02_18x&CYear=2016) [Hebrew]; JERUSALEM INSTITUTE OF ISRAEL STUDIES, Statistical Yearbook 2016 Edition, Table III/9, “Population of Jerusalem, by Age, Religion and Geographical Spreading, 2014,” [http://www.jiis.org.il/upload/yearbook/2016/shnaton\\_C0916.pdf](http://www.jiis.org.il/upload/yearbook/2016/shnaton_C0916.pdf).

<sup>107</sup> See IDF Open Fire Regulations Jan. 2012, *supra* note 95, at § 22 (referring to separate regulations for law enforcement against Israelis in the West Bank); see also 2006 IDF West Bank Open-Fire Regulations, *supra* note 67, at § 3(f) (prohibiting the use of rubber or live ammunition against Israelis in demonstrations, unless said Israelis pose a real and imminent threat to the lives of soldiers or others); THE STATE OF ISRAEL: THE JUDICIAL AUTHORITY, GOVERNMENT COMMISSION OF INQUIRY TO EXAMINE THE CLASHES BETWEEN THE SECURITY FORCES AND ISRAELI CITIZENS IN OCTOBER 2000, Ch. 6, ¶¶ 12-17 (Aug. 2003) [Hebrew] [hereinafter ISRAELI INQUIRY COMMISSION REPORT], [http://elyon1.court.gov.il/heb/veadot/or/inside\\_index.htm](http://elyon1.court.gov.il/heb/veadot/or/inside_index.htm).

<sup>108</sup> See sources cited and accompanying text *supra* note 95.

<sup>109</sup> *Id.*; see also Hareuveni, *Standing Idly By*, *supra* note 85, at 46 (citing Letter from Public Liaison Department, Public Communications Branch, IDF

both police and soldiers authorize the use of certain CCWs against Israelis,<sup>110</sup> the practice when it comes to handling settler unrest in the West Bank and East Jerusalem dictates showing great restraint toward this population.<sup>111</sup>

Accordingly, the idea that police and soldiers would use live ammunition against the Jewish population in the occupied territory is inconceivable, although regulations provide for its use in situations posing mortal danger.<sup>112</sup> This restrained approach is deeply ingrained in Israeli society, dating back to decades of IDF and Israel Police's delicate relationship with the settler population, the delicate relationship arising due to numerous factors: political pressures to maintain overall "peace" with the settler population, the desire to preserve order on the ground, and attempting to address mounting local and foreign pressure to curb settler violence against Palestinians.<sup>113</sup>

---

Spokesperson's Office, to Noa Cohen, Yesh Din Data Coordinator (December 25, 2014) (describing an IDF Central Command lesson plan on handling public disturbances and ideological crime by Israelis in the Judea and Samaria Area)).

<sup>110</sup> Michaeli, *Crowd Control*, *supra* note 94; Yoav Zitun, *IDF Considering Open-Fire Regulations against Jews Too*, YNET (Dec. 14, 2011), <http://www.ynet.co.il/articles/0,7340,L-4161634,00.html>.

<sup>111</sup> Zitun, *supra* note 110; Hareveni, *Standing Idly By*, *supra* note 85, at 41, 63-76; Oded Shalom & Akiva Novick, *Hilltop Shirkers*, YEDIOT AHARONOT, FRIDAY POLITICAL SUPPLEMENT (May 10, 2013) [Hebrew] (English translation available at <http://www.yesh-din.org/en/hilltop-shirkers/>). C.f. Yair Altman, *Havat Gilad inquiry determines forces acted proportionally*, YNET News (Mar. 6, 2011), <http://www.ynetnews.com/articles/0,7340,L-4038434,00.html> (describing the use of CCWs against Israeli settlers during evictions and demolitions of buildings in Israeli outposts).

<sup>112</sup> Altman, *supra* note 111; Michaeli, *Crowd Control*, *supra* note 94.

<sup>113</sup> Hareveni, *Standing Idly By*, *supra* note 85, at 22. The widespread phenomenon of settler crime and violence against Palestinians and their property has been documented since the 1980s. See YEHUDIT KARP, KARP COMMISSION, THE KARP REPORT: INVESTIGATION OF SUSPICIONS AGAINST ISRAELIS IN JUDEA AND SAMARIA, JERUSALEM (1982) [hereinafter KARP REPORT] (describing various attempts to address the phenomenon of settler crime against Palestinians and their property); STATE COMPTROLLER, REPORT 63B 136-38 (2013) [Hebrew], [www.mevaker.gov.il/he/Reports/Report\\_315/bfc2c75a-3d38-4a2e-b020-b6696d24e935/31-ayosh.pdf](http://www.mevaker.gov.il/he/Reports/Report_315/bfc2c75a-3d38-4a2e-b020-b6696d24e935/31-ayosh.pdf). A "Nationalistic Crime Unit" of the West Bank Israel Police was even established in 2013. Affidavit of Superintendent Erez Amoyal, Head of Questioning, Nationalist Crime Unit, December 8, 2014, enclosed in Notice and Response on behalf of the Defendant to the Jerusalem Magistrates Court, Israel, in the claim filed by Fadel Hamad Mahmoud Amour, CC 61685-06-13. According to data collected by Yesh Din, among over 1 thousand cases of settler crimes against Palestinians tracked by the organization between 2005 and 2015, 91.5% were closed without indictment, among which 85% were closed based on failure on the part of the Israel Police to collect sufficient evidence or locate suspects. *Datasheet, May 2015: Prosecution of Israeli Civilians Suspected of Harming Palestinians in the West Bank*, YESH DIN VOLUNTEERS FOR HUM. Rts. 2 (May 20, 2015), <http://files.yesh-din.org/userfiles/>

The resulting mixed message delivered to the lower ranking soldiers and police officers deployed across the West Bank is that Jews are to be handled with care and caution.<sup>114</sup> In an interim opinion commissioned from former state attorney and special legal advisor Talia Sasson by then-Prime Minister Ariel Sharon on the impact of “unauthorized outposts” in the West Bank,<sup>115</sup> Sasson quoted a senior official of the IDF with whom she had spoken as having said, “by the nature of things, we first deal with terrorism, and only then (if at all), with illegal activity by settlers.”<sup>116</sup> The same official went on to explain, “the settlers are putting Zionism into action, and so they should not be looked at through a legal prism.”<sup>117</sup>

In practice, the combination of these official and unofficial policies results in disparate treatment of Jews and Palestinians, including when law enforcement personnel are present while the former commit acts of aggression against the latter.<sup>118</sup> In cases of clashes between settlers and Palestinians, law enforcement personnel regularly employ CCWs against the Palestinians while rarely escalating beyond verbal orders in an attempt to disperse the settlers.<sup>119</sup> Even in cases in which soldiers or police witness stone-throwing or shooting by settlers toward Palestinians, they regularly show restraint toward the settlers, endangering the Palestinians present.<sup>120</sup> The phenomenon of law enforcement personnel

Prosecution%20of%20Israeli%20Civilians%20Suspected%20of%20Harming%20Palestinians%20in%20the%20West%20Bank\_May%202015.pdf. By comparison, according to the official website of the Israel Police, as of 2014 the overall national crime-solving rate stood at roughly 55%. Hofi Amos, *Police Don't Think Stone-Throwing is a Nationalistic Crime*, NRG (Dec. 19, 2014), <http://www.nrg.co.il/online/1/ART2/661/344.html>.

<sup>114</sup> In fact, soldiers are often told that shooting an Israeli will result in criminal charges against the soldier; this perception contrasts sharply with the average soldier’s impression of the potential outcomes of shooting a Palestinian. *See, e.g.*, Hareveni, *Standing Idly By*, *supra* note 85, at 73 (citing testimony of a soldier as provided to Breaking the Silence).

<sup>115</sup> Outposts are Israeli settler-led construction projects, used almost exclusively for residential purposes, built without proper permits and approval from the Israeli authorities. *See ZIV STAHL, YESH DIN VOLUNTEERS FOR HUMAN RIGHTS, THE ROAD TO DISPOSSESSION: A CASE STUDY – THE OUTPOST OF ADEI AD 28-30*, 44-5 (2013) [adeiad.yesh-din.org/MaslulHanishul\\_Eng\\_LR](http://adeiad.yesh-din.org/MaslulHanishul_Eng_LR). Although outposts are thus illegal under relevant Israeli law, the Israeli government and army still provide them with electricity, sewage, and other basic services, as well as access roads and security. *Id.*

<sup>116</sup> TALIA SASSON, (INTERIM) OPINION CONCERNING UNAUTHORIZED OUTPOSTS 259-61 (2005) (Hebrew), <http://www.pmo.gov.il/SiteCollectionDocuments/PMO/Communication/Spokesman/sason2.pdf>.

<sup>117</sup> *Id.*

<sup>118</sup> *See* Hareveni, *Standing Idly By*, *supra* note 85.

<sup>119</sup> Documentation of over twenty complaints from recent years of soldiers and/or police using disproportionate force in dispersing Palestinians in clashes with settlers are on file with the author.

<sup>120</sup> *Id.*; Hareveni, *Standing Idly By*, *supra* note 85.

“standing idly by” while settlers commit crimes against Palestinians has been documented extensively since as early as the 1980s,<sup>121</sup> and it continues without adequate redress despite repeated complaints to police and military investigators and legal advisors.<sup>122</sup>

In sum, Palestinians face regular violence from state actors alongside a lack of protection from violence by non-state actors. The degree of force used against Palestinians oftentimes far exceeds what is necessary to maintain safety and order in the area, as IHL requires; in many cases, this excessive force blatantly violates Israel’s own rules and regulations regarding appropriate law enforcement responses to civilian unrest, violence, and even mortal danger.<sup>123</sup> A closer examination of the open-fire and safety regulations reveals that these are often ambiguously worded, and moreover, contradict the instructions and messages received by police and soldiers during briefings by commanding officers.<sup>124</sup> Thus, the disparate treatment of acts committed by Palestinians versus Jews is consistent with the putative expectations of behavior of law enforcement personnel in Israel. Moreover, with negligible risk of facing punishment for deviating from the regulations, Israeli security personnel operate in a realm of practical impunity when using force against Palestinians.

#### IV. LACK OF ACCOUNTABILITY FOR VIOLENCE AGAINST PALESTINIANS

When Sergeant Azaria’s lawyers accused the military court-martial system of singling him out for the killing of a Palestinian stabber in Hebron, they were not completely off base. Despite more than 2 thousand killings of Palestinians by Israeli security forces in law enforcement scenarios since the start of the Second Intifada, only eight soldiers and six police

---

<sup>121</sup> See, e.g., KARP REPORT, *supra* note 113; S.C. Res. 471 (June 5, 1980); S.C. Res. 904 (Mar. 18, 1994); Human Rights Council, U.N.Doc. A/HRC/22/63, at 12 (Feb. 7, 2013); U.S. DEP’T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2014: ISRAEL AND THE OCCUPIED TERRITORIES, 68 (2015).

<sup>122</sup> From September 2000 to December 2011, B’Tselem filed fifty-seven complaints to the military prompted by cases in which security personnel allegedly stood idly by while Israeli civilians committed violent crimes against them or their property. Hareuveni, *Standing Idly By*, *supra* note 85, at 53. Between March 2008 and May 2016, Yesh Din filed thirty-seven complaints to both the IDF and police investigative bodies regarding similar cases. Case records on file with author. Notably, not a single soldier has been criminally indicted for standing idly by while settlers commit crimes against Palestinians and their property. Letter from Military Prosecutor for Operational Affairs, Lieut. Col. Adoram Riegler, to the author, on behalf of Yesh Din’s Legal Team (Feb. 14, 2015) (on file with author).

<sup>123</sup> See sources cited *supra* note 94.

<sup>124</sup> See sources cited *supra* notes 95 and 96 (detailing the gradual escalation of crowd dispersal tactics espoused by the open-fire and safety regulations).

officers have been convicted of killing offenses to date.<sup>125</sup> Of those fourteen, only two soldiers and four police officers were convicted of manslaughter, the same offense of which Azaria was found guilty,<sup>126</sup> the rest were convicted of lesser killing offenses.<sup>127</sup>

A lack of investment in adequate tools and resources to effectively investigate has contributed to this lack of accountability. Many efforts have been made over the last five years to bring Israel's systems of

<sup>125</sup> According to official IDF data, between 2000 and 2015, 267 investigations were opened into the killing of Palestinians by IDF soldiers in the West Bank and Gaza; among them only seventeen (approximately 6%) led to indictments. YESH DIN VOLUNTEERS FOR HUMAN RIGHTS, MPCID INVESTIGATIONS INTO THE CIRCUMSTANCES SURROUNDING THE DEATH OF PALESTINIANS: CONVICTIONS AND PENALTIES (2013) [hereinafter IDF CONVICTIONS AND PENALTIES], <http://tinyurl.com/gugwctxy>; *Law Enforcement on IDF Soldiers 2015*, *supra* note 91; *Law Enforcement on IDF Soldiers 2014*, *supra* note 91; *Law Enforcement on IDF Soldiers 2013*, *supra* note 91. Among those seventeen indictments (of a total of twenty-four soldiers), only seven soldiers were convicted to date of killing offenses in six incidents; twelve more were convicted of lesser offenses, such as obstruction of justice, aggravated assault, the unlawful use of a weapon or exceeding authority. *Id.* The trial in an additional indictment is pending, and the remaining cases resulted in acquittal or withdrawal of charges. *Id.* In 2016 thus far only one soldier was indicted for killing a Palestinian, Sergeant Azaria, and in January 2017 he was convicted of manslaughter. *Id.* Official IDF data, indictment sheets and court-martial judgments are on file with author. Cohen, *Israeli Soldier Convicted*, *supra* note 55. According to B'Tselem data, during the same time period and as of Nov. 30, 2016, eleven police and border police officers have been indicted for involvement in the deaths of Palestinians in Israel or the occupied territories, among whom six have been convicted of killing offenses and three trials are pending. The remainder were either acquitted or their charges commuted to lesser offenses. B'Tselem data on file with author. See also 28 April 2009: *Two additional policemen given jail sentences for incident exposed by B'Tselem*, B'TSELEM (Apr. 28, 2009), [http://www.btselem.org/beating\\_and\\_abuse/20090428\\_bp-officers\\_sentenced\\_for\\_abu\\_hamdiyah\\_killing](http://www.btselem.org/beating_and_abuse/20090428_bp-officers_sentenced_for_abu_hamdiyah_killing) [hereinafter B'Tselem, *Two additional policemen*].

<sup>126</sup> Three of the four police officers convicted were involved in the same abduction and killing incident in Hebron in 2002; the fourth officer was involved in a killing incident that took place in Jaffa, Israel in 2006. Mil. Southern District Court Martial (Tel Aviv) South 10/04, Military Prosecutor v. Private Taysir Hayib (Jun. 27, 2005), Nevo (by subscription, in Hebrew) (Isr.); Mil. Court Martial Appeal Court (Qastina) A/96/05, Private Taysir Wahayib v. Head Military Prosecutor, (Aug. 10, 2006) (Nevo, by subscription, in Hebrew) (Isr.); District Court (Tel Aviv) Crim. Case (TA) 40182/07, State of Israel v. Avraham Tomer (Jan. 16, 2008), Nevo (by subscription, in Hebrew) (Isr.); Jerusalem District Court (Jerusalem) Crim. Case (Jer.) 157/03, State of Israel v. Shahar (Ben Ami) Botbika (Sept. 2, 2008), Nevo (by subscription, in Hebrew) (Isr.); B'Tselem, *Two additional policemen*, *id.*; Indictment Sheet of Sgt. Azaria, *supra* note 52; Cohen, *Israeli Soldier Convicted*, *supra* note 55; IDF CONVICTIONS AND PENALTIES, *supra* note 125, at 3-4; official IDF data, indictment sheets and court-martial judgments are on file with author.

<sup>127</sup> See sources in *supra* note 125.

accountability in line with international standards.<sup>128</sup> Below I will examine whether those efforts have proven fruitful, whether it is too soon to tell, and whether there is any potential reform of the system that is capable of overcoming built-in obstacles to justice and accountability in the Israeli-Palestinian context.

#### A. *The Duty to Investigate under International Humanitarian Law and International Human Rights Law*

A naturally derivative duty of the Occupying Power's duty under IHL to protect the civilian population under occupation is its duty to investigate and punish breaches of that duty. The duty to investigate and prosecute war crimes and IHL violations has been established as a customary rule of IHL.<sup>129</sup> The rule is based on, in addition to state practice, the language found in the bodies of IHL, particularly the Fourth Geneva Convention and the First Additional Protocol, which obligate the Occupying Power to uphold the provisions contained therein.<sup>130</sup> This obligation inherently requires establishing a system of laws, investigating breaches of the laws, and prosecuting and punishing violations.<sup>131</sup>

As has been mentioned, the Israeli-Palestinian context discussed here requires expanding the analysis beyond the paradigm of hostilities under IHL. It must also include a policing context under occupation, in which the military and those with delegated military power (i.e., the Israel Police) act as both a military when there are hostilities and a police force maintaining safety and order on a daily basis.<sup>132</sup> Indeed, IHL and IHRL are not mutually exclusive sets of laws. IHRL applies when a state exer-

---

<sup>128</sup> See Fourth Geneva Convention, *supra* note 11, at arts. 146-47.

<sup>129</sup> JEAN-MARIE HENCKAERTS AND LOUISE DOSWALD-BECK, INT'L COMM. OF THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *Rule 158: Prosecution of War Crimes* 607 (2009); CIHL Rule 158, ICRC *Customary IHL Database* (Oct. 2, 2016).

<sup>130</sup> See Fourth Geneva Convention, *supra* note 11, at arts. 1, 3, 146-48; AP I, *supra* note 15, at art. 87.

<sup>131</sup> See Fourth Geneva Convention, *supra* note 11, at arts. 146-48; The Rome Statute for the International Criminal Court, July 17, 1998, U.N. Doc. A/Conf.183/9, Preamble; see also ICRC CIHL Rule 158, *supra* note 129; G.A. Res. 3(I), Extradition and Punishment of War Criminals (Feb. 13, 1946); G.A. Res. 60/147, Annex, ¶ 3, 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 (Dec. 16, 2005).

<sup>132</sup> See Turkel Commission Report, *supra* note 73, at ¶ 58. The Report states: "Only if the activities necessitating the resort to lethal force qualify as 'direct participation in hostilities' and are not mere internal disturbances and tensions, such as riots, isolated and sporadic acts of violence, is the situation governed by the rules regulating the conduct of hostilities. Obviously, classifying the nature of the activity must be circumstance-specific depending on the attendant facts." *Id.*

cises “effective control” over a territory.<sup>133</sup> In an occupation context, this means that IHRL fills in the gaps where IHL is silent or unclear on the specific rights and protections of the protected persons and the duties and obligations of the Occupying Power.<sup>134</sup> As such, the rules regarding the duty to investigate violations of IHRL are commonly accepted as applicable and supplementary to the rules of IHL.<sup>135</sup>

In the context of Israel’s occupation, general international consensus stipulates that Israel is bound by the provisions of IHRL, at the very least, regarding the West Bank and East Jerusalem.<sup>136</sup> While Israel has not accepted the wholesale application of IHRL to the West Bank, the High Court of Justice has held in several judgments that in certain circumstances human rights obligations under IHRL may apply to the IDF’s activities there.<sup>137</sup>

<sup>133</sup> See, e.g., U.N. Hum. Rts. Comm., General Comment No. 31 (80), ¶ 10: *Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, CCPR/C/21/Rev.1/Add. 1326 (Mar. 29, 2004) [hereinafter General Comment 31]; see also Rep. of the Comm. on the Elimination of Racial Discrimination, at ¶ 28, U.N. Doc. A/67/18 (2012) (regarding Israel and the “territories under the State party’s effective control”); ICJ Wall Advisory Opinion, *supra* note 88; Loizidou v. Turkey (preliminary objections), no. 15318/89, ¶ 62, Eur. Ct. H.R. (1995); Bankovic v. Belgium, no. 52207/99, Eur. Ct. H.R. (2001); Behrami v. France and Saramati v. France, Germany and Norway, nos. 71412/01 and 78166/01, Eur. Ct. H.R. (2007). See also R (Al-Skeini) v. Secretary of State for Defence [2007], UKHL 26; R (on the application of Al-Jedda) (FC) v. Secretary of State for Defence [2007], UKHL 58.

<sup>134</sup> ICJ Nuclear Weapons Case, *supra* note 15, at 240; ICJ Wall Advisory Opinion, *supra* note 88, at 177-81. The Israeli Supreme Court recognized the ICJ as the highest judicial authority in International Law in Marabe. See Marabe, *supra* note 24, at ¶ 56.

<sup>135</sup> See, e.g., Turkel Commission Report, *supra* note 73, at 67-69. On the duty of investigating violations of IHRL in an occupation context – specifically the killing of Iraqi civilians by British soldiers in then occupied Iraq in a law enforcement context see *Al-Saadoon & Others v Secretary of State for Defence* [2016] EWHC 773 (Admin) at ¶¶ 92-109 2016 WL 01253990 (Apr. 7, 2016) (Eng.); see also Rep. of the U.N. Fact-Finding Mission on the Gaza Conflict, *Human Rights in Palestine and Other Occupied Arab Territories*, ¶ 117, 1436, UN Doc. A/HRC/12/48 (Sept. 25, 2009) [hereinafter Goldstone Report].

<sup>136</sup> See, e.g., ICJ Wall Advisory Opinion, *supra* note 88, at ¶¶ 95-114. Israel’s duties toward the Gaza Strip and Gazan population today are subject to debate. See HCJ 9132/07 Jaber Al-Bassiouni Ahmed v. The Prime Minister (Jan. 27, 2008) (Isr.); Rep. of the Ind. Comm’n of Inquiry on the 2014 Gaza Conflict, ¶ 1, UN Doc., A/HRC/29/52 (Jun. 24, 2015); Goldstone Report, *supra* note 135, at ¶ 131; Sari Bashi and Tamar Feldman, *Scale of Control: Israel’s Continued Responsibility in the Gaza Strip*, GISHA (Nov. 2011), [http://gisha.org/UserFiles/File/scaleofcontrol/scaleofcontrol\\_en.pdf](http://gisha.org/UserFiles/File/scaleofcontrol/scaleofcontrol_en.pdf).

<sup>137</sup> Marabe, *supra* note 24, at ¶ 57; PCATI Target Killings Case, *supra* note 12, at ¶ 18; HCJ 3969/06, Head of Dir Samet Village Council, Mohammed Abed Mahmoud Al-Harub v. IDF Commander in the West Bank, ¶¶ 10, 17 (2009) (Isr.); HCJ 1893/03, Bethlehem Municipality v. State of Israel, 26 (2005) (Isr.).

Thus, taking IHL and IHRL's provisions together, the following is a list of required standards of investigation of violations of International Law.<sup>138</sup> First, an investigation must be independent, whereby the investigating body is separated from the chain of command such that those providing the orders in real time, or advising on the legality thereof, as well as those creating overall policies for the army or police, are not charged with investigating their own decisions and advice.<sup>139</sup> Second, an investigation must be impartial, such that there is no prejudice or bias toward or against the suspect or witnesses during the investigation and prosecution.<sup>140</sup> Third, in order to comply with International Law, an investigation must be effective, thorough, and professional, in the sense that investigators and prosecutors must be equipped with the tools and means necessary to expose the truth and prepare a case, where appropriate, with a docket of evidence sufficient for effective prosecution.<sup>141</sup> A crucial

---

<sup>138</sup> For further discussion on the international standards of effective investigation and their sources as are applicable to the Israeli-Palestinian context, see Michael Sfard, Ido Tamari, Emily Schaeffer & Lior Yavne, *The Duty to Investigate: Compatibility of Israel's Duties under International Law with the Examination and Investigation of Complaints regarding Violations of the Law of Armed Conflict*, YESH DIN, at ¶¶ 52-70 (Mar. 23, 2011) [hereinafter *Duty to Investigate*], <http://tinyurl.com/hsa6s2g>. See also Michael N. Schmitt, *Investigating Violations of International Law in Armed Conflict*, 2 HARV. NAT'L SEC. J. 1, 31 (2011).

<sup>139</sup> Philip Alston, Report of the Special Rapp. on extrajudicial, summary or arbitrary executions: Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development, ¶¶ 25, 33–38, UN Doc. A/HRC/8/3 (2008) [hereinafter Alston 2008 Report]; Draft Policy Paper on Preliminary Examinations, ICC Office of the Prosecutor, ¶ 34 (Oct. 14, 2010) [hereinafter ICC Draft Policy Paper on Preliminary Examinations].

<sup>140</sup> See, e.g., Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 12, 1465 U.N.T.S. 85 (1984) [hereinafter CAT] (to which Israel is a party); ICCPR, Art. 2(3)(a); General Comment 31, *supra* note 133, at ¶ 15; U.N. Hum. Rts. Comm., General Comment No. 20, ¶ 14 *Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, E/C.12/GC/20 [hereinafter General Comment 20]; G.A. Res. 60/147, ¶ II 3(b), UN Doc. A/RES/60/147, *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* (Dec. 16, 2005) [hereinafter UN Basic Principles for Gross Violations of IHRL and IHL]; G.A. Res. 55/111, ¶ 6, UN Doc. A/RES/55/111, *Extrajudicial, Summary or Arbitrary Executions* (Mar. 12, 2001) [hereinafter UN Resolution on extrajudicial executions]; ICC Draft Policy Paper on Preliminary Examinations, *supra* note 139, at ¶ 65.

<sup>141</sup> See, e.g., ICCPR, at arts. 2(2), 2(3); Hum. Rts. Comm., General Comment 6, *Article 6, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, ¶ 4 U.N. Doc. HRI\GEN\1\Rev. 1, at 6 (1994); General Comment 31, *supra* note 133, at ¶¶ 15, 18; General Comment 20, *supra* note 140, at ¶ 14; UN Basic Principles for Gross Violations of IHRL and IHL, *supra* note

requirement of an effective investigation is promptness, as unreasonable delays in investigation and prosecution necessarily reduce the likelihood of justice being served.<sup>142</sup> The passage of time damages memories and physical evidence, lessens motivation to pursue justice, and, as we will see below, often bears consequences for the ability under law to prosecute, given statutes of limitation. Fourth, investigations and prosecutions must be open to public scrutiny, by the victims' families and their lawyers and by the public at large, in order to review the quality of the investigation and its conclusions and to ensure a fair and effective process.<sup>143</sup>

### B. Israel's Mechanisms of Investigation and Accountability

This Article has already alluded to the low level of accountability for the use of excessive force by soldiers against Palestinians. Official IDF data compiling all types of crimes allegedly committed by soldiers against Palestinians and their property between October 2000 and end of 2015 in the West Bank and Gaza shows that overall only 5% of investigations against soldiers have led to indictments, with these numbers declining over recent years.<sup>144</sup>

<sup>140</sup>, at ¶ II 3(b); UN Resolution on extrajudicial executions, *supra* note 140, at ¶ ¶ 6-7; Alston 2008 Report, *supra* note 139, at ¶ 32.

<sup>142</sup> See, e.g., Pictet Commentary, *supra* note 87, at 593 on the promptness requirement of Art. 146 of the Fourth Geneva Convention; UN Basic Principles on the Use of Force and Firearms, art. 22 (1990); General Comment 31, *supra* note 133, at ¶ 15; General Comment 20, *supra* note 140, at ¶ 14; UN Basic Principles for Gross Violations of IHRL and IHL, *supra* note 140, at ¶ II 3(b); UN Resolution on extrajudicial executions, *supra* note 140, at ¶ 7.

<sup>143</sup> See, e.g., Principle 16 of the Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, E.S.C. 1989/65, annex, 1989 U.N. ESCOR Supp. (no. 1) U.N. Doc. E/1989/89 at 52 (1989). For judgments of the European Court of Human Rights see also *Finucane v. The United Kingdom Judgment*, Application no. 29178/95, at § 71 (2003); *Isayeva v. Russia*, Application nos. 5794/00, 57948/00 and 57949/00, at § 213 (Feb. 24, 2005).

<sup>144</sup> According to official data provided by the IDF Spokesperson's Office, between October 2000 and the end of 2015, 2,821 investigations were opened against IDF soldiers for alleged offenses against Palestinians and their property, leading to the prosecution of 239 soldiers in 141 cases (5% of the investigations conducted). As not every complaint of a crime against a Palestinian is investigated by the Military Police Criminal Investigation Department (MPCID), that figure translates to 3% of all complaints leading to indictment of soldiers. Over the most recent three-year period for which there is data available, 2013 to 2015, soldiers were indicted in only 3.6% of investigations opened. Data provided to Yesh Din from IDF Spokesperson in response to Freedom of Information Law requests (on file with author); see also *Law Enforcement on IDF Soldiers 2015*, *supra* note 91; *Law Enforcement on IDF Soldiers 2014*, *supra* note 91. Data on indictment rates of police for violations against Palestinians is not available, as the Ministry of Justice does not provide disaggregated data regarding the identity of the complainant. However, among the 108 complaints filed by Yesh Din on behalf of Palestinians in East Jerusalem and the West Bank

But numbers only say so much about the quality of investigations. On the numbers alone, one could conclude that the statistics show that most complaints are frivolous or simply did not adequately account for the security or other legal justification behind the action taken by the security personnel. Given that a significant portion of complaints are filed via human rights and humanitarian organizations present on the ground in the West Bank, as Palestinians lack direct access to the Military Police Criminal Investigation Division (“MPCID”), and thus are vetted by lawyers or experienced researchers, such a conclusion seems unlikely to be accurate.<sup>145</sup>

Furthermore, there is ample evidence that a host of failures in the investigation system create substantial barriers, such that in most cases an external evaluation of whether a crime was committed is not possible. One of the most basic failures of the system is the frequent delay at every stage of the process, from the decision on whether to open a criminal investigation, to the length of the investigation itself, to the time spent by the prosecution deciding whether to prosecute, order additional investigative steps, or close the case without indictment.<sup>146</sup> Delays not only lead in a large percentage of cases to closure of investigations due to insufficient evidence,<sup>147</sup> but, in the case of soldiers, delays often create obstacles to prosecution, as the statute of limitations for trying a soldier under Israel’s Military Penal Law is 180 days after discharge from service, or up to a year in certain egregious crimes.<sup>148</sup>

Military police investigations of soldiers’ conduct in the occupied territories in the majority of cases are opened only when an “operational

---

following alleged crimes (primarily violent offenses) committed by police between 2009 and August 2016 (handled by both the Police Investigations Department and the SJ District [West Bank] Israel Police), only 5.6% led to indictment of police officers.

<sup>145</sup> In 2013 and 2014, fewer than 3% of all complaints submitted to the MPCID were filed directly by Palestinians; the majority were filed with the assistance of Israeli lawyers or organizations. *Law Enforcement on IDF Soldiers 2014*, *supra* note 91, at 1. On average, human rights NGOs file around a third of the complaints received by the MPCID. *Alleged Investigation*, *supra* note 91, at 46.

<sup>146</sup> This section on the inadequacies of the investigations and prosecutions of Israeli soldiers and police is based, *inter alia*, on the author’s personal experience handling over 5 hundred cases of this kind since 2008 on behalf of Yesh Din and in a private capacity under the auspices of the Michael Sfard Law Office in Tel Aviv. See Turkel Commission Report, *supra* note 73, at *passim*; *Alleged Investigation*, *supra* note 91, at *passim*; see also HCJ 4167/11, HaMoked: Center for the Defence of the Individual v. Commander of the Military Police Criminal Investigation Department (filed Aug. 31, 2011) (on file with author).

<sup>147</sup> See Turkel Commission Report, *supra* note 73, at 132, 143 (reflecting the point that delays often lead to the closing of cases due to insufficient evidence); see also Attorney General Guideline 4.1202 (Aug. 2010; updated July 2014) (Hebrew) (translation in Turkel Commission Report, *id.* at 398).

<sup>148</sup> Military Penal Law, 5715-1955, § 6 (Isr.).

debriefing,” conducted within the chain of command and with scant exception based on soldier accounts alone, reveals a suspicion of criminal wrongdoing.<sup>149</sup> When investigations are opened, in roughly 60% of cases,<sup>150</sup> MPCID investigations are essentially desk-based investigations in which investigators rarely visit the scene of the crime in order to draw conclusions, collect evidence, and produce forensic analyses.<sup>151</sup> Moreover, the review of hundreds of closed investigative files reveals that soldiers’ accounts of the events are accorded great deference and often-times are insufficiently challenged by their investigators, who are themselves young soldiers serving compulsory military duty.<sup>152</sup> While this substantive flaw could potentially be overcome through intensive training, these young soldiers are ill-equipped to interrogate officers and commanders who outrank them in the chain of command. Because of this structural oversight, and the lack of efforts to remedy it, the vast majority of investigations, and thus prosecutions, focus on the lower-ranking soldiers who carried out the orders, rather than on their commanders.<sup>153</sup> Furthermore, the international criminal law doctrine of “command responsibility” has not yet been adopted into the Israeli justice system, and as such, commanders are prosecuted only for their own direct actions and not those of their subordinates.<sup>154</sup> Thus, IDF investigations of crimes against Palestinians can hardly be said to be impartial, professional,

<sup>149</sup> The purpose of the operational debriefing is to review the incident, draw lessons for similar future “operations,” and consider disciplinary action or command sanctions (such as censure or demotion) where deemed appropriate. Military Justice Law § 539A. It is not a tool for collecting evidence in preparation of a criminal case or determining whether those involved are criminally culpable; in fact, its findings are only admissible in court in limited circumstances. *Id.*; HCJ 6208/96 Mor Hayim v. IDF 42(3) P.D. 835 (1998); *Alleged Investigation*, *supra* note 91, at 32-8; *Duty to Investigate*, *supra* note 138, at 25-27.

<sup>150</sup> *Law Enforcement on IDF Soldiers 2014*, *supra* note 91, at 5.

<sup>151</sup> See *Alleged Investigation*, *supra* note 91, at 79. This is similar with regard to the Police Investigations Department’s investigations of such incidents. ISRAELI INQUIRY COMMISSION REPORT, *supra* note 107, at Ch. 6; Adalah, *Mahash: The Green Light for Police Brutality* (Sept. 2014), <http://www.adalah.org/uploads/oldfiles/Public/files/English/Newsletter/Sep-2014/Adalah-Mahash-Data-Report-Sep-2014.pdf>.

<sup>152</sup> *Alleged Investigation*, *supra* note 91, at 19-21, 67; *Duty to Investigate*, *supra* note 138, at 18.

<sup>153</sup> *Alleged Investigation*, *supra* note 91, at 11, 82; *Duty to Investigate*, *supra* note 138, at 18.

<sup>154</sup> CIHL Rule 153, *ICRC Customary IHL Database* (Oct. 2, 2016); Recommendation No. 2 of the Turkel Commission Report, *supra* note 73, at 366-69; Prime Minister’s Office, *Team for the Review and Implementation of the Second Report of the Public Commission for the Examination of the Maritime Incident of May 31st 2010 Regarding Israel’s Mechanisms for Examining and Investigating Complaints and Claims of Violations of the Law of Armed Conflict According to International Law* 12-13 (Aug. 2015) [hereinafter Ciechanover Report], <http://www.pmo.gov.il/Documents/ReportEng.pdf>.

prompt, and effective, as is required under IHL and IHRL due to the fact that the decision to investigate, in an overwhelming portion of cases, relies disproportionately on the subjective accounts of the law enforcement personnel involved in the alleged crimes; investigators rarely visit the scene of the crime; investigations suffer from unreasonable delays at all stages; and high-ranking officers and commanders are seldom investigated as suspects.

### C. Improved Accountability or Cushioning from External Scrutiny?

The issue of accountability of Israeli security personnel came under the spotlight in the aftermath of Operation Cast Lead and after the sharp critique of Israel's investigation mechanisms contained in the UN Fact-Finding Mission's "Goldstone Report."<sup>155</sup> Although the Report was initially denounced by the Israeli government,<sup>156</sup> the Israeli government later appointed an independent commission of inquiry into the resulting civilian deaths following the 2010 Gaza Flotilla incident, as had been recommended in the UN's Report.<sup>157</sup> The commission, known as the "Turkel Commission," decided to expand its mandate beyond the isolated incident to a comprehensive review of the system of investigating violations of International Law by soldiers, police officers, and prison wardens.<sup>158</sup>

In February 2013, the Turkel Commission published Part II of its Report, which focused on the mechanisms for accountability of security personnel for IHL violations.<sup>159</sup> The Report contained eighteen operative recommendations for reforming the investigation system, ranging from adopting war crimes legislation, to setting maximum timeframes for investigations, to creating a dedicated investigative unit specialized in crimes against Palestinians as opposed to other violations of military law.<sup>160</sup> The security establishment and human rights organizations each

---

<sup>155</sup> Goldstone Report, *supra* note 135, at 307, ¶ 1438; *Id.* at 383; *Id.* at 394, ¶ 1832.

<sup>156</sup> Israel Ministry of Foreign Affairs, *Israel's analysis and comments on the Gaza Fact-Finding Mission Report* (Sept. 15, 2009), [http://mfa.gov.il/MFA/ForeignPolicy/Terrorism/Pages/Israel\\_analysis\\_comments\\_Goldstone\\_Mission\\_15-Sep-2009.aspx](http://mfa.gov.il/MFA/ForeignPolicy/Terrorism/Pages/Israel_analysis_comments_Goldstone_Mission_15-Sep-2009.aspx). Israel published two official papers in response to the report. See State of Israel, *Initial Response to Report of the Fact Finding Mission on Gaza Established Pursuant to Resolution S-9/1 of the Human Rights Council* (Sept. 24, 2009), [http://mfa.gov.il/MFA\\_Graphics/MFA%20Gallery/Documents/GoldstoneReportInitialResponse240909.pdf](http://mfa.gov.il/MFA_Graphics/MFA%20Gallery/Documents/GoldstoneReportInitialResponse240909.pdf); State of Israel, *Gaza Operation Investigations: An Update* (Jan. 2010), [http://mfa.gov.il/MFA\\_Graphics/MFA%20Gallery/Documents/GazaOperationInvestigationsUpdate.pdf](http://mfa.gov.il/MFA_Graphics/MFA%20Gallery/Documents/GazaOperationInvestigationsUpdate.pdf).

<sup>157</sup> Turkel Commission Report, *supra* note 73.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at 362-422; see also Yuval Shany, Amichai Cohen, Ido Rosenzweig, The Turkel Commission Report Part 2: Israel's Mechanism for Investigating Violations of International Humanitarian Law, 50 TERRORISM AND DEM. (Feb. 6, 2013), <http://>

lauded the Report's conclusions and recommendations.<sup>161</sup> The former viewed the Report as affirmation that the system mostly met international standards and that simple adjustments were required, whereas the latter saw the Report as confirmation that the system was flawed and its recommendations were a long-needed intervention.<sup>162</sup>

What has since transpired is a series of attempts to bring the report to life, which have mostly remained action-less.<sup>163</sup> Even the recommendations that have been adopted by the government, with few exceptions, have yet to be put into practice, and, in many cases, planned reforms lack budgets or timelines for implementation.<sup>164</sup>

The recommendations that have been partially or fully implemented have also drawn criticism. For instance, two of the more significant Turkel recommendations concern, *inter alia*, the role of the operational debriefing procedure in influencing and delaying the decision to open a criminal investigation in killing cases.<sup>165</sup> In the course of the Turkel Commission's work, the Military Advocate General's Corps ("MAG") announced that going forward in all cases of Palestinian unnatural death at the hands of Israeli soldiers, excluding during combat scenarios, the

[en.idi.org.il/analysis/terrorism-and-democracy/issue-no-50/the-turkel-commission-report-part-2/](http://en.idi.org.il/analysis/terrorism-and-democracy/issue-no-50/the-turkel-commission-report-part-2/).

<sup>161</sup> Prime Minister's Office, PM Netanyahu Receives the Second Half of the Turkel Commission Report (Feb. 2, 2013), <http://www.pmo.gov.il/English/MediaCenter/Events/Pages/eventturkel060213.aspx>; Yonah Jeremy Bob, *Turkel II could bring change*, THE JERUSALEM POST (Feb. 7, 2013), <http://www.jpost.com/National-News/Turkel-II-could-bring-change>; Yael Stein, *Promoting Accountability: The Turkel Commission Report on Israel's Addressing Alleged Violations of International Humanitarian Law*, B'TSELEM (Aug. 2013), [http://www.btselem.org/download/position\\_paper\\_on\\_turkel\\_report\\_eng.pdf](http://www.btselem.org/download/position_paper_on_turkel_report_eng.pdf); Fatmeh El-Ajou, *Briefing Paper on the Turkel Report – Part II*, ADALAH (May 2013), <https://www.adalah.org/uploads/oldfiles/Public/files/English/Publications/Articles/2013/Briefing-Paper-Turkel-II-El-Ajou.pdf>; *Time to Address Impunity*, AMNESTY INT'L (2016), <http://tinyurl.com/hoknpyv>.

<sup>162</sup> See sources cited *supra* note 161.

<sup>163</sup> See Yesh Din, Position Paper: The Ciechanover Report – dodging the criminalization of war crimes and practical steps toward implementation (Oct. 1, 2015), <http://files.yesh-din.org/userfiles/Ciechanover%20Eng.pdf>; Prime Minister's Office, Security Cabinet Approves Recommendations of the Ciechanover Team on Evaluating and Implementing Part II of the Turkel Commission Report on Israel's Examination and Investigation Mechanisms (July 3, 2016), <http://www.pmo.gov.il/English/MediaCenter/Spokesman/Pages/spokeTirkel030716.aspx>.

<sup>164</sup> See sources cited *supra* note 163.

<sup>165</sup> Turkel Commission Report, *supra* note 73, at 336-41, 375-84. The IDF reported that of the complaints received between end of 2007 and April 2011, in 89% of complaints which warranted an operational briefing, it was decided to refrain from opening an investigation. Minutes of the testimony of then MAG Major-General Avichai Mandelblit to the Turkel Commission (Apr. 11, 2011), <http://www.turkel-committee.gov.il/content-49.html>.

decision to open an investigation would be immediate and automatic, irrespective of the findings of the debriefing.<sup>166</sup> Yet, the MAG has made extensive use of the “combat exception,” even in cases of alleged stabbings or vehicular attacks by Palestinians, attempted or committed. For instance, of the 76 incidents in which Palestinians were shot and killed by IDF soldiers in the West Bank in 2015, nearly two-thirds were classified by the MAG as combat scenarios and no criminal investigations were conducted.<sup>167</sup> Furthermore, the decision whether to investigate incidents that did not result in death, but rather severe injury of Palestinians, remains subject to the findings and timeline of the operational debriefing.<sup>168</sup> This is but one example of partially realized recommendations whose implementation does not fulfill the spirit or intention behind them.<sup>169</sup>

---

<sup>166</sup> State update of April 4, 2011 in HCJ 9594/03, B’Tselem – The Israeli Information Center for Human Rights in the Occupied Territories v. Military Advocate General (published Aug. 21, 2011). With regard to incidents involving police, in operational activity during which a civilian is killed or injured by shooting by police forces operating in the West Bank under the auspices of the IDF (border police units), the decision whether to open an investigation may also be based upon the results of a police operational debriefing according to the Police Law, 5766–2006, LA 2045, at Article 102(b)(4)(b); in practice, a debriefing is not consistently conducted.

<sup>167</sup> According to B’Tselem’s monitoring of all Palestinian deaths by security personnel in 2015, in forty nine out of seventy six killings by IDF soldiers in the West Bank, or 64.4% of cases, the MAG decided that the circumstances did not warrant criminal investigation based on the combat exception and after having conducted an operational debriefing. The MAG has declined to investigate on these same grounds in at least eighteen incidents of alleged stabbing and vehicular attacks occurring since the start of the current wave of violence, between October 2015 and November 2016. B’TSELEM, *Follow-up: Military Police and MAG Corps investigations of civilian Palestinian fatalities in West Bank since April 2011* (updated Nov. 16, 2016), [http://www.btselem.org/accountability/military\\_police\\_investigations\\_followup](http://www.btselem.org/accountability/military_police_investigations_followup); B’TSELEM, *Palestinians killed by Israeli security forces in the West Bank, after operation Cast Lead* (last visited Nov. 30, 2016), <http://www.btselem.org/statistics/fatalities/after-cast-lead/by-date-of-event/westbank/palestinians-killed-by-israeli-security-forces>.

<sup>168</sup> See sources cited *supra* note 166.

<sup>169</sup> For instance, in line with recommendation no. 5 of the report, following Israeli operations in Gaza in July and August 2014, “Operation Protective Edge,” an independent “Fact-Finding Assessment Mechanism” (FFA) was established in order to review incidents raising suspicion of violations of IHL and make recommendations to the MAG on which incidents warrant criminal investigation. This mechanism was established in order to ensure independence as well as promptness of investigations. Turkel Commission Report, *supra* note 73, at 209-11, 228-30, 257-58, 382-84. However, the FFA in Israel has essentially replaced the operational debriefing in these Gaza cases, leaving the ultimate decision to investigate to the MAG, and it has not resolved the promptness problem, as the FFAs have in many cases taken months and even years in some cases to be completed. Two years after the Gaza offensive,

Despite this, over recent months and years, several Israeli government and military officials have hailed Israel's accountability mechanisms before various international audiences.<sup>170</sup> Relying heavily on the Turkel Commission and its ongoing implementation, officials make the case for the system's willingness and capability to effectively investigate alleged war crimes and prosecute, where appropriate, those responsible.<sup>171</sup> Since January 2015, the Office of the Prosecutor of the International Criminal Court has been conducting a preliminary examination into potential war crimes and crimes against humanity under the Rome Statute allegedly committed by both Israel and Palestine from June 13, 2014 to the present.<sup>172</sup> Proving that Israel has, or is in the process of, adequately investigating these crimes on its own is key to avoiding external scrutiny by the ICC or other foreign courts, based on the principle of complementarity.<sup>173</sup>

FFAs have yet to be concluded in nearly half of the cases submitted by human rights organizations Adalah and Al-Mezan, which represents a major deviation even from the lenient twenty one-month deadline set in the 2015 Ciechanover Commission recommendations. See Ciechanover Report, *supra* note 154; Adalah and Al-Mezan, *Gaza 2 Years On: Impunity over Accountability* (Aug. 28, 2016), [https://www.adalah.org/uploads/uploads/REPORT\\_Gaza\\_Obstacles\\_English\\_28\\_Aug\\_2016.pdf](https://www.adalah.org/uploads/uploads/REPORT_Gaza_Obstacles_English_28_Aug_2016.pdf); see also Yonah Jeremy Bob, *Gaza war crimes report: Allegations of 49 illegal civilian deaths nixed*, THE JERUSALEM POST (Aug. 24, 2016), <http://www.jpost.com/Arab-Israeli-Conflict/Gaza-war-crimes-report-Allegations-of-49-illegal-civilian-deaths-nixed-465924>.

<sup>170</sup> See, e.g., IDF MAG Legal Conference - Practical Orientation of International Law in Contemporary Armed Conflicts, IDF MAG (Feb. 16, 2015), <http://www.mag.idf.il/163-7129-en/Patzar.aspx>; Charlotte Silver, Israel's twist on international law, AL JAZEERA (Apr. 26, 2015), <http://www.aljazeera.com/indepth/opinion/2015/04/israel-international-law-icc-war-crimes-150419044229850.html>; Roi Sheyndorf, 57th session of the UN Committee Against Torture (May 2015), <http://www.treatybodywebcast.org/cat-57th-session-israel/>; UN Committee Against Torture, Israel's periodic report to the Committee Against Torture, UN Doc. CAT/C ISR/5 (Feb. 16, 2016), <http://tinyurl.com/h7z4eey>; Shurat HaDin, Conference Report, Towards a New Law of War Conference (June 20-21, 2016), <http://israellawcenter.org/activities/law-of-war-conference-towards-a-new-law-of-war/>.

<sup>171</sup> See sources cited *supra* note 170.

<sup>172</sup> International Criminal Court, Preliminary Examination, Palestine, <https://www.icc-cpi.int/palestine>; Bethan McKernan, *ICC to visit Israel to assess alleged war crimes at request of Palestinians*, INDEPENDENT (Sept. 6, 2016), <http://www.independent.co.uk/news/world/middle-east/icc-israel-war-crimes-palestinians-investigation-latest-a727066.html>.

<sup>173</sup> Rome Statute, UN Doc. A/CONF.183/9\*, art. 17(2)(c) (July 17, 1998). For a response and analysis of the Israeli government and military uproar following the ICC Office of the Prosecutor's announcement to undertake a preliminary examination, see Emily Schaeffer Omer-Man, *Palestine's ICC bid is only as threatening as Israel makes it*, +972 MAGAZINE (Jan. 2, 2015), <http://972mag.com/palestines-icc-bid-is-only-as-threatening-as-israel-makes-it/100882/>.

#### D. Lack of Accountability Perpetuates Violence

Despite these reform efforts, and regardless of the motivations behind them, accountability for excessive violence against Palestinians remains a rare and exceptional occurrence.<sup>174</sup> Under these circumstances, criminal prosecution of select security personnel for excessive force against Palestinians has not led to compliance with the law and a system-wide reduction in unnecessary violence. The rare prosecution of soldiers like Sergeant Azaria for the death of Palestinians calls attention to the system’s “singling-out” of a particular soldier and distracts the public conversation from a much-needed discussion on discriminatory use of force against Palestinians. Moreover, select prosecutions allow the system to dismiss criticism and declare its health while ignoring the systemic, political, and societal factors contributing to the high incidence of unjustified violence against Palestinians.

Of course, in a democratic society, accountability takes on other forms in addition to criminal prosecutions of rights-violators. Accountability in a democratic sense means addressing the systemic factors that lead to excessive violence against racial and ethnic minorities through election politics, campaigns to remove local and regional leaders, and pressure to dismiss heads of law enforcement for lax discipline of their subordinates.

Palestinians living under occupation have few means of calling for accountability. Unlike their Israeli neighbors, such Palestinians are neither afforded the right to assemble, nor participation in electing the Israeli government officials who dictate the policies to be applied in the West Bank.<sup>175</sup> Their tools for seeking accountability are limited primarily to international media, the few available avenues for external judicial review, and mostly ineffective direct legal channels within Israel that focus on individual investigations and specific aspects of investigation policies but rarely address the overall systemic obstacles to protection from violence.<sup>176</sup> Thus, lack of accountability creates and perpetuates a culture of impunity that emboldens Israeli police and soldiers to use excessive violence against Palestinians, whether they are non-violently protesting or carrying out acts of violence.

---

<sup>174</sup> See sources cited *supra* note 154.

<sup>175</sup> The vast majority of Palestinian residents of East Jerusalem are permanent residents, rather than citizens, and by Israeli law may vote in local but not national elections. See Emily Schaeffer, *No Home, No Homeland: A New Normative Framework for Examining the Practice of Administrative Home Demolitions in East Jerusalem*, ICAHD 14-15 (Sept. 2011), <https://www.scribd.com/document/326400063/No-Home-No-Homeland-ICAHD>. For the most part they do not participate in elections for political reasons. *Id.* A minority of Palestinian East Jerusalem residents are citizens of Israel and thus have full voting rights. *Id.*

<sup>176</sup> See DAVID KRETZMER, THE OCCUPATION OF JUSTICE (2002); Michael Sfard, *The Price of Internal Legal Opposition to Human Rights Abuses*, 1 J. OF HUM. RTS. PRAC. 37 (2009).

## V. CONCLUSION

Extrajudicial killings of Palestinian assailants, or suspected assailants, may be the subject of increased media attention as of late, but they are part of a decades-old phenomenon of excessive violence against the Palestinian population. While IHL contains broad allowances for the security needs and military necessities of the Occupying Power, IHL also mandates protection of the occupied population and limits the use of force to what is absolutely necessary to maintain security. The killing of Palestinian assailants who pose a real and immediate threat to the lives of those in their vicinity, and who cannot be stopped with non-lethal force, is absolutely necessary and justified under the law, as is the killing of non-Palestinian assailants in the same circumstances. The cases examined in this Article are among those that raise serious concerns as to the necessity of the use of lethal force and whether the subjects instead could have been neutralized and granted judicial process.

The existence of the law is not enough to ensure compliance. In allowing the use of excessive force against Palestinians to continue with little accountability, particularly in comparison to how parallel situations of unrest and criminal activity by Israeli citizens are handled, Israel is shirking its fundamental duty to protect the Palestinians and, moreover, distorting the concept of necessity under IHL. If the protection of the occupied population under IHL is to maintain its status and force, Israel must seriously consider applying objective standards in assessing necessity of force and conducting genuine investigations into violations thereof.

This state of affairs has important bearing on the development of IHL and the setting of precedents. Given that IHL is a living, breathing body of law that relies heavily on state practice and with few fora for judicial review and enforcement, the way in which Israel administers its occupation has ramifications on the interpretation of IHL in other contexts and the development of customary IHL rules. Beyond the scope of this Article, a question arises as to whether any protracted occupation is bound to lead to a situation in which the occupying population's security is prioritized over that of the protected persons, even with clear IHL and IHRL rules.