



For

**The Public Commission to Examine the Maritime Incident of 31 May 2010**

Nachman Avigad Street, Givat Ram

Jerusalem 91343

### ***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 Position Paper*

#### **Executive Summary**

**This is an executive summary of Yesh Din's recent position paper, which was submitted as a written brief to the Public Commission to Examine the Maritime Incident of 31 May 2010 (known also as the Turkel Commission), prior to Yesh Din's appearance, by invitation, before the Commission in April 2011.**

The Israeli government authorized the Public Commission to Examine the Maritime Incident of 31 May 2010 to examine Israel's compliance with international law not only in the maritime incident but in its response to complaints of violations of the law of armed conflict in general, including in the daily administration of the occupied territories.

The Military Advocate General Corps (MAGC) submitted two position papers to the commission clarifying the compliance of the IDF's examination and investigation mechanism with Israel's duties under international law.

**The position paper by Yesh Din, of which this is an Executive Summary, was submitted as a response to The MAGC's second position paper, based on our extensive work monitoring investigations of claims of violations of the law of armed conflict.**

The MAGC argues that international human rights law, including the duty to investigate breaches of the law, does not apply to military action in the occupied territories.

**Yesh Din, along with the international legal community, believes that Israel is obligated to investigate the activities of its armed forces in the occupied territories by the standards established in international human rights law.**

### **Summary of the MAGC's position**

The MAGC derives from the Rome Statute the following criteria for the exercise of the duty to investigate: independent and impartial investigation, intention to prosecute, without unjustifiable delay.

- The IDF's law enforcement mechanism is part of the IDF. The MAGC argues that the requirement for an independent and impartial investigation does not require institutional independence of the investigating body but rather functional independence. The MAGC claims that it is functionally independent.
- The MAGC does not describe its standard of "intent to prosecute."
- The MAGC says the legality of the pace of investigation must be judged by the date on which the law enforcement apparatus receives first notice of the incident in question, difficulties in conducting the investigation and comparison to other investigations by the same law enforcement apparatus.

### **Yesh Din's position**

Yesh Din disagrees with the The MAGC's position that these are the only duties derived from the duty to investigate and on the definitions of these standards.

- **Independence:** Yesh Din believes that in most cases functional independence is sufficient but not when the subject of the investigation is an act taken by very senior officials and/or a policy that the Military Advocate General (MAG) had a role in forming. The Military Prosecution and THE MAGC are both subject to the Military Advocate General (MAG) and therefore can not be considered independent.
- **Impartiality:** We believe that the absence of bias in the investigation process is a mandatory requirement of the duty to investigate.
- **Effectiveness and professionalism:** The MAGC does not list in the criteria it considers binding the requirement that the investigation be professional and effective. Many sources establish this duty.
- **Promptness:** Our position is that the requirement of a prompt investigation should not be comparative, but objective.
- **Public scrutiny:** The MAGC omits the requirement of public scrutiny of the investigation. The public must be able to inspect the quality of the investigation and reasonableness of its findings.

### **Actual examination and investigation: failure to comply with binding standards**

In October 2000, the MAG introduced a new investigation policy by which an investigation by the Military Police Criminal Investigation Division (MPCID) is not opened every time a civilian is harmed in operational activity in the occupied territories, but rather an operational debriefing is conducted, on the basis of which a decision is made whether to order an investigation. Since October 2000 the operational debriefing has become an obstruction to effective criminal investigations. **We believe this is a breach of the duty to investigate\*.**

- In practice, 37% of complaints of alleged breaches of the law by soldiers or officers against Palestinians in the West Bank do not lead to MPCID investigations.
- From the beginning of the second intifada in September 2000 until the end of 2009, 1,806 criminal investigations were opened by the MPCID. By January 2011 only 6% of these investigations had led to indictments.
- The MAGC has no data on the reasons for closing investigations. Therefore it is impossible to know how many were closed because of a failure to collect sufficient testimony. The chance that a notice given to the MPCID will yield an indictment against a suspect is around 2.5%.
- Between September 2000-January 2011, 189 soldiers and officers were prosecuted for offenses of harm to Palestinian civilians and their property. 162 (89%) were convicted.
- Between 2002 and 2009, MPCID opened 173 investigations into the unlawful killings of Palestinian civilians by IDF soldiers. Only 14 of these investigations led to indictments against 19 defendants. Of these, 16 were convicted of various offenses. Only five of these were convicted of crimes directly related to the civilian deaths.

**In our opinion, the data shows that the low number of investigations that led to indictments, and the even smaller number of investigations that led to convictions for deaths, are an inescapable result of the systematic problems in the investigative and prosecutorial processes.**

#### **Operational debriefings**

- The operational debriefing is an internal inquiry by the IDF units or their commanders, lacking any independence.
- Those who conduct the operational debriefing are not investigators and have no forensic tools or equipment. Its goal is to derive operational lessons, not to determine criminal culpability.
- The operational debriefing delays any other decision by the prosecution to open a criminal investigation.
- Military law dictates that the inquiry and its conclusions classified.
- The operational debriefing does not hear victims, civilian witnesses or anyone outside of the military.
- The operational debriefing is not limited in time, sometimes lasting months or years, and can effectively thwart the effectiveness or even the possibility of a criminal investigation.

**The examination process does not comply with even one of the requirements of the duty to investigate: it lacks independence, is not professional, is conducted in secret without public scrutiny, is tainted with bias, and cannot be said to meet the standard of promptness.**

#### **MPCID investigations**

- The opening of MPCID investigations is often delayed for many months.

- The MPCID bases that receive complaints of suspicions of crimes against Palestinians in the West Bank are located in Israel, and Palestinians do not have access to them.
- The MPCID lacks translators to collect testimony from Palestinians, causing long delays.
- Most MPCID investigators are soldiers with limited training, ill-equipped for the complexity, severity and importance of the cases. Investigators rarely travel to the scene of the incident.
- The MAGC often investigates practices or methods it helped to create or approve.
- When an MPCID investigation is opened only after an operational debriefing, there is concern that the investigation is already tainted.

**The MPCID investigation is replete with serious structural flaws that render defective each of the requirements of the duty to investigate which international law imposes on the State of Israel.** These problems constitute non-conformity with the requirements of promptness, professionalism, effectiveness, independence and public scrutiny of the enforcement proceedings.

**Our conclusion is that due to these serious structural defects, Israel fails to meet its duty to investigate complaints of violations of justice by soldiers, insofar as reflected by the manner in which complaints by Palestinians living in the West Bank are handled.**

\* In April 2011 the Military Advocate General announced that there was an intention to reverse this decade-long policy not to open an MPCID investigation every time a civilian is harmed in operational activity in the occupied territories; Yesh Din welcomes this announcement, notwithstanding its stated reservations about the standards of MPCID investigations, and Yesh Din's data regarding the percentage of investigations which result in indictments, as discussed in the written brief in question.