



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*

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## A. Foreword

### I. *The Commission's Mandate*

1. According to Government of Israel Resolution No. 1796, dated June 14, 2010, the Commission was given a mandate to investigate not only the legality of actions by the Israeli security forces when they took charge of the Gaza Flotilla, on May 31, 2010, but also:

*" . . .the question of whether the examination and investigative mechanism regarding complaints and claims raised about violations of the law of armed conflict, that are practiced in Israel in general, and as applied in this specific incident, are consistent with the duties of the State of Israel with respect to the rules of international law."*

(Section 5 of the Resolution)

2. This section of the Commission's mandate pertaining to the study of the mechanism for investigating complaints of violations of the law of armed conflict (for the sake of simplicity, we will call the issue about which this paper engages – "the duty to investigate"), as is clearly defined in the Government's resolution, is general and all inclusive, and it authorizes the Commission to examine, investigate and make recommendations regarding the investigation and examination mechanism for complaints that are different from the maritime incident or from customary practice in respect to the Gaza Strip.
3. Therefore the mandate is really about the enforcement response by the State authorities to complaints of violations of the law of armed conflict, both from the aspect of its conduct during hostile confrontations and actual fighting, and also regarding the manner in which it conducts itself in administering an occupied territory (an issue that is also regulated by international humanitarian law). In other words: the Commission's mandate is to explore not only how the IDF fulfills its duty to investigate complaints of incidents that occur during combat and the exchange of fire between soldiers, but also complaints relating to the day to day administration of the occupied territories, the responsibility for which, as is known, has been given to the Israeli security forces. Thus, the Commission's mandate also covers examinations and investigations of a broad spectrum of complaints by civilians of the occupied territories, from the conduct of the soldiers at checkpoints, to claims of the method for dispersing civilian non-violent demonstrations and even complaints of soldiers standing idly by while in their presence Israeli civilians cause damage to Palestinian civilians or their property.
4. **The Commission has been authorized to study an important and very unique issue: the compatibility of the enforcement response by the State of Israel to complaints of violations of the law of armed conflict by Israel**

**soldiers, officers and policy makers. Despite repeated complaints by Israeli, Palestinian and international human rights organizations over the course of many years, we are not aware of such a sweeping investigation of this issue ever having been undertaken by any official Israeli body. In this state of affairs we place considerable importance on the study that the Commission is conducting and believe that the role that was conferred on it is of unparalleled importance.**

5. On December 19, 2010, the Commission received a position paper from the Military Advocate General Corps (Hereinafter, MAGC), signed by the Military Advocate General (Hereinafter, MAG). This is the second position paper that was submitted to the Commission by the MAGC in which it clarifies its position regarding the compliance of the examination and investigation mechanism of the IDF with the Israel's duties under international law.
6. We read the second position paper of the MAGC in depth and found that in many cases we are in complete agreement with it, but that we disagree, even vehemently at times, on many other issues stated therein.
7. This position paper submitted by the the Israeli human rights organization Yesh Din is a response to the MAGC's second position paper. As will be described below, this response is based on our extensive work and the broad experience that we have accumulated by tracking military inquiries, examinations and investigations of claims of violations of the law of armed conflict. Our position paper will include a legal analysis as well, but its main purpose is to deal with the practices **and the systematic and serious failures** that we believe exist in the military's examination and investigative apparatus.
8. We will open with a presentation of the organization and its activities, in order to enable the members of the Commission to understand how the information that will be presented later was gathered. In the second half of the position paper, we will address briefly, but critically, the legal analysis that was presented by the MAGC in Chapter C of the second position paper submitted by the latter, and will lay out the standards that an examination and investigation apparatus is required to meet according to the international fields of law that bind the State of Israel. The third section will be devoted to a detailed analysis of the compliance of the examination and investigative mechanisms, as they are actually conducted, with the standards that were described in the second section. In closing we will discuss the errors that we believe occurred in the MAGC's position paper in its descriptions of the relevant examination and investigative mechanisms of the four English speaking countries chosen for comparison (the United States, Canada, the United Kingdom and Australia).
9. However, as we have stated, we will begin with a presentation of the organization and its activities.

## ***II. A survey of the activity of the Yesh Din and its relevance to the mandate***

### **The organization**

10. **Yesh Din – Volunteers for Human Rights** was founded in March 2005 with the goal of achieving real and lasting improvement in the human rights situation in the Israeli occupied territories.
11. Yesh Din is an independent and non partisan Israeli organization. While Yesh Din's position is that the continued Israeli military occupation of the occupied territories inherently leads to widespread and serious violations of the rights of the protected persons in the occupied territories – and for this reason must be ended – Yesh Din does not hold any position regarding any one political process to end the Israeli-Palestinian conflict.
12. Being an independent organization, Yesh Din is careful not to accept donations from Israeli or Palestinian governmental bodies. Yesh Din exists on donations from private civilians, private and public foundations, including contributions from foreign official bodies which support the protection of human rights in our region and in the entire world. A full list of our donors can be found on the organization's website at [www.yesh-din.org](http://www.yesh-din.org).
13. Yesh Din is an organization of volunteers who work side by side with professional experts: lawyers, field workers, researchers, spokespeople, etc. The volunteers who receive specialized training go out into the field collect testimony from victims of offenses and help them file complaints with the relevant investigative bodies. The experts operate in their own professions to advance the organization's activity. At the head of the organization is an executive director who is subordinate to a managing board composed of five volunteers of the organization who are chosen by members of the organization.
14. Alongside Yesh Din is a public council which assists the organization in its work. Among the members of the public council are many individuals who have worked in the past in various law enforcement capacities. Members include: former Minister Shulamit Aloni, former Attorney General Michael Ben Yair, Former Deputy Attorney General Yehudit Karp, Brigadier General (res.) Ilan Paz, and Attorney Talia Sasson, former Head of Special Prosecutions in the State Attorney's Office.

### **Areas of activity**

15. Yesh Din is presently active in three main areas:

**Enforcement of the law on Israeli civilians:** Yesh Din has worked since its establishment in 2005 to bolster law enforcement proceedings against Israeli

civilians who are involved in criminal offenses against Palestinians and their property in the West Bank. As part of this activity volunteers of the organization assist victims of offenses in filing complaints, and attorneys working for the organization, who represent the complainants, follow the investigation of the complaints until their completion, either by a closing of the investigation or – in cases where indictments are filed against defendants – the issuance of a verdict. In those cases in which the investigation is closed without filing an indictment against the accused, Yesh Din inspects the case file – through powers of attorney given by the victims to the attorneys who act on behalf of Yesh Din –to determine whether there is cause to file an appeal of the decision to close the case, and in certain circumstances Yesh Din will appeal a decision to close an investigation on behalf of the victims.

In order to give a simple overview, as part of this project, Yesh Din has handled and is presently handling **over 700 investigations** of complaints by Palestinians of alleged offenses committed against them by Israeli civilians.

16. Along with aiding victims of offenses on an individual basis, based on the knowledge gained from providing this assistance, Yesh Din promotes the study and change of policy in the field of law enforcement on Israeli civilians who are involved in criminal offenses against Palestinians and their property. Yesh Din collects data from cases that the organization handles, from official sources and other sources, and on the basis of these publishes its findings and offers recommendations.
17. Yesh Din has published thus far two comprehensive reports on this issue. The report "A Semblance of Law: Enforcement of the Law on Israeli Civilians in the West Bank" deals with a host of subjects, but it focuses primarily on the failures in the work of the Israel Police in Judea and Samaria (the West Bank) District when investigating Palestinian complaints of offenses allegedly committed against them by Israeli civilians. By studying the actual investigation files, the report pointed out systematic and routine failures in these investigations and offered recommendations to rectify the problems described in the report. A second report, entitled "Too Little Too Late", deals with the supervision by the State Attorney's Office over the investigation of offenses committed by Israeli civilians against Palestinians in the occupied territories, focusing mainly on the activities of the enforcement team headed by the Deputy State Attorney (Special Assignments) and the activities of the Appeals Division.
18. Along with these comprehensive reports, Yesh Din also publishes a series of data sheets. The last data sheet that the organization published, based on 643 investigations by the Samaria and Judea (SJ) District Police which the organization followed and continues to monitor since its establishment, demonstrates that only 9% of investigations into offenses committed by Israelis against Palestinians in the West Bank areas reach the stage of an indictment. Most of these investigations – more than 90 percent – end in the

closing of the case for reasons that indicate a failure of the investigation ("offender unknown", "lack of sufficient evidence" and investigation files that were lost).

19. **Land Issues:** In light of the growing number of cases of Israeli civilians taking control of land owned by Palestinian civilians in the West Bank, either by trespass and use (building, planting, etc.) or by preventing access to its owners, Yesh Din assists land owners in seeking the return of their property. Yesh Din represents Palestinian owners of plots of land in the West Bank which were overtaken by Israeli civilians through the erection of structures and/or by fences and/or by the planting of crops in such a way that the Palestinian owners of the plots are prevented from using their land. Yesh Din researchers are in continuous contact with land owners whose land was stolen and collect information and the necessary documentation from them. The legal staff of the organization represents the land owners before the enforcement and administrative authorities in the West Bank, and in relevant cases sues for stop work and eviction orders to halt unlawful work and trespass. In cases in which there exists no alternative, Yesh Din helps land owners apply to the various judicial bodies to compel the enforcement agencies to enforce the orders that they themselves have issued to return the plots of land to their owners.
20. Until present, Yesh Din has assisted Palestinian land owners in initiating legal proceedings in 36 cases, most of them appeals to the High Court of Justice for orders to the enforcement agencies to enforce demolition orders on buildings erected by Israeli civilians on private Palestinian land. Other proceedings conducted as part of this project involve protecting access of land owners to their properties, evicting trespassers who have overtaken land by planting different types of seedlings, compensation for land owners from the State due to its failure to enforce the law on trespassers, and more.
21. **Enforcement of the law on security forces in the territories:** Similar to the project enforcing the law on civilians, as part of the organization's activities in this field, its volunteers and team of experts act on behalf of Palestinian victims who have allegedly suffered criminal offenses by soldiers and police officers and help in filing complaints to the proper investigative bodies: the Military Police Criminal Investigations Division (MPCID), the Department of Investigating Police Officers at the Ministry of Justice, and in certain cases, the Israel Police. Here too, Yesh Din's legal staff provides representation through powers of attorney to victims of offenses before the relevant investigative and prosecuting bodies and follows the progress of the investigation until its conclusion. Upon request, Yesh Din assists the investigative and prosecuting bodies in contacting the victims of offenses and eye witnesses, and in obtaining relevant documents (such as medical documentation, etc.), with the aim of providing optimal conditions for the success of the investigation. The lawyers who represent the victims from Yesh Din submit requests to inspect investigation files that have been closed

without an indictment being filed in order to consider the filing of an appeal, and in cases in which it appears that the investigation should be reopened or indictments should be issued according to evidence found in the investigation file – Yesh Din files an appeal of the decision to close the case.

22. As part of its activity in this field Yesh Din monitors the handling by the military investigative and prosecuting agencies **of about 200 complaints that were filed at MPCID bases** on grounds of alleged criminal offenses committed by IDF soldiers against Palestinian civilians and their property in the West Bank.
23. Yesh Din has published thus far a comprehensive report, entitled "Exceptions: Prosecution of IDF soldiers during and after the Second Intifada, 2000-2007", which contains a study of the outcome of all the indictments filed against soldiers who committed offenses against Palestinians during that period. Along with this study, Yesh Din also addresses briefly the main problems in enforcement proceedings regarding offenses of this kind. A variety of data sheets published by Yesh Din dealt with subjects such as the prolonged examination of complaints and review of investigation files by the Military Prosecution.

### **Yesh Din Publications**

#### Comprehensive reports

- A. A Semblance of Law: Enforcement of the Law on Israeli Civilians in the West Bank (June 2006)
- B. Preparing for the Olive Harvest 2007 (Position Paper) (February 2007)
- C. Backyard Proceedings: The Implementation of Due Process Rights in the Military Courts in the Occupied Territories (December 2007)
- D. Too Little Too Late: Supervision by the Office of the State Attorney Over the Investigation of Offenses Committed by Israeli Civilians against Palestinians in the Occupied Territories (May 2008)
- E. Exceptions: Prosecution of IDF soldiers during and after the Second Intifada, 2000-2007

#### Data Sheets

- A. Investigations of Criminal Offenses of IDF Soldiers against Palestinians and their Property: Figures for 2000 – 2007 (December 2007)
- B. Investigations of Criminal Offenses of IDF Soldiers against Palestinians and their Property: Unit Index 2006 – 2007 (April 2008)

- C. Enforcement of the Law on Israeli Civilians in the West Bank: Monitoring by Yesh Din (July 2008)
- D. Investigations of Criminal Offenses of IDF Soldiers in the Occupied Territories: Indictments 2000 – 2007 (July 2008)
- E. Investigation of Criminal Offenses of IDF Soldiers against Palestinians and their Property: Data on Activity of the Military Prosecution's Operational Affairs Unit (October 2009)
- F. Police Investigation of Vandalism of Palestinian Trees, Yesh Din Monitoring 2005 – 2009 (November 2009)
- G. Investigation of Criminal Offenses of IDF Soldiers against Palestinians and their Property: Data from the years 2000 – 2009 (February 2010)
- H. Police Investigation of Vandalism of Palestinian Trees in the West Bank: Yesh Din Monitoring 2005 – 2010 (October 2010)
- I. Yesh Din Monitoring: Law Enforcement on Israeli Civilians in the West Bank – 2005 – 2010 (February 2011)

## B. The Normative Legal Framework Required for Investigations in the Occupied Territories

### I. *Applicable Fields of Law*

24. Below we will analyze the position of the MAGC with respect to the fields of law that apply to the duty to investigate complaints of violations of the law of armed conflict, and we will present the position held by Yesh Din. The analysis from this point onward is made with an emphasis on the situation of military occupation of a territory, similar to the occupation of the West Bank.

#### The MAGC's position

25. In the MAGC's second position paper it is argued that the sole normative legal framework that is binding in respect to investigating claims of violations of the law of armed conflict in the occupied territories is international humanitarian law (which partially deals with the law of armed conflict). After a study of the meager number of provisions that are included on the subject of the law of armed conflict, the MAGC suggests that a derivative branch of humanitarian law – international criminal law – should be used as an additional normative source.
26. In Yesh Din's approach international humanitarian law does in fact constitute a cornerstone for all matters related to the binding legal framework on the issue discussed in this position paper. The source for the duty to investigate alleged violations of the law of armed conflict derives from common Article 1 which is shared by the four Geneva Conventions (1949) (hereinafter: Geneva Conventions), which places a duty on states to comply with and to commit to comply with the norms that are established in the convention under any situation: ("respect and to ensure respect for the present Convention in all circumstances").
27. **We would like to add** the following to the MAGC's position paper:
- We refer to the common Article 3 of the four Geneva Conventions and Article 27 of the Fourth Geneva Convention and Regulation 46 of the regulations annexed to the Fourth Hague Convention concerning the Laws and Customs of War on Land, 1907. **These clauses establish the duty of the combatant force to protect civilians during combat**, and they set out specifically **the duty to respect rights and protect the persons and property of civilians in an occupied area**.
28. The duty to investigate serious violations of the duty to protect civilians is established in Articles 146 – 147 of the Fourth Geneva Convention (Article 146 is also mentioned in the MAGC's position paper). Established in Article 146, *inter alia*, is the duty:

*"to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts."*

29. Indeed, the obligation to adhere to the rules of international humanitarian law, which inherently consist of the duty to deal with any breaches including prosecuting those responsible for the grave breaches, naturally establishes the duty to investigate suspects in regard to these breaches. In light of the determination by the Military Advocate General that with respect to the army's duty to investigate harm caused to a non-combatant there is no significance to the determination whether the conflict between Israel and the terror organizations in Gaza and the West Bank is governed by rules applicable to an international hostile conflict, or rules applicable to hostile conflicts that are non-international, we will not expand on this issue.
30. As can be seen, the duty to investigate established in international humanitarian law (or derived from it) does not specify the principles guiding its implementation. Therefore additional legal sources must be consulted in order to determine how to give substance to this duty. Even the MAGC states, and rightly so, that it cannot be claimed that just because international humanitarian law does not give instructions on how to investigate, the investigation itself is free of any type of standard. **We agree** with the first determination made by the MAGC that investigations of suspicions of violations of the law of armed conflict should be "**criminal**" in substance, given that the goal of the investigation is "to locate suspects of violating the law of armed conflict and prosecute them". Parenthetically it should be noted that Yesh Din believes that the purpose of an investigation is to reach the truth and impose personal responsibility for offenses insofar as there are any, and therefore it is appropriate that the investigation possesses a "criminal" nature being that this is the manner in which our legal system suggests that this task be achieved.
31. The sole material standard that the MAGC derives from international humanitarian law regarding the duty to investigate is compliance with the requirement of good faith. This requirement, as the MAGC states correctly, is a generalized requirement and is insufficient.
32. Thus, the MAGC requires an additional legal source, which is international criminal law. The principle of complementarity, which constitutes a basic principle in international criminal law, states that as long as a state law enforcement system investigates and prosecutes, if warranted, suspicions of the commission of international crimes, its proceedings will not be replaced by proceedings in international or external tribunals outside of the state dealing with the suspected breach.
33. By virtue of the complementarity principle anchored in Article 17 of the Rome Statute of the International Criminal Court of 1998 (hereinafter: Rome

Statute) the MAGC derives a number of criteria for the exercise of the duty to investigate (Articles 17(2)(a), 17(2)(b) and 17(2)(c) of the Rome Statute), as follows:

- A. **Independent and impartial investigation** – an objective investigation of the bodies being accused of committing violations of international humanitarian law.
  - B. **Intention to prosecute** – the investigation must be done not out of an intention to "shield" the suspects from prosecution. We prefer the language of "an investigation the purpose of which is to disclose the truth and impose personal responsibility if any".
  - C. **Without unjustifiable delay** – an investigation that is unjustifiably postponed may be demonstrating a lack of good faith on the part of the state conducting the investigation.
34. In addition, the MAGC examines the content of international human rights laws and reaches the conclusion **that this discipline does not apply to the duty to investigate**, and therefore it cannot be considered a **complementary legal source**. According to the MAGC there are presently two approaches in respect to this discipline of international law: the first, which views it as an independent source for the duty to investigate, and the second as a complementary source to international humanitarian law. The MAGC claims that these two approaches are basically the approaches of human rights organizations all over the world who use, as it defines it, the "normative confusion" which encompasses the law of armed conflict during a hostile conflict. Alongside this, the MAGC takes pains to emphasize in its opinion that "the consistent approach of the State of Israel in this matter is that human rights law does not apply to IDF actions taken during hostile conflicts to which it is a party" (page 44 of the MAGC's position paper). Thus we see that the Military Advocate General denies the application of the provisions of international human rights laws to military action in the occupied territories, and includes as part of this rule the duty to investigate breaches of the law, and refutes it as a source of complementary law to humanitarian law or to international criminal law.

### **Yesh Din's Position**

35. Contrary to the position of the MAGC, Yesh Din believes that the provisions of international human rights law apply directly to the duty to investigate complaints of violations of the law of armed conflict, **especially in the context of activities by armed forces in an occupied territory**.
36. We believe that the MAGC's position is inconsistent with the goal and objective of the human rights treaties ("goal and objective" is a primary clarifying principle in interpreting international law – see Article 31 of the Vienna Convention on the Law of Treaties). The international legal community also rejects Israel's position, and all of the bodies of the United

Nations acting to enforce human rights treaties repeat this point over and over again in their reports.

37. Even the International Court of Justice in Hague, which the Supreme Court has established in the past as the supreme judicial body in international law – and therefore full, proper consideration must be given to its interpretation of human rights law and its rules (see HCJ 7957/04 **Zaharan Yunes Mahmed Maraba et al v. Prime Minister of Israel** et al [Judgment from 15.9.2005, para. 56 of the ruling of President (ret.) Barak] – has held in two advisory opinions that human rights laws also apply to rules of hostile conflict in general and in particular to rules of occupation:

*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* ADVISORY OPINION O F9 JULY 2004, **I.C.J. Reports 2004**, p. 136, at pp. 177 – 181.

*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion of 8 July 1996*, **I.C.J. Reports 1996**, p. 226, at p. 240.

38. These opinions state, without any doubt, that human rights laws are not suspended during a situation of occupation, but are applicable in full force, with existing limitations. The opinion of the international court regarding the separation wall examined in a practical manner the application of the treaties in the West Bank areas and the duties of the State of Israel in light of its international obligations, and it reached the necessary conclusion that Israel – being the sole sovereign body in the region – is obligated to protect the international human rights of the Palestinian residents.
39. This unequivocal determination joins a list of decisions by the European Court of Human Rights that established the "**effective control**" test as determinative regarding the geographic borders for the application of the European Convention for the Protection of Human Rights and Fundamental Freedoms, from the perspective of a signatory member. Among these decisions can be listed, for example:

**Loizidou v. Turkey** (Preliminary Objections), Decision of the 23<sup>rd</sup> of February 1995, Paragraph 62.

**Behrami v. France, Saramati v. France, Germany and Norway** (Application Nos 71412/01 and 78166/01 (unreported), 2 May 2007).

40. To all of the above must be added rulings that were recently issued by the House of Lords in England, which also held that the rules of international human rights to which the United Kingdom is bound apply also to occupied territories under its control and the control of its soldiers, as in Iraq:

**R (Al-Skeini) v. Secretary of State for Defence** UKHL 26 [2007] 3 WLR 33 [13.6.2007] available at: <http://www.parliament.the-stationery-office.com/pa/ld200607/ldjudgmt/jd070613/skeini-1.pdf>

**R (on the application of Al-Jedda) (FC) v. Secretary of State for Defence** UKHL 58, [12.12.2007], available at <http://www.publications.parliament.uk/pa/ld200708/ldjudgmt/jd071212/jedda.pdf>

41. It appears from the foregoing that international human rights law also applies to the relationship between the military power/occupier and the civil population, and the obligations of the occupying power – including the duty to investigate – derive from these laws. It should be noted that in the **Maraba** case mentioned above, the Supreme Court did not negate the applicability of the treaties that comprise international human rights law, and it held that for the purpose of the specific ruling, there is an assumption of the applicability of these treaties (see: HCJ **Maraba** Id., para. 57 of the ruling of the President (ret.) Barak).
42. Even in rulings other than **Maraba**, the High Court of Justice has recognized the applicability of basic rights by virtue of international human rights law in an area that can be militarily seized. More than one ruling has held that the basic rights of a person or group of persons apply during wartime as well (see, for example, the words of Justice A. Proccacia, in HCJ 10356/02 **Yoav Hess v. Commander of IDF Forces in the West Bank** (unpublished); a ruling from 4.3.2004, called hereinafter the "**Hess Case**"), which states in paragraph 17 of the ruling that "*the proprietary right of the individual does not expire even during wartime*"; and also the holding of Justice (then) D. Beinish, in HCJ 1890/03 **Bethlehem Municipality and 21 others v. State of Israel et al**, (Supreme Ct. Rulings 2005(1), 1114 (2005)), which relates to the application of the right to freedom of movement as a right deriving from customary international law of human rights which applies in the case). We will return to these rulings and their holdings when examining the rights of the victims in our cases, on an individual basis.
43. Furthermore, even in a ruling that was handed down not so long ago, HCJ 3969/06 **Head of the Dir Samet Village Council, Muhamed Abbat Mahmoud Alharov et al v. Commander of the IDF Forces in the West Bank et al** (unpublished; a ruling from 22.10.2009; to be called hereinafter the "**Dir Samet Case**") Chief Justice Beinish (together with the Vice President A. Rivlin and Justice A. Procaccia), held unequivocally:

*"[. . .] the authorities of the military commander are derived from the rules of public international law that apply to military seizure.*

*These rules are anchored, mainly, in the Fourth Hague Convention [. . . ] and in the regulations annexed to it, the provisions of which have the status of customary international law; in the Fourth Geneva Convention [. . . ], whose practiced provisions constitute part of Israeli jurisprudence, and this court has needed in the past to interpret the various provisions in its rulings [. . . ]; and in the first additional protocol to the Geneva Convention, [. . . ] to which Israel is not a party, however the practiced provisions of it do constitute part of Israeli jurisprudence [. . . ] **at times, the humanitarian provisions can be supplemented by international human rights laws (Human Rights Law)**".* (HCJ Dir Samet, **Id**, para. 10 of the ruling of Chief Justice Beinish; emphases added).

Later in the ruling, in paragraph 17 of Chief Justice Beinish's opinion:

*"17. In respect to the human rights of the local population, there is no disputing that the military commander must respect, protect and allow the exercise of a range of human rights granted to the local residents, subject to essential security needs (see, for example, Article 27 of the Fourth Geneva Convention; Regulation 46 of the Hague Regulations. See also the principles that guide our rulings according to the international treaty regarding civil and political rights (International Covenant on Civil and Political Rights, 1966) hereinafter: Covenant on Civil and Political Rights))."*

44. Furthermore, there is no, and cannot be any, doubt that Israel has a very high level of effective control over the streets of the West Bank and that its effective control over Area C is **complete, exclusive and inimitable**.
45. The foregoing demonstrates that the provisions of international human rights law, on subjects that are specified in treaties and instruments of international humanitarian law, apply to every area over which the State of Israel (through its military) has effective control. This is also the position taken by the High Court of Justice, as demonstrated by the aforementioned rulings. **Thus, the application of the standards of the duty to investigate that are established in international human rights law is not a voluntary application of a legal source existing merely to guide or supplement – but rather it is a binding legal duty that must be exercised.**

## ***II The binding standards for investigating claims of violations of the law of armed conflict***

46. Below we will describe the standards for exercising the duty to investigate alleged violations of the law of armed conflict. We will begin by showing the position of the MAGC and then we will explain our position.

## Position of the MAGC

### A. Functional independence and impartial investigation

47. The law enforcement mechanism in the IDF is an apparatus that constitutes part of the IDF. The law enforcement bodies of the military (the Military Prosecution, the military police, and the courts-martial) are IDF units. This arrangement is similar to those existing in countries with similar legal systems to Israel (the United States, the United Kingdom, Canada and Australia). Thus, the MAGC developed the idea that the requirement for an independent and impartial investigation of suspected violations of the international humanitarian law does not require **institutional independence** of the investigating body, but rather **functional independence**.
48. The MAGC claims that the independent-functional status of the Military Advocate General, who ranks at the top of the IDF law enforcement mechanism, derives from the fact that despite his subordinacy to the Chief of Staff, in professional matters "there is nothing above him other than the authority of the law". His appointment is made by the Minister of Defense where the Chief of Staff is the sole recommending body, and his professional activities are subject to oversight by the Attorney General and the Supreme Court sitting as the High Court of Justice. The functional independence is not just personal to the function of Military Advocate General, but pertains to all the functions of the legal advisors working in the MAGC.
49. In addition, the MAGC claims that a few years ago there was an organizational change in the MAGC, and an Operational Affairs Unit was founded whose main task is to handle law enforcement, and it is separate from the legal advisory bodies. In this situation, the Attorney General claims, the functional independence is reinforced in light of the fact that the bodies of the legal advisors are not the same bodies that later examine the results of the recommendations in a case from a criminal perspective.

### B. Intent to prosecute

50. The MAGC does not describe in its position paper the standard of "intent to prosecute". It appears that it intended to refer to a test in which the proceedings that are used for investigation and examination of the complaint are conducted with a real intent to investigate, and not just for the sake of performing a routine duty or to "cover up".

### C. Without unjustifiable delay

51. The MAGC claims that there are a number of factors according to which the legality of the pace of investigation must be judged, and they are:

- I. The date on which the law enforcement apparatus in the IDF was first notified of the incident that raised a concern of a violation of international humanitarian law;
- II. The (objective) difficulties in conducting an effective investigation;
- III. A comparison to other investigations done by the same law enforcement apparatus in respect to suspicions of offenses that do not constitute a breach of international humanitarian law (a claim of reasonableness of the delay which must be examined from a comparative viewpoint).

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

52. Yesh Din disagrees with the MAGC both on the question of whether the standards described above (functional independence, intent to prosecute and absence of unreasonable delay) are the only duties derived from the duty to investigate, and also on the question of the exact definitions of these standards. The following is our position.

#### **A. Independence**

53. We do not contest the idea that functional independence is sufficient in most of the cases. However we believe that in those cases in which the subject of the investigation/examination is an act taken by very senior officials and/or a policy that the Military Advocate General had a role in forming, functional independence cannot be considered to fulfill the legal requirement of an independent investigating body from the body to be prosecuted.
54. For example, we believe that investigations dealing with the issue of the legality of orders (such as rules of engagement) or the use of a certain type of weapon (for instance white phosphorous), or with actual practice (for example assassinations), all of which involve the MAGC, cannot be conducted by the military police upon direction of the Military Prosecutor. Furthermore we would like to mention that the Military Prosecution and the MAGC are both subject to the Military Advocate General.
55. In addition, we do not believe that one can seriously expect the IDF law enforcement system to conduct a serious investigation and prosecution of the army's chief officers, including commanding officers and the Chief of Staff, on issues related to combat and operational actions. Despite the independence of the MAG, the army is a hierarchal military system in which the military advocates serve as advisors to their commanders. Officers with a rank of major general serve as district jurisdiction commanders and they and the Chief of Staff are authorized to intervene in sentencing (section 442 of the Military Justice Law, 5715 – 1955, hereinafter: "Military Justice Law"). We do not know of a precedent of an investigating military body investigating a major general or lieutenant general suspected of war crimes.

## B. Impartiality

56. We believe that the absence of bias in the investigation process is a mandatory requirement of the duty to investigate and has its source in international law dealing with human rights.
57. The thrust of this standard is that the investigators cannot lean towards (or against) the persons being investigated; **in particular there cannot be any bias toward the authorities under their investigation.**
58. The requirement of impartiality – as a condition for the satisfaction of the duty to investigate – is found in many sources of international human rights laws (see for example):

- The International Covenant on Civil and Political Rights, Article 2 (in particular Article 2(3)(a) "effective remedy, **notwithstanding that the violation has been committed by persons acting in an official capacity**");
- The interpretation of the above sections in General Comment 31 of the Human Rights Commission of the United Nations paragraph 15 ("independent and impartial bodies");
- Interpretation of Article 7 of the International Covenant on Civil and Political Rights in General Comment 20 of the Human Rights Commission of the United Nations, paragraph 14 ("complaints must be investigated promptly and **impartially**")
- Convention against Torture, Article 12 ("prompt and **impartial** investigation");
- United Nations resolutions:

GA Res 60/147 16 December 2005, 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, para. II 3(b) ("investigate. . . **impartially**");

GA Res 55/111 12 March 2001, Extrajudicial, summary or arbitrary executions, para. 6 ("obligation of all governments to conduct exhaustive and **impartial** investigations");

United Nations Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, adopted on 24 May 1989 by the Economic and Social Council Resolution 1989/65, (UN Principles on Extra-Legal Executions), E.S.C. res. 1989/65, annex, 1989 U.N. ESCOR Supp. (no. 1) at 52, U.N. Doc. E/1989/89 (1989), Principle 9 ("thorough, prompt and **impartial** investigation").

- And specifically, many rulings of the European Court of Human Rights, holding that the effective standards of investigation are not satisfied if there is no impartiality or objectivity on the part of the investigative bodies. See for example:

*Ramsahai v. The Netherlands* (Application no. 52391/99), Judgment 15 May 2007, § 112 ("the persons responsible for and carrying out the investigation must be independent and **impartial, in law and in practice**"); § 113 ("investigation's conclusions must be based on thorough, **objective and impartial analysis of all relevant elements**"); § 325 ("not only a lack of hierarchical or institutional connection but also a **practical independence**").

*Kaya v. Turkey* (158/1996/777/978), Judgment 19 February 1998 (holding that the investigation underlying the appeal was not effective because of the fact that on the basis of his prior assumption and opinion in favor of the suspected soldiers the investigation did not meet the criteria of impartiality).

### C. Effectiveness and Professionalism

59. An additional criterion that is not mentioned in the list of criteria that the MAGC considers as binding (as opposed to voluntary compliance with the criteria) is the requirement that the investigation be professional and effective.
60. The meaning of this requirement is that the investigating body must have the ability to collect evidence that will expose the truth and be able to give proper redress to the victims of the unlawful conduct that was revealed.
61. We refer to the following sources in this matter:
  - The Covenant on Civil and Political Rights, Articles 2(2) and 2(3) ("competent authorities", "effective remedy");
  - Interpretation of the above sections in General Comment 31 of the Human Rights Commission of the United Nations, paragraph 15 ("thoroughly and effectively"), and paragraph 18 ("ensure that those responsible are brought to justice");
  - General Comment 20 of the Commission against Torture, paragraph 14 ("by competent authorities", "so as to make the remedy effective");
  - General Comment 6 of the Human Rights Commission, related to Article 6 of the Covenant on Civil and Political Rights (Right to Life), "effective facilities and procedures to investigate thoroughly"; a ruling of the British House of Lords: *R. (Amin) v. Secretary of State for the Home Department* [2003] UKHL 51 ("effective investigation, "reasonably complete").

62. In addition, many rulings of the European Court of Human Rights have established the duty to investigate in an effective and professional manner – to wit, in a manner that enables the uncovering of the truth and the accountability of individuals and institutions for violating basic rights. The following is a partial list:

- *Ramsahai v. The Netherlands* (Application no 52391/99), Judgment 15 May 2007, § 324 ("In order to be 'effective' . . . an investigation . . . must firstly be adequate. That is, it must be capable of leading to the identification and punishment of those responsible.").
- *Finucane v. The United Kingdom* (Application no 29178/95) Judgment, Strasburg, 1 July 2003, § 67 – 69 ("effective official investigation. . . secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility. . . capable of leading to a determination of whether the force used in such cases was or was not justified in the circumstances . . . and to the identification and punishment of those responsible. . . reasonable steps . . . to secure the evidence concerning the incident, including inter alia eye witness testimony, forensic evidence and, where appropriate, an autopsy. . . Any deficiency in the investigation which undermines its ability to establish the cause of death or the person or persons responsible will risk falling foul of this standard. . .").
- *Velikova v. Bulgaria* (Application no. 41488/98), Judgment 18 May 2000, § 79 ("The investigation must be, *inter alia*, thorough, impartial and careful") § 82 ("Unexplained failure to undertake indispensable and obvious investigative steps is to be treated with particular vigilance").
- *Aksoy v. Turkey* (100/1995/606/694), Judgment 18 December 1996, § 98 ("thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the complainant to the investigatory procedure. . . such a requirement is implicit in the notion of an "effective remedy").

63. Even the Inter-American Court for Human Rights insists on this duty (in the context of investigating the killing of civilians). See:

*Case of Myrna Mack-Chang v. Guatemala*. Judgment of November 25 2003. Series C No. 101, para. 4 ("a serious and effective investigation that could be the basis for complete elucidation of the facts, prosecution, trial, and punishment of those responsible, both direct perpetrators and accessories, within a reasonable term.").

64. There are also a considerable number of decisions by United Nations institutions that reiterate the requirement that investigations must be

professional and effective in order to meet the requirements of international law:

- GA Res 60/147 16 December 2005, The Basic Principles and Guidelines on the right to a remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, para. II 3 (b) ("effectively. . . thoroughly");
- GA Res 55/111 12 March 2001, Extrajudicial, summary or arbitrary executions, para. 6 ("exhaustive", "identity and bring to justice those responsible"), para. 7 ("thoroughly");
- Principle 11 of the Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, E.S.C. res. 1989/65, annex, 1989 U.N. ESCOR Supp. (No. 1) at 52, U.N. Doc. E/1989/89 (1989) ("thorough . . . The purpose of the investigation shall be to determine the cause, manner and time of death, the person responsible, and any pattern or practice which may have brought about that death. It shall include an adequate autopsy, collection and analysis of all physical and documentary evidence and statements from witnesses. The investigation shall distinguish between natural death, accidental death, suicide and homicide."); Principle 10 ("The investigative authority shall have the power to obtain all the information necessary to the inquiry. Those persons conducting the inquiry. . . shall also have the authority to oblige officials allegedly involved in any such executions to appear and testify. . .").

#### D. Promptness

65. Our position is that the requirement of a prompt investigation is not comparative but objective. The requirement is that the pace of the investigation should be such that it does not affect its effectiveness and its ability to provide relief to the victims and a deterrent to potential perpetrators.
66. We base this interpretation on the following sources:
  - General Comment 31 of the Human Rights Commission relating to investigation of breaches of the International Covenant on Civil and Political Rights, section 15 ("promptly");
  - General Comment 20 of the Human Rights Commission, (Regarding Investigations of Torture and Cruel and Humiliating Treatment or Punishment) paragraph 14: ("complaints must be investigated promptly . . . so as to make the remedy effective").
  - Rulings from the European Court of Human Rights, for example:

- *Ramsahai v. The Netherlands* (Application no. 52391/99), Judgment 15 May 2007, § 9 ("a prompt response by the authorities in investigating a use of lethal force may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts.");
- *Finucane v. The United Kingdom* (Application no. 29178/95) Judgment, Strasbourg, 1 July 2003, § 70 (repeated in *Ramsahai*); § 80 ("requirement that effective investigations be commenced promptly and conducted with due expedition");
- *Edwards v. UK* (Application no. 46477/99) 14 March 2002, § 86 ("it is crucial in cases of deaths in contentious situations for the investigation to be prompt. The passage of time will inevitably erode the amount and quality of the evidence available and the appearance of a lack of diligence will cast doubt on the good faith of the investigative efforts, as well as drag out the ordeal for the members of the family.");
- United Nations resolutions:
  - GA Res 60/147 16 December 2005, 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, para. II 3(b) ("promptly").
  - GA Res 55/111 12 March 2001, Extrajudicial, summary or arbitrary executions, para. 7 ("promptly").

#### E. Public scrutiny

67. Another requirement that is missing from the list of criteria to which an investigation is bound from the point of view of the MAGC is the requirement of public scrutiny of the investigation.
68. It is our understanding that this requirement means that the investigation proceeding must be one that enables the public to follow the decision making process, allows public monitoring, and basically would allow the victims, their families and their attorneys and representatives to inspect the quality of the investigation and the reasonableness of its findings.
69. This requirement is an inextricable and integral part of the effective and professional requirements of investigations. Without public involvement, without (real) input from the victims and their representatives, without

supervision of the investigative processes – these proceedings are fated for failure and distortion.

70. With respect to this requirement we refer to the following sources:

United Nations Resolutions:

- 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) at 52, U.N. Doc. E/1989/89 (1989) ("Families of the deceased and their legal representatives shall be informed of, and have access to any hearing as well as to all information relevant to the investigation, and shall be entitled to present other evidence . . . A written report shall be made within a reasonable period of time on the methods and findings of such investigations. The report shall be made public immediately and shall include the scope of the inquiry, procedures and methods used to evaluate evidence as well as conclusions and recommendations based on findings of fact and on applicable law. The report shall also describe in detail specific events that were found to have occurred and the evidence upon which such findings were based, and list the names of witnesses who testified, with the exception of those whose identities have been withheld for their own protection.")

Rulings of the European Court of Human Rights, for example:

- *Isayeva v. Russia* (Application nos. 5794/00, 57948/00 and 57949/00), Judgment 24 February 2005, § 213 ("there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory. The degree of public scrutiny required may well vary from case to case. In all cases, however, the next-of-kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests.");
- *Finucane v. The United Kingdom* (Application no. 29178/95) Judgment, Strasbourg, 1 July 2003, § 71 (repeated in *Isayeva*); *Edwards v. UK* (Application no. 46477/99) 14 March 2002, section 73 (same as above).

## C. Examination and investigation in fact: failure to comply with the required standards

### *I. The examination and investigation process of complaints for violations of the law of armed conflict by IDF soldiers in the West Bank: Investigative Policies beginning from October 2000.*

#### The Operational Debriefing

71. As described in the MAGC's position paper, the body in the IDF in charge of investigating breaches of law by soldiers, is the Military Police Criminal Investigation Division (MPCID).
72. Since the Al Aqsa intifada broke out in September 2000 the Military Advocate General has imposed a new investigation policy by which an MPCID investigation will not be opened each time a civilian is harmed in an operational exercise in the occupied territories; instead, an operational debriefing will be conducted, and only after receipt of its findings will the respondent decide whether to order an investigation.
73. In the past (not so long ago – in the first Intifada) the IDF boasted of the fact that each time a person was killed during a military action – an MPCID investigation was opened (see the book by the former Military Advocate General, Amnon Starnsnov, **Justice Under Fire**, page 139). At one time the prevailing thought was that:

*"the death of a small child is inexcusable and unforgivable and there is no significance as to who bears the responsibility for the death and who should be blamed for this horrible sin. . . I therefore asked the MPCID to go deeper into the investigation of this painful subject".*

(A. Starnsnov, **Justice under Fire**, pages 166 – 167)

74. Indeed, the new policy contradicts the practice that took place during the "first Intifada" in which the army acted according to General Staff Order no. 33.0304, which mandated the opening of an MPCID investigation in any instance in which the prosecutor received information of the killing of a civilian by IDF troops, other than during a hostile terrorist attack.
75. The status of the operational debriefing is anchored in section 539a of the Military Justice Law. Justice (ret.) Dorner discussed the status of the operational debriefing in H CJ 6208/96 Mor Hayim et al v. IDF et al (42(3) P.D. 835, 834):

*"The operational debriefing is in general the appropriate method to investigate an incident that occurs during a military operation. It is*

*conducted, generally, by professional bodies close to what is happening in the field and situated in the operational activity. It takes place immediately after the incident, while the incident is still fresh in the minds of the participants in the inquiry. It is done directly and easily. It has constituted an integral part of the military operation of the IDF since the inception of IDF."*

76. Therefore, the nature of the operational debriefing is professional. Its objective is to **derive operational lessons** and to learn from operational failures and problems. It is not a tool that is designated to collect evidence or to **determine personal accountability**.
77. The content and manner of the implementation of the operational debriefing are derived from the following objectives:
  - A. Other than in exceptional circumstances the persons conducting the operational debriefing are commanding officers in the chain of command of the unit involved in the investigated action;
  - B. Other than in exceptional circumstances, the persons conducting the operational debriefing have no training in investigations and do not have investigative abilities or any forensic tools;
  - C. The operational debriefing is not admissible at a trial for an offense committed during the investigated action;
  - D. The inquiry is classified;
  - E. Other than in exceptional circumstances, the operational debriefing hears the accounts of soldiers and officers only and civilian accounts are almost never present.
78. Yesh Din does not dispute the need for the existence of these inquiries when the IDF needs to clarify operational failures. However, the fact that since October 2000, under the paradigm of "armed confrontation", the operational debriefing has become a serious and significant obstruction to effective criminal investigations of incidents of shooting in which Palestinian civilians have been injured is outrageous and grave, and **it is our belief that it constitutes a breach of the duty to investigate**.
79. The centrality of the operational debriefing since the start of the new investigative policy has turned it in many cases into the sole examination/investigative tool. While the MAGC claims that the process of the "probe" (which precedes the decision of whether to open a criminal investigation) includes not only the operational debriefing but also the collection of testimony by the MPCID and the gathering of material from human rights organizations or the press – the experience of Yesh Din has

shown that collecting testimony of Palestinians as part of the investigation is rarely, if ever conducted.

80. In practice, the operational debriefing is the heart of the probe and in most cases the only act included in it. It is not a surprise, therefore, that the MAGC in its position paper explains that the investigation policy requires –

*"that first there be conducted, **through an operational debriefing**, a preliminary examination of the event – essentially from the point of view of the forces involved – and on the basis of its findings (and other available data) a decision will be made whether there is a suspicion as to the commission of a criminal offense that justifies an order to open an MPCID investigation."*

(Page 13, emphasis added)

81. The number of instances where notice of an alleged breach of the law by a soldier or officer **against Palestinians in the West Bank** does not lead to an MPCID investigation and basically ends with a probe, which mostly consists of an operational debriefing only, is demonstrated by the following data possessed by Yesh Din. As can be seen, 37% of the complaints are not transferred to an MPCID investigation.

**Table 1: The ratio between the number of notices reported to the MPCID and the number of investigation files that were opened and indictments issued as a result, 2005 - 2009<sup>1</sup>**

	2005	2006	2007	2008	2009	Total
Notices reported to MPCID	292	323	477	432	415	<b>1,939</b>
Investigation files opened	155 (53%)	152 (47%)	351 (74%)	323 (75%)	236 (57%)	<b>1,217 (63%)</b>
Investigation files that led to an indictment	5 (1.71%)	9 (2.79%)	10 (2.1%)	19 (4.4%)	6 (1.45%)	<b>49 (2.53%)</b>

### Investigations by the MPCID

82. In this section we will deal with the substance of the MPCID investigation, opened for those instances that passed the initial probe (which basically is the operational debriefing).

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<sup>1</sup> The data shows indictments that were filed on the basis of investigation files that were actually opened in each year (even if the indictment was filed afterwards). The source of the data regarding notices that were filed with MPCID for 2005 – 2007: response of IDF Spokesperson to an inquiry the Public Commission against Torture in Israel, May 1, 2008. The source of the information about notices given to MPCID for 2008 – 2009: response of IDF Spokesperson to a Yesh Din inquiry, April 26, 2010. Source of the data regarding investigation files and indictments: Yesh Din's research on the basis of indictments and rulings given by the IDF Spokesperson to the organization. In his letter to Yesh Din, the IDF Spokesperson stated that 34 of the investigation files that were opened in 2008 came from notices that were received in 2007.

83. A general "flow chart" of the main intersecting points of the examination and investigation process appears on pages 13 – 16 of the document filed by the Military Advocate General with the Commission. In the following pages we will point out the data related to the results of the work by the MPCID investigators and the Military Prosecution in those same instances where complaints were filed regarding criminal offenses that allegedly committed by IDF troops against Palestinian civilians and their property in the territories.

A. Accessibility of victims and delivery of notices of offenses committed by soldiers

84. MPCID handling of the incident begins on the basis of a notice received at one of the MPCID bases. MPCID investigations of offenses in the West Bank are conducted on a number of MPCID bases, principally at the MPCID base of Sharon and Shomron (which is housed in Bet Lid in the Netanya Region) and the MPCID base in Jerusalem – both belonging to MPCID sub unit in Central Command and the Beersheba MPCID base which belongs to the Southern Command MPCID sub unit. None of these MPCID bases are situated in the West Bank, and this fact naturally has implications on the accessibility by Palestinian victims of offenses to military enforcement agencies and on the manner in which MPCID investigators perform their investigations, as we will summarize briefly below.

85. The notice is intended to be received directly from a military unit, from the Israel Police (in particular taking into account that the main Israeli address for filing complaints in the West Bank by Palestinian civilians is a police officer stationed in a coordination and liaison office in the area of residence of the complainant), from a human rights organization, from the Military Prosecution (which serves for some of the human rights organizations as the first address for delivering a notice of an alleged offense), and in a small number of cases directly from Palestinian civilians.

86. On the basis of the notice and according to parameters that we will address later in this document, a decision is made on how to handle the notice: whether to open a criminal investigation ("MPCID investigation"), to implement a process of examination, or to deal with the notice in another manner such as closing the case without any action.

87. The following table shows data regarding the identities of the reporter of the notice where criminal investigations were in fact opened. As can be seen from the table, Palestinian civilians are a rare source of notifications, and in our understanding this derives, *inter alia*, from their lack of access to MPCID bases. Even if we include the notices that come from the Police (with the assumption that they come from complaints that were filed by Palestinians at the coordination and liaison offices), we will see that the notices that come

from victims represent the minority of notices, and in certain years even a small minority.

**Table 2: Reporters of notices which led to the opening of an MPCID investigation, 2006-2009<sup>2</sup>**

	2006	2007	2008	2009	Total
Palestinian civilians	14	23	23	21	81
Human rights organizations	10	39	80	56	185
Israel Police	40	104	70	41	255
Military unit	14	26	54	58	152
Military Prosecution	74	158	59	56	347
Ministry of Defense	0	1	0	0	1
Palestinian Authority	0	0	3	4	7
<b>Total</b>	<b>152</b>	<b>351</b>	<b>289</b>	<b>236</b>	<b>1,028</b>

B. Scope of investigations that lead to indictments

88. Data that was gathered by the MPCID and the MAGC and provided to Yesh Din at the request of the organization, as well as copies of judgments that were issued in the courts-martial, sent by the IDF spokesperson to Yesh Din in the past years by request of the organization, enable Yesh Din to present accurate data regarding the number of investigation files involving offenses committed by soldiers against Palestinians and their property which led to indictments (against one or more defendants).
89. In fact, 1,806 criminal investigations were opened by the MPCID since the beginning of the Second Intifada and until the end of 2009.<sup>3</sup> These were investigations that were opened for a wide range of serious harm committed against Palestinian civilians and their property: acts of killing and injuring, looting, theft and other harm to property, violence and abuse of passersby and detainees, etc. As of January 2011, the number of these investigations that led to indictments **was only 6%**.

**Table 3: MPCID investigations and the indictments filed as a result, 2000 - 2009<sup>4</sup>**

<sup>2</sup> The data in this table only refers to notices which led to the opening of an MPCID criminal investigation. The source for the data for 2006 – 2007: Response of IDF Spokesperson to a Yesh Din inquiry, April 15 2008. Source of the data for 2008 – 2009: Response of IDF Spokesperson to a Yesh Din inquiry, April 26, 2010. In respect to the data for 2008, the IDF Spokesperson stated that 34 of the investigations that were opened in 2008 came from notices that were received in 2007.

<sup>3</sup> The data here is up-to-date as of January 1, 2011 and is based on the information that was sent by the IDF Spokesperson until that date.

<sup>4</sup> The source of the data of investigation files that were opened by MPCID for the years 2000-2002: Hanan Greenberg, IDF 2004: Rise of the number of offenses in the territories. **Ynet**, January 10 2005. Source of data of investigations opened in 2003 – 2007: response of IDF Spokesperson to an inquiry by Yesh Din, April 15 2008. Source of data on investigations opened in 2008 – 2009: response of IDF Spokesperson to a Yesh Din inquiry, April 26, 2010. Source of data regarding indictments filed: Yesh

Year	Investigations opened by MPCID	Indictments	
		<i>Investigations that resulted in indictments</i>	<i>Percentage of investigations</i>
2009	236	6	2%
2008	323	19	6%
2007	351	10	3%
2006	153	9	6%
2005	155	5	3%
2004	189	12	6%
2003	146	16	11%
2002	155	23	15%
2001	82	7	9%
2000 <sup>5</sup>	16	1	6%
<b>Total</b>	<b>1806</b>	<b>108</b>	<b>6%</b>

C. Reasons for closing investigation files: MAGC has no data

90. The MAGC does not maintain data regarding reasons for closing investigations that have ended, and therefore the MAGC cannot classify the investigations that were closed based on the reasons for their closure, as stated by the MAGC in response to our request.<sup>6</sup>
91. Therefore, even though it is clear that some of the investigation files were closed after the investigators and military prosecutors who reviewed the investigation material were convinced that there was no criminal offense underlying the complaint, it is impossible to know how many investigations were closed because of a lack of culpability and how many were closed because the investigators failed in their job of collecting sufficient testimony in order to bring the perpetrators to justice. The absence of authorized information from the MAGC about the scope of failure of MPCID investigators in investigating offenses makes it very difficult to instruct investigative and prosecutorial bodies on how to remedy recurring systematic problems.<sup>7</sup>

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Din's research on the basis of indictments and rulings that were sent by the IDF Spokesperson to the organization. This data does not include investigation files that were opened and indictments that were filed in 2010. It should be clarified that the data covers the indictments that were filed on the basis of investigation files that were opened in each of the years (even if the indictment was filed afterwards). At the request of Yesh Din, in his letter of April 26, 2010, the IDF Spokesperson provided Yesh Din partial data regarding the filing of indictments for the years 2007 – 2009, with various comments and reservations. The data that is presented in this table was cross checked also with the statistical data that the IDF spokesperson provided to Yesh Din.

<sup>5</sup> After the start of the Second Intifada on September 29, 2000.

<sup>6</sup> Response of the IDF Spokesperson to a Yesh Din inquiry, April 26, 2010. Similar answers were sent by the IDF Spokesperson to previous inquiries sent by Yesh Din. See **Exceptions**, page 18, footnote 14.

<sup>7</sup> This criticism is not new. In **Exceptions** Yesh Din criticized the MAGC and MPCID for their refraining from gathering data regarding the grounds for closing investigations dealing with offenses against

#### D. Notices

92. As stated above (see table no. 1), 37% of the notices that were communicated regarding suspected offenses by soldiers against Palestinians were not followed by a criminal investigation. The reasons for this are likely to be the policy of the MAGC not to investigate complaints for specific offenses that occur under "operational" circumstances, a decision of the Military Prosecution that the information that was provided in the notice does not form a basis for an offense, or a decision by MPCID functionaries that the complaint does not demonstrate the commission of a criminal offense, and in specific instances even the loss of the investigative material.
93. An examination of the gap between the number of notices provided to the MPCID in the past years and the number of investigations that were opened and the number of indictments that were filed on the basis of those investigations reveals that the chances that a notice given to the MPCID will become an indictment against suspects is very miniscule: 1,939 notices transferred to the MPCID in the years 2005 – 2009 led to 1,217 investigations, but only 49 of the investigations – which constitute around 2.5% of the notices – yielded indictments against suspects (Table no. 1 above).

#### E. Convictions, acquittals and withdrawals of indictments

94. Indictments are filed by the Military Prosecution in the district military courts-martial. According to information held by Yesh Din, as of January 1, 2011, since September 2000 the Military Prosecution has prosecuted 189 defendants – soldiers and officers – for offenses related to harm against Palestinian civilians and their property. With respect to seven additional defendants, proceedings are either pending or the results of the proceedings were not yet delivered to Yesh Din.
95. 162 defendants, which is the decisive majority (89%) of the defendants for whom the results of the proceedings in their cases are known to Yesh Din, were convicted at the completion of the legal proceedings in their cases. Nine of the defendants were acquitted (5%) and indictments that were filed against 11 other defendants (6%) were withdrawn or instead were transferred to disciplinary proceedings.

#### F. Conviction of soldiers for civilian deaths

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Palestinian civilians. Unfortunately the military law enforcement authorities still do not gather such data.

96. In the years 2002 – 2009 the MPCID opened 173 investigations into the unlawful killings of Palestinian civilians by IDF soldiers.<sup>8</sup> Only 14 of these investigations led to indictments filed against 19 defendants.
97. As of January 2011 the legal proceedings of 18 of the 19 defendants have been concluded. One defendant was acquitted, the indictment against another was withdrawn, and the remaining 16 defendants were convicted of various offenses.
98. The indictments that were filed dealt with incidents in which 17 Palestinian civilians were killed from the start of the second Intifada. In the last indictment that was filed in this matter, First Sergeant S, a soldier from the Givati Unit, was indicted for crimes of killing and improper conduct. The indictment accuses the defendant of killing a person whose name is unknown during "Operation Cast Lead", while the deceased was walking among a group of people while at least one member of the group was waving a white flag.<sup>9</sup>
99. Notwithstanding the fact that until now 16 defendants have been convicted for various crimes following investigations that were opened to examine the circumstances of the killings of civilians, only five of them were convicted for crimes that were directly related in the ruling to the deaths of civilians: three Palestinians and one British civilian.<sup>10</sup> With respect to other defendants, the military courts-martial stated clearly that the military prosecutor was unable to prove the causal link between the acts of the defendants and the deaths of civilians under the circumstances that were attributed to the defendants in the original indictments.<sup>11</sup>

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<sup>8</sup>The government of Israel published that in 2002-2008, the MPCID opened 162 investigations into the deaths of Palestinian civilians (State of Israel. **The Operation in Gaza: Factual and Legal Aspects** (July 2009). P.110, para. 295). Another 11 investigations were added to this in 2009 (source: response of IDF Spokesperson to a Yesh Din inquiry, April 26, 2010).

<sup>9</sup> **Staff /816/10 Military Prosecutor v. Sergeant S.**

<sup>10</sup> Two additional defendants were convicted of crimes associated with attempts to obstruct an investigation. One officer was convicted of negligently causing the death of a 16 year old LAC/135/03 **Military Prosecutor v. Captain Zvi Korzki** as well as a ruling on appeal Appeal/64/04; A soldier was convicted of killing a British civilian and with other offenses and his friend was convicted of offenses related to obstructing justice (South/10/04 **Military Prosecutor v. Sergeant Tayseer Heib** as well ruling on appeal Appeal/96/05; South/7/04 **Military Prosecutor v. Sergeant Imad Atauna**); two soldiers were convicted for killing a resident of al-Yamoun Village, one by negligently causing death and both by an offense of perjury and improper conduct (North/450/04 **Military Prosecutor v. Staff Sergeant DGA**; North/451/04 **Military Prosecutor v. Staff Sergeant RA** as well as ruling on appeal A/154/04); two junior officers were convicted of negligence for their part in the death of a toddler (North/186/04 **Military Prosecutor v. 2<sup>nd</sup> Lieutenant Zvi Winik and 2<sup>nd</sup> Lieutenant Dor Galzal**, as well as a ruling on the appeal of 2<sup>nd</sup> Lieutenant Winik A/59/05). See **Exceptions**, pages 47 – 52.

<sup>11</sup>For more on this issue, see **Exceptions**, pages 82-105. Since the publication of **Exceptions** rulings were issued in the cases of two additional defendants who were first indicted in relation to the deaths of Palestinian civilians. In these two cases the defendants were convicted of various offenses without connecting their convictions to the deaths of the deceased persons. In Central/186/04, Sergeant Major GA was convicted of offenses related to the death of Omar Matar, 14 years old, and for injuring a 16 year old, in March 2003 (see **Exceptions**, page 65). The defendant pled guilty to the amended

100. Thus, from the start of the "Second Intifada" in September 2000 and until present, over more than a decade, less than 170 instances have passed the stringent bar that the MAGC has placed according to which a criminal investigation can then be opened regarding the circumstances of the deaths of civilians. Among these, only very few investigations – 14 investigations – succeeded in obtaining sufficient evidence in order to file an indictment. Even fewer investigations – only four – led to convictions where the death of a person was related to the acts or omissions of defendants: in one case a soldier was convicted of manslaughter; in two instances soldiers were convicted of negligently causing death; and in an additional instance two soldiers were convicted of criminal negligence. In every investigation of alleged offenses that led to the deaths of Palestinian civilians, the "test of results" does not demonstrate the success of the military enforcement bodies in effective investigations or prosecutions.
101. It is true that arguably one cannot draw from the "test of results" conclusions regarding the quality of the investigations and prosecutorial proceedings in the army, being that the data is probably the consequence of a lack of guilt in certain cases that were investigated. However, the data can be examined against the background of the failures that will be described below and which, in our opinion, show 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.

## ***II Timeframe for decisions by the Military Prosecution***

### **Opening a criminal investigation**

102. Yesh Din handled 14 cases in which, following a process of "examination", a decision was made not to open a criminal investigation.<sup>12</sup> On average **slightly less than 15 months (458 days)** pass between the date a notice is delivered to the MPCID and the date on which a decision is made not to open a criminal investigation.
103. As of January 30, 2011, Yesh Din was monitoring 15 cases undergoing a "examination" process in which the Military Prosecution had not yet made a decision whether to open a criminal investigation. Between the date of the

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indictment and was convicted of unlawful use of a weapon and sentenced to three months of suspended incarceration and to a demotion to the rank of Private. St.-Sgt. LI was convicted in MR/158/03 (see **Exceptions**, page 63) of an offense of Exceeding Authority and Risking the Life or Health of Others and was sentenced to a suspended sentence of 7 months' incarceration and to a fine of NIS 1,000.

<sup>12</sup> This refers to cases in which an "examination" process was conducted and where a decision was made by the Military Prosecution not to continue with an MPCID investigation. The reference here is not to those instances where after a notice is received by the MPCID, MPCID functionaries decided not to open an investigation into the complaint. Yesh Din is handling five such cases.

reporting of the notice regarding these incidents and January 30, 2011, an average of 566 days had passed, **which is close to a year and seven months**. Eight of these cases have been awaiting a decision for over a year and a half, in three cases a year to a year and a half has passed since the delivery of the notice, and decisions regarding three additional notices have not yet been made for a shorter period than a year.

#### **On the fate of an investigation: to close or to file an indictment**

104. Out of 38 cases monitored by Yesh Din, in which a criminal investigation was conducted and a decision by the Military Prosecution was made to close the investigation without an indictment, the Military Prosecution has provided Yesh Din with information regarding the date of the decision to close the case in only 15 cases. The average time between the transfer of the investigative material from the MPCID to the Military Prosecution for review and rendering of a decision regarding closing the case is close to one year (340 days).
105. In 57 other cases being monitored by Yesh Din, in which the MPCID investigation has ended, as of January 30, 2011 a decision has not yet been made by the Military Prosecution regarding the outcome of the investigation.
  - Among these cases, in ten cases, as of January 30, 2011, **over two years** have passed since the closing of the MPCID investigation and the transfer of the investigative material to the Military Prosecution.
  - In 24 instances the investigation has been awaiting a decision by the Military Prosecution for **between a year and two years**.
  - In 23 cases a year has not passed since the investigation file was transferred for a decision by the Military Prosecution; however, over six months have passed in 13 of the cases.

#### ***III. Operational Debriefing does not meet the standards of the duty to investigate***

106. On the basis of the analysis of the normative-legal framework and on the basis of the data that we presented above, we would like to state to the Commission Yesh Din's position on the compliance of the existing military investigative mechanism for complaints of breaches of the law of armed conflict according to the standards of international law.
107. This study will be done in accordance with the list of criteria that we found are applicable to the duty to investigate.
108. We will begin by examining compliance of the operational debriefing with the requirements of the duty to investigate, and later we will examine the fulfillment of these requirements in those cases that are undergoing an MPCID investigation.

## **Independence**

109. The operational debriefing is conducted within the military. As described above, even if we accept the position of the MAGC that it enjoys functional independence, it is clear that the military inquiry which is conducted in the units themselves, or by their commanders from the selected units, constitutes an "internal inquiry" apparatus lacking any independence. The examination of incidents that give rise to a suspicion of a breach of international humanitarian law is conducted according to the investigative policies of October 2000 first and foremost within the body alleged of committing the crime.
110. It is therefore clear that such an examination, even if formally concluding with a decision by the Military Prosecution, does not meet the criteria of independence, given that the decision is based solely on the operational debriefing. The process of the examination is conducted by an involved body, and therefore it is tainted by an inherent conflict of interest, and thus the decision that is made is not independent.

## **Effectiveness / Professionalism**

11. The operational debriefing is not carried out by investigators. The people responsible for the operational debriefing are not individuals who have been trained in investigations, nor do they have the investigative or forensic tools needed in order to uncover evidence and expose the truth. Being that the orientation of the operational debriefing is not a probe of criminal culpability, it is not surprising that the investigative processes are not conducted in a manner to maximize the effectiveness of examining this issue.
112. In addition, the operational debriefing, as stated above, delays any other decision by the Military Prosecution to open criminal investigations. In this situation, where the examination that is being conducted through the operational debriefing takes a long time, the effectiveness of the MPCID investigation when it is opened is already compromised. Not only is the inquiry not professional, but during the inquiry, which is conducted by military bodies that have not been trained to handle suspected criminal offenses, the future criminal investigation is also compromised:
  - A. First and foremost, there is a real concern of coordination of testimony among soldiers who took part in the action, which leads to a concern of a violation of justice;
  - B. Holding interviews with soldiers who were involved is a type of "dress rehearsal" before the criminal investigation;

- C. Evidence at the scene is likely to be destroyed, or to disappear without any chance of reconstruction, such that in many cases an investigation that is opened later, however professional, cannot collect evidence at the scene;
- D. The time that passes until the start of the investigation causes the witnesses to lose the sharpness of their memories, damages the evidence and provides an opportunity to fabricate evidence.

### **Public scrutiny**

- 113. According to section 539a(b)(2) of the Military Justice Law "the inquiry material is classified to any person but shall be transferred, in whole or in part, only to those military functionaries that require the inquiry in order to fulfill their functions". Therefore, not only is the inquiry material classified, but even its conclusions are confidential and may not be shown to any body outside of the IDF.
- 114. In this way the ability of victims of offenses, human rights organizations, or other interested parties to object to the conclusions of the operational debriefing, especially when they do not lead to the opening of an investigation, is hindered.
- 115. And indeed, in many cases in which Yesh Din has been interested in challenging a decision not to open a criminal investigation, our attorneys were not allowed to inspect the material that was collected in the inquiry, and therefore we are forced to lodge an appeal to the prosecutor who decided not to open the investigation based on a mostly laconic reason.

### **Impartiality**

- 116. The operational debriefing does not include (other than a few exceptional cases) hearing the narrative of the victims of the offense, civilian eyewitnesses, or basically any person who is not a soldier or officer involved in the investigated activity.
- 117. As noted above the inquiry is mostly conducted by commanding officers in the line of command of the involved unit.
- 118. These two elements transform the operational debriefing into a seriously tainted and distorted process.

### **Promptness**

119. According to Yesh Din's knowledge, the operational debriefing is not limited in time, such that there can be cases in which the operational debriefing takes such a long time that it effectively thwarts the chance for a future criminal investigation.
120. In actuality, the inquiries do in fact last a long time until a decision is made by the Military Prosecution. Updated data regarding the duration of the operational debriefing was provided above and demonstrates the fact that the examination process sometimes lasts for many months and even years.
121. For the sake of illustration we would like to mention **Yesh Din Case 1686/09**: On December 12, 2008, Yakub Mouhmad Zalach Ala Kazroi, 15 years old, was shot and critically injured in Hebron. Following the incident Yesh Din filed a notice with MPCID on January 18, 2009 (notice no. 1237/08 to MPCID Beersheba). As of today, after over two years have passed, the Military Prosecution has yet to render a decision whether to open an MPCID investigation, and in all of its answers to Yesh Din it has stated that the "case is under review".
122. In summary: the examination process, when not followed by a criminal investigation, does not comply with even one of the requirements of the duty to investigate that international law imposes on the State of Israel. The examination lacks independence, is not professional (and therefore not effective), it is conducted in secret without public scrutiny (and therefore the element of public scrutiny is absent), it is tainted with bias, and it is conducted at a pace that cannot be said to meet the standard of promptness.

#### ***IV Problems in MPCID investigations***

##### **Promptness**

123. In light of the policy of the MAGC since October 2000, the opening of an MPCID investigation is delayed in many cases and does not conform with the requirement to open this type of investigation "without delay" where there is a prima facie concern of a violation of the law of armed conflict. Unfortunately, the failure of the MAGC to comply with this demand is especially blatant in serious cases of the killing and injuring of Palestinian civilians when the circumstances especially warrant the immediate attention of an investigation.
124. Up-to-date data held by Yesh Din regarding the pace of investigations and decision making by the MAGC indicates that there is a serious bottleneck in the Military Prosecution that causes these cases to be stuck for years.
125. Naturally, under these conditions it cannot be said that the processing of cases that are being investigated by the MPCID meets the promptness standard.

126. For the sake of illustration we would like to provide the example of **Yesh Din Case 1390/08**: On January 5, 2008, 16 year-old Muhamad Fasil Musa Salim was injured by fire from army forces in the village of Azun. After the information reached Yesh Din, the organization contacted the Military Prosecution's Operational Affairs Unit, Lt. Colonel Sigal Mishal Shahori, on March 30, 2008, with a request to investigate the incident. The incident was investigated by the Operational Affairs Unit for over a year and two months, until on June 4, 2009, close to one and a half years after the incident, the MAG gave notice of his decision to order the opening of an MPCID investigation into the circumstances of the incident (MPCID Sharon and Shomron 210/09). On December 28, 2010, nearly three years after the incident, Yesh Din was told that the investigation was transferred for a decision by the Military Prosecution's Operational Affairs Unit.

### **Effectiveness / Professionalism**

127. During the course of Yesh Din's work since its founding six years ago, the organization has been exposed to many MPCID investigations. In each case in which an MPCID file was closed by the Military Prosecution, the investigation file was photocopied by the organization and the investigative material in it was analyzed to decide whether an appeal should be lodged. We are talking about dozens of investigations which the organization has examined, and from a broad standpoint a number of considerable problems and difficulties in the MPCID can be pointed out that render an effective and professional investigation impossible:

- Accessibility – the MPCID bases in which suspicions about crimes against Palestinian civilians are investigated are located within Israel (Jerusalem, Beersheba, Netanya area). A Palestinian who wishes to file a complaint personally cannot do so, and in order to collect his testimony prior coordination has to be made with an MPCID investigator. For the most part this testimony will be taken in the various coordination and liaison offices in the West Bank, and in specific cases under conditions that are not appropriate.
- Translators – in many cases, collecting the preliminary testimony on a case is delayed for a long time due to the lack of translators in the MPCID. Many times Yesh Din's staff have encountered long delays in the collection of testimony of Palestinian complainants due to the lack of the basic ability to translate their testimony.
- Professionalism of investigators – most of the MPCID investigators that deal with investigating complaints of apparent violations by soldiers against Palestinians in the West Bank are soldiers on regular duty or on reserve duty, and their training is the general training that MPCID investigators receive, namely: a course on investigation

immediately after recruitment into the army and by more senior investigators when they arrive at an MPCID base. This limited type of training does not correspond to the complexity, severity and importance of the cases over which they are entrusted.

- Lack of investigative activity in the field – a review of dozens of investigation files indicates that there have only been a few documented incidents of MPCID investigators traveling to the scene of the incident.

### **Independence**

128. In many cases the MAGC must investigate practices and methods of operation that the MAGC itself helped create or approve. It would seem that there is no greater harm than this to the independence of the investigating body. In the MAGC's position paper they state that "the double hat" of the legal advisors and the chief prosecutor is found only on the heads of two functionaries: the MAG himself and his deputy. According to the report, there is a complete separation in the MAGC between the legal advisors and the military prosecutors who guide and follow the MPCID investigations into suspected violations of the law of armed conflict.
129. We do not accept this position. In light of the complexity of the cases with which the MAGC has to contend, it is clear that the Military Advocate General and his deputy oversee issues that require their involvement both as the most senior legal advisor to the IDF and as one who stands at the head of the military prosecutorial system. If the action that was approved while he was wearing his hat as legal advisor (or by any of his subordinates) raises a concern of an alleged violation of the law of armed conflict, how could the Military Advocate General order an MPCID investigation of that same issue when he was involved in it personally or institutionally?
130. The issue of independence also arises in the lower echelons such as the MPCID investigators. In cases where young soldiers who are trained as investigators are asked to deal with complex investigations, there is a concern of intervention by those with positions and authority from the command of the IDF in the investigative methods of the MPCID, due to the hierarchal nature of the army.
131. An example can be seen in testimony that was given at a civil trial (held in the District Court in Haifa) in the lawsuit by the family of Rachel Corrie, a U.S. civilian who was killed in Gaza by an IDF bulldozer in March 2003, against the State of Israel. According to a report from September 6, 2010 in the Jerusalem Post, an MPCID investigator who was in charge of the investigation of the incident admitted in his testimony in court that the Southern Company Commander at the time of the incident ordered him "to reduce" the time of investigation. The investigator whose name is Oded, said that at the time of

the investigation of the death of Corrie he was lacking experience, and had only 3 months of training, and had conducted only one investigation of a death beforehand.<sup>13</sup>

### **MPCID investigation after an operational debriefing**

132. In cases where an MPCID investigation is opened following an operational debriefing, there is a serious concern that the investigation is already "tainted". As explained above, as part of the operational debriefing the soldiers who are involved give their versions of the incident under investigation, and there is a serious concern of coordination of testimonies. The long waiting period until a decision is made whether to open an MPCID investigation also almost completely negates the possibility of an effective and professional investigation.
133. We also cannot ignore the lack of trust that is created by the above delay with the Palestinian complainants who find it difficult to understand why their complaints are not handled immediately and treated properly. How is a victim of an offense meant to feel, when only after many months from when he filed a complaint, he is suddenly contacted by the MPCID for his testimony? But not only can the lack of trust by complainants sabotage an investigation: it is clear to any intelligent person that collecting testimony from a victim of an offense immediately after the filing of a complaint is not the same as testimony taken at a much later date, when important details are already forgotten or diminished due to the passage of time.
134. **For example: Yesh Din Case 1733/09**: On February 6, 2009 Muhamad Fatahi Muhad Madamin Salim was shot and injured in the village of Jus by rubber bullets fired by IDF forces. The firing at Salim was from 0 range aimed at his arm while he was trying to protest the arrest of his brother. After the information about the incident reached Yesh Din the organization contacted the chief Military Prosecutor, Colonel Jenna Modzegabershvili with a demand to open an MPCID investigation, which came after a response to a notice sent to MPCID by a Yesh Din volunteer (notice no. 123/09 MPCID Sharon Shomron), which stated that the incident would not be investigated until the facts were clarified. On August 20, 2009, over half a year after the incident, the complainant was summoned to give his testimony to the MPCID. The complainant, who had given up hope in the meantime, decided to forego his complaint out of a sense of distrust of the system. Until today, over two years after the incident, no decision has been made on the opening of an MPCID investigation to examine the circumstances of the incident, and the incident is still under review in the Operational Affairs Unit.
135. In summary: even the MPCID investigation is replete with serious structural problems that render defective each of the requirements of the duty to

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<sup>13</sup> Dan Izenberg, 'General told me to cut short probe of Corrie death'. **Jerusalem Post**, September 6, 2010.

investigate which international law imposes on the State of Israel. The long delay in the proceedings until a decision is made by the Military Prosecution at the end of the MPCID investigation, the problem of accessibility for Palestinian victims, lack of translators, failure to investigate in the field, problems of the independence of matters in which the MAGC is involved and the confidentiality requirement that shrouds the proceedings – all serve to create non-conformity with the requirements of promptness, professionalism, effectiveness, independence and public scrutiny of the enforcement proceedings.

137. In addition, in those many instances (many many instances) where an operational debriefing is held prior to a criminal investigation, one must add to all of the problems described above the damage the operational debriefing causes to the investigation, the long time that it takes, the impairment of evidence and the memory of witnesses, and the risk of fabrication of evidence, and coordination of testimony among the witnesses.
137. Our conclusion therefore is that due to these serious structural problems, 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.

#### **D. Inaccuracies in the analysis of the MAGC regarding practice in foreign armed forces**

138. In this last chapter we would like to comment on a number of inaccuracies that we believe exist in the description of the investigative practices of foreign armies, which is included in the MAGC's position paper.
139. We would like to explain that from our perspective, even if a foreign army is found to act similarly to the IDF, it does not constitute proof of the legality of the policy or practice, since the requirements and duties are fixed in international law and in it alone. However, we accept that the practice of countries is a source of the international law and that practice can also reflect a consensual interpretation of its provisions.

#### ***United Kingdom***

140. The UK law that regulates military investigations establishes a duty to initiate a criminal investigation in instances where a complaint or events that a "reasonable person" would consider to raise a suspicion that a crime has been committed of those offenses established in the law (which includes a wide range of serious offenses against persons and/or property, including violations of the international law of armed conflict).
141. The law further states that every commanding officer has a duty to report any suspicion that an offense of this type has been committed to the service police without unreasonable delay (according to internal directives of the Royal Military Police –within 48 hours). Upon receiving the report the service police will decide whether to open an independent criminal investigation. (See: Armed Forces Act 2006 (Sec. 113)). Likewise, according to the Queens Regulations, British army personnel must report to their commanding officer any suspected breach of the law of armed conflict, and the officer must continue to report the suspicion along the chain of command and must ensure that the matter is investigated in a thorough manner without delay (see: Regulation J7.121 (a)(3) & (b)).

#### **Inaccuracies in the description of UK practice by the MAGC**

142. In the MAGC's position paper it is argued that "*like in the U.S. army (and the IDF) commanders are given the option to hold a preliminary examination of claims regarding breaches of the law of armed conflict through inquiries; and only if in the inquiries a suspicion is raised as to the commission of a criminal act – or when from the beginning there is a concern of the commission of a serious offense – the matter is transferred to the military police*" (page 60).
143. This description is not accurate. Any claim or suspicion **that would cause a reasonable person to suspect that a breach of the law of armed conflict has been committed (or any offense included in the list in the law) falls within**

**the category of cases requiring immediate reporting and regarding which the service police – and not the commanding officers – decide how to act.** Only in regard to lesser offenses, which do not appear in the list in the law, does the commanding officer have the authority to hold a preliminary investigation, and in such case, the officer is likely to be assisted by legal counsel prior to making a decision to act as stated.

144. Further, the requirement established in the directives of the British service police requiring reports of suspected commissions of offenses to be made within 48 hours is missing from the description of British practice provided by the MAGC.

### ***Canada***

145. Within the Canadian military network any allegation or suspicion of a breach of the law of armed conflict is referred to the National Investigation Service, a branch of the military police charged with investigating serious and sensitive matters, including breaches of the law of armed conflict. This body is entrusted with conducting an inquiry into the question of whether a criminal investigation should be launched.
146. In addition, in military incidents that result in the serious physical harm or death of a person there is a duty to report directly to a special body within the military police.
146. If a report is received about a breach of the law of armed conflict, the National Investigation Service conducts an inquiry in order to decide whether to initiate a criminal investigation, and only if it decides that the matter is not serious enough to warrant an investigation, it may transfer the matter to the command unit to probe the incident.

### **Inaccuracies in the description of Canadian practice by the MAGC**

148. In the description by the MAGC of the Canadian military network, it is alleged that the legal system in the Canadian army operates similarly to that of the Israel Defense Forces. However this description disregards the fact that in complete contrast to the Israeli military system, in the Canadian military system the preliminary investigation on the question of whether to open a criminal investigation is done in Canada by an independent body – the National Investigation Services – and not by the same unit in the army from which the report is received of a suspected commission of a breach of the law of armed conflict, from a substantive perspective.

### ***Australia***

149. In the Australian military system, any serious incident involving non-combatant civilians is considered a "notifiable incident". Commanding

officers must determine if the incident is notifiable, and if they find that it is, they must deliver immediate notification of the incident in the most expedient manner available to them to the Defence Investigative Authority. This body is an independent body that is not connected to the chain of command. A notifiable incident is, *inter alia*, an incident which raises a "reasonable suspicion" that a disciplinary or criminal offense has been committed. The death, injury or disappearance of a person who is not in the military, other than enemy soldiers, is a notifiable incident even if there is no reasonable suspicion that a crime was committed. (See: Australian Government Department of Defence, Defence Instructions (General) ADMIN 45-2, 26 para. 6 March 2010).

150. The Defence Investigative Authority, upon receiving a report of a notifiable incident, must conduct an inquiry on the question of whether to open an investigation, and must report its findings within seven days through the chain of command which has functional responsibility over the matter (see: Id, para. 31).

#### **Inaccuracies in the description of the Australian practice by the MAGC**

151. In the MAGC's position paper it is alleged that when there is a suspicion of a breach of the law of armed conflict a Quick Assessment is made within 24 hours by an officer appointed by the commanding officer of the forces involved in the incident, in order to check the facts and to evaluate whether an investigation should be opened.
152. This description is not accurate. The rule is that every notifiable incident is to be transferred to the military police without delay, and the commanding officer has the option to order a Quick Assessment if according to his judgment the facts are not clear and there is a need for their clarification. If a decision is made that such a clarification is needed, the Quick Assessment is then conducted **within 24 hours from the report by an independent body**, and an exception is allowed only if the supervising officer is from the military and the same unit but was not personally involved in the incident under investigation and he has no interest in its findings. It should further be explained that Australian law provides that if a police investigation has already been initiated, the officer conducting the Quick Assessment must ensure that the assessment will not harm or interfere with the investigation. Likewise, the assessment is not a release from the duty to report (see: Australian Department of Defence, Defence Instructions (General) ASMIN Government 67-2, 7 August 2007).
153. Additionally, in the MAGC's position paper there is no mention of the investigation that the defence investigative authority must make within seven days.

## **United States**

154. In the U.S. army, commanding officers are obligated to report all reportable incidents to the US Army Criminal Investigation Division (USACID) without delay and by the quickest method available to them. Likewise, the commanding officers are responsible for ensuring that military personnel under their command report incidents of this type. A reportable incident is any possibility, suspicion or accusation based on reliable information that a breach of the law of armed conflict has been committed, or any act which was committed during times of peace but which would have been considered a suspected breach of the law of armed conflict if it would have taken place during wartime, by U.S. army personnel, or against them. If it is determined that U.S. army personnel were involved in an incident, the incident will be investigated expediently and thoroughly by the USACID, and at the end of the investigation the commander of the force will decide, upon consultation with the Judge Advocate, whether to initiate legal proceedings against the suspects.
155. It is important to note that the directives of the American Chief of Staff that are in force, are those that entered into force on April 30, 2010 – and not the directives from 2007 to which the MAGC refers and which have since been annulled. According to these directives, suspects of breaches of the law of armed conflict receive a special status in the US military, and they must be reported immediately through the chain of command to the investigative bodies and the relevant bodies in the Department of Defense, and at the same time to the Secretary of Defense, Chairman of the Joint Chiefs of Staff, and the Army Secretary, as well as to the commander of the forces in the event that he is not the reporting body (see: Chairman of the Joint Chiefs of Staff Instruction, "Implementation of the DOD Law of War Program," CJCSI 5810.01D 4(d)-(e), Department of Defense Directive "DOD Law of War Program," 2311.01E, certified as current as of February 22, 2011, 6.3-6.7).

Date: 23 March, 2011

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