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VII. Israel's Investigation of Alleged Violations of the Law of Armed Conflict

409. Israel is aware of allegations of violations of international law during Operation Protective Edge (hereinafter: the “2014 Gaza Conflict”) and is committed to investigating fully any credible accusation or reasonable suspicion of a serious violation of the Law of Armed Conflict.⁵⁰⁴ Thus, Israel reviews complaints and other information suggesting IDF misconduct, regardless of the source, and maintains a mechanism that is capable of examining and investigating such allegations in an independent, prompt, thorough, and effective manner.

410. In 2010, the Government of Israel created an independent public commission of inquiry headed by retired Israeli Supreme Court Justice Jacob Turkel and observed by international legal experts (hereinafter: the “Turkel Commission”), whose mandate included an assessment of Israel’s mechanisms for examining and investigating complaints and claims regarding alleged violations of the Law of Armed Conflict. The Turkel Commission reviewed Israel’s investigations systems in light of the “general principles” for conducting an effective investigation under international law: independence, impartiality, effectiveness and thoroughness, and promptness.⁵⁰⁵ The Commission’s work included a review of the military justice system — which involves a multi-stage process directed by Israel’s Military Advocate General (the “MAG”), Military Courts, civilian oversight by the Attorney General of Israel, and judicial review by the Supreme Court of Israel. Following a careful and comprehensive review, the Turkel Commission concluded in 2013 that Israel’s mechanisms for examining and investigating complaints and claims of violations of the Law of Armed Conflict generally comply with its obligations under international law. Although the Turkel Commission recommended additional best practices that Israel might implement, it found that Israel’s system ranks favourably with those of other democratic countries, including Australia, Canada, Germany, the Netherlands, the United Kingdom and the United States.⁵⁰⁶

⁵⁰⁴ This Paper uses the term Law of Armed Conflict in its ordinary sense — describing the legal obligations of parties to an armed conflict in the course of their military operations. International Humanitarian Law is used by many commentators and countries as an interchangeable term, as is the laws of war.

⁵⁰⁵ For more information regarding Israel’s investigations system, see Chapter C (pages 266-358) of The Public Commission to Examine the Maritime Incident of 31 May 2010, Second Report – The Turkel Commission: Israel’s Mechanisms for Examining and Investigating Complaints and Claims of Violations of the Laws of Armed Conflict According to International Law (Feb. 2013) (hereinafter: “Turkel Report”), available at <http://www.turkel-committee.gov.il/files/newDoc3/The%20Turkel%20Report%20for%20website.pdf>, which includes a detailed description of the mechanisms in place for examining and investigating complaints and claims regarding alleged violations of the Law of Armed Conflict.

⁵⁰⁶ See Turkel Report, *supra* note 505, at Chapter C; see also *id.* at Chapter B (pages 152-264) (“Comparative Survey of Investigative Systems Relevant to Laws of Armed Conflict”).



411. Notwithstanding the endorsement of the Turkel Commission and numerous foreign jurists,⁵⁰⁷ Israel continually seeks to improve the effectiveness and efficiency of its investigations system. For example, in recent years Israel has developed a specialised prosecution unit to deal with allegations of misconduct arising from IDF operations. In July 2014, while IDF forces were engaged in the 2014 Gaza Conflict — and with the process of implementing the Turkel Commission’s recommendations still ongoing — the IDF Chief of General Staff implemented one of the Commission’s key recommendations: the creation of a permanent Fact Finding Assessment Mechanism (hereinafter: the “FFA Mechanism”). The FFA Mechanism is tasked with examining exceptional incidents (such as an attack resulting in significant, unanticipated civilian casualties) in order to assist the MAG’s decision whether to open a criminal investigation and also to inform the IDF’s “lessons-learned” process so that steps may be considered to minimise the risk of such incidents in the future.

412. The numerous practical challenges involved in examining and investigating alleged violations of the Law of Armed Conflict in the context of the 2014 Gaza Conflict have not deterred examination and investigatory efforts. The IDF’s new FFA Mechanism is actively examining approximately 126 incidents. Some examinations have been completed, and some are pending review by the MAG. The MAG periodically publishes his decisions. To date, the following details have been released: The MAG thus far has opened 19 criminal investigations based on a reasonable suspicion of criminal misconduct. Some of these criminal investigations were opened following an examination by the FFA Mechanism where the MAG required additional information to make a decision. Others were opened without an FFA examination on the basis of credible allegations that *prima facie* gave rise to a reasonable suspicion of criminal wrongdoing. The MAG also has closed a number of cases after reviewing findings and material collected by the FFA Mechanism and concluding that there is no reasonable suspicion of criminal misconduct. The examination and investigations process is ongoing, and the MAG is committed to providing further updates on decisions concerning specific incidents.⁵⁰⁸

⁵⁰⁷ See, for example, the decision of the Criminal Chamber of the National Court of Spain following a request to investigate military action carried out by the IDF against Salah Shehadeh, a leader of Hamas, in July 2002. Decision no. 1/2009, July 9, 2009 (plenary), Criminal Chamber of the Spanish National Criminal Court of Appeals (“Sala de lo Penal de la Audiencia Nacional”), at 24, regarding Preliminary Criminal Proceedings no. 157/2008 of the Central Investigation Court no. 4; Plenary of the Criminal Chamber of the Supreme Court, Appeal no. 1979/2009, April 5, 2010, at 6 (confirming the decision). See also Appeal of the Coordinating Prosecutor (Pedro Martínez Torrijos), May 6, 2009, from the Order of Criminal Investigating Court no. 4 of the National Court, May 4, 2009, in Preliminary Proceedings Case No. 157/2008 (emphasizing that Israel’s investigatory system, with review by the Military Advocate General, Attorney General, and Supreme Court, “fully satisfy” the requirements of “an independent and impartial system of justice”).

⁵⁰⁸ See *Decisions of the IDF Military Advocate General regarding Exceptional Incidents that Occurred during Operation ‘Protective Edge’ – Update No.3*, IDF, MAG Corps (Mar. 22, 2015), available at

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413. As in the civilian justice system, criminal investigations in the military justice system often take considerable time, and military prosecutors must thoroughly review all available evidence before deciding whether to bring criminal charges. As explained below, this is especially true in the complex circumstances of intensive military activity that takes place against terrorist organisations outside Israeli territory.

414. In addition to conducting thorough preliminary fact-finding examinations and criminal investigations, the IDF focuses on the lessons learned from these processes and continues to improve its military doctrine and operational practices in an effort to limit harm to civilians and civilian property during military operations.⁵⁰⁹

A. The IDF's Military Justice System

415. The IDF maintains a multi-layered investigations system, with numerous checks and balances to ensure impartiality before investigative, administrative, and judicial authorities.

1. Components

416. The three main components of the military justice system are the Military Advocate General's Corps ("MAG Corps"), the Military Police Criminal Investigation Division ("MPCID"), and the Military Courts. The MAG Corps consists of highly-trained lawyers who are divided into two units, one responsible for enforcing the law (both military and criminal) throughout the IDF⁵¹⁰ and another responsible for providing legal advice to all military authorities.⁵¹¹ The head of the MAG Corps (the

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<http://www.law.idf.il/163-7183-en/Patzar.aspx>; *Decisions of the IDF Military Advocate General regarding Exceptional Incidents that Occurred during Operation 'Protective Edge' – Update No. 2*, IDF, MAG Corps (Dec. 7, 2014), available at <http://www.law.idf.il/163-6958-en/Patzar.aspx>. For an earlier report, see *Operation Protective Edge: Examinations and Investigation*, IDF, MAG Corps (Sept. 10, 2014), available at <http://www.mag.idf.il/261-6858-en/Patzar.aspx?pos=13>.

⁵⁰⁹ See Chapter VI (IDF's Conduct during the Conflict), Section B.

⁵¹⁰ Military Justice Law 5715–1955, LA 189, art. 178(2), (4) (hereinafter: "Military Justice Law"); IDF Supreme Command Order 2.0613, The Military Advocate General Corps, ¶ (2)(a) (March 5, 1976), (hereinafter: "IDF Supreme Command Order 2.0613"). See also *Avivit Atiyah v. Attorney General*, HCJ 4723/96, ¶ 11 (July 29, 1997).

⁵¹¹ Military Justice Law, § 178(1); IDF Supreme Command Order 2.0613(2)(b) and 3(d). See also Attorney General's Directive No. 9.1002, *The Military Advocate General* (last updated April 2015), § 2(b), unofficial English translation available at

<http://index.justice.gov.il/En/Units/AttorneyGeneral/Documents/AGDirectiveMilitaryAdvocateGeneral.pdf> (hereinafter: the "Attorney General's Directive No. 9.1002"). This directive states that "[t]he opinion of the Military Advocate General with respect to a legal matter determines the state of the law for all IDF authorities, and the Military Advocate General's interpretation of the law is the authoritative interpretation for all IDF authorities."



MAG), who serves on the IDF General Staff, is appointed by the Minister of Defence, a civilian authority,⁵¹² and is “subject to no authority but the law.”⁵¹³ On professional matters, the MAG is guided only by Israel’s Attorney General.⁵¹⁴ The MAG’s professional independence extends to every subordinate military attorney serving as an officer within the MAG Corps. These officers are subordinate to and report directly to their MAG Corps commanders, who, in turn, report to the MAG himself. This legal chain of command is an important and fundamental aspect of the MAG Corps, implemented to insulate military legal officers from the risk of improper influence by non-MAG commanders. No commanders outside of the MAG Corps are part of the legal chain of command.

417. In 2007, the MAG Corps underwent two significant organisational changes designed to improve its ability to more effectively enforce the rule of law. First, the MAG Corps separated its law enforcement units from its legal advice units. As a result, the MAG Corps officers responsible for military prosecutions (*i.e.*, the Chief Military Prosecutor and subordinate military prosecutors) do not provide legal advice to the military bodies whose activities they may prosecute.⁵¹⁵ The dual (but separate) enforcement and advisory responsibilities that the MAG himself retains parallel those of the Attorney General of the State of Israel.

418. Second, the MAG established a specialised department within the law enforcement unit — the Office of the Military Advocate for Operational Affairs — to oversee all investigations and conduct all prosecutions of alleged misconduct by IDF soldiers occurring in the context of operational activity, including alleged mistreatment of detainees, looting, abuse of authority, or the use of force in a manner not conforming with IDF rules and regulations (which incorporate the Law of Armed Conflict). This Office’s mandate specifically includes prosecution of alleged violations of the Law of Armed Conflict. Prosecutors assigned to the Office receive special training to ensure they

⁵¹² Military Justice Law, §§ 177(a), 178(1).

⁵¹³ IDF Supreme Command Order 2.0613(9)(a). The independent status of the MAG is also reflected in the Attorney General’s Directives No. 9.1002, which states that “[w]hen exercising his or her authority under Article 178 of the Military Justice Law as legal advisor [for the IDF Chief of General Staff and other IDF authorities]... the Military Advocate General operates independently, and is not subordinate to the Chief of the General Staff or any other command authority; and is guided by considerations pertaining to the rule of law – and these considerations only – when fulfilling his or her role.” Attorney General’s Directive No. 9.1002, *supra* note 511 at § 3.

⁵¹⁴ Attorney General’s Directive No. 9.1002 details the relationship between the military legal system headed by the MAG and the general legal system headed by the Attorney General, and also details the principal circumstances in which the Attorney General will intervene, or provide guidance, with respect to legal matters pertaining to the military legal system. *Id.* § 2(b) (“[T]he Military Advocate General must ... adopt the interpretation of the law given by the Attorney General”) and § 9 (“The Attorney General will review decisions made by the Military Advocate General ... after hearing the Military Advocate General’s position on the matter,” where, *inter alia*, the Attorney General believes that the MAG’s decision is of “special importance to the public” or where “the implications go beyond the IDF,” such as “decisions regarding policy aspects of the application of military force, where it is alleged that such policy is unlawful and constitutes a serious violation of international law.”).

⁵¹⁵ Turkel Report, *supra* note 505, at 283.



competently manage these sensitive cases and effectively advise military police investigators on how to conduct investigations regarding IDF operations.

419. The IDF's primary entity for investigating allegations of criminal offences — the Military Police Criminal Investigation Division ("MPCID") — enjoys complete professional independence similar to that of the MAG Corps. The MPCID is not subordinate to any commanders outside the military justice system. All MPCID investigators must complete extensive training.⁵¹⁶ Investigators handling alleged violations of the Law of Armed Conflict receive additional training that includes international law, reconstruction of battlefield situations, and gathering of evidence from witnesses and alleged victims outside Israeli territory. All investigators handling complaints involving Palestinians are assisted by Arabic-speaking interpreters. Following the 2014 Gaza Conflict, the MPCID established a specialised team dedicated to investigations arising from that Conflict. This MPCID team consists of experienced investigators who undergo in-depth training with respect to the Law of Armed Conflict as well as operational affairs.

420. The Military Courts — which are independent of both the MAG and the IDF chain of command — adjudicate charges against IDF soldiers for military and other criminal offenses. The Military Court system includes regional courts of first instance, as well as a Military Court of Appeals. The head of the Military Courts system, the President of the Military Court of Appeals, is a Major General. Professional military judges (appointed by an independent commission)⁵¹⁷ and regular IDF officers (who have no connection to the cases they hear) serve on these Military Courts.⁵¹⁸ Each bench of the Military Courts must include at least one professional military judge, and professional judges must constitute a majority of any appellate panel.⁵¹⁹ Under the Military Justice Law, "[i]n judicial matters, a military judge is not subject to any authority save that of the law, and is not subject in any way to the authority of his commanders."⁵²⁰

421. The proceedings of Military Courts are generally open to the public, except in rare cases when an open proceeding would jeopardise national security.⁵²¹ The media covers Military Court

⁵¹⁶ Military Justice Law, § 252(a)(3).

⁵¹⁷ Military commanders do not appoint professional military judges. Rather, an independent commission comprised of the Minister of Defense, the Minister of Justice, the General Chief of Staff, the Head of Manpower Directorate in the IDF, members of Israel's Supreme Court and the Military Court of Appeals, and a representative of the Israeli Bar Association, make the appointments. *See* Military Justice Law, § 187(a).

⁵¹⁸ *Id.* Israel's Supreme Court has noted that the participation of regular officers in the panel serves "to emphasize the common responsibility of all of those who serve in the military regarding what happens in the military." *Katz v. President of the Court Martial, Central Jurisdictional District*, HCJ 142/79, ¶ 6 (June 10, 1979).

⁵¹⁹ Military Justice Law, §§ 202, 216

⁵²⁰ *Id.* § 184.

⁵²¹ *Id.* § 324.



proceedings, and many judgments of the Military Courts are published online.⁵²² Furthermore, Military Courts typically apply the same rules of evidence used in civilian criminal proceedings.⁵²³

2. Mechanisms for Investigating Complaints

422. Israel has multiple avenues for obtaining information regarding alleged misconduct by IDF soldiers, and the MAG Corps constantly reviews any complaints and other information that may suggest IDF misconduct, regardless of the source. As an open and democratic society, Israel has a free press and an active community of domestic and international non-governmental organisations, which are a source of many of the allegations of misconduct. Such allegations also may come from putative victims, their family members, attorneys, or witnesses of the conduct at issue. In fact, any person can file a complaint alleging misconduct by IDF soldiers at any civilian police or MPCID station, either by appearing in person or through written communication. Residents of the Gaza Strip also can — and indeed do — file complaints directly to the MAG through Israel’s liaison mechanism with the Palestinian Authority, through a non-governmental organisation acting on their behalf, or through an attorney (who need not be Israeli).

423. In addition, Israeli commanders, soldiers, police, or other law enforcement officers who witness an offence being committed may file a report to a competent officer. Indeed, under the Military Justice Law, any IDF “commander ... or soldier who knows or has reasonable grounds to believe that another soldier committed an offense” *must* prepare a complaint and present it to a competent officer.⁵²⁴ To bolster compliance, following a recommendation made in the Turkel Report, the IDF has revised existing procedures and introduced a specific directive asserting a duty to file a report, for example, when there is reasonable suspicion that an IDF soldier committed a serious violation of Israeli or international law, as well as in certain other cases even if no such cause for suspicion arises, such as when medical facilities are damaged. The IDF is currently integrating this new, more detailed directive into all levels of IDF command and in the field.

424. Each report, complaint or other piece of information suggesting IDF misconduct undergoes an initial screening process by the MAG Corps to determine whether it is sufficiently concrete and credible *prima facie* to merit further review by the MAG. In certain cases, where the known facts are

⁵²² See, e.g., Nevo Press Ltd., <http://www.nevo.co.il/>, and Takdin Online Israeli Law Database, <http://www.takdin.co.il/>.

⁵²³ See Military Justice Law, § 476 (establishing that evidence law applicable to criminal proceedings in civilian courts shall apply in Military Courts unless a specific provision states differently). Rules of evidence that are unique to the Military Courts must be interpreted in light of similar provisions and the principles of general evidence law. See *Isascharov v. Military Prosecutor General*, Cr.A. 5121/98 (May 4, 2006).

⁵²⁴ Military Justice Law, § 225.



sufficient to indicate that the alleged wrongdoing could be criminal in nature (such as looting or the abuse of detainees), the MAG immediately refers the complaint to the MPCID. In other cases — for example, when an allegation is sufficiently credible yet partial or circumstantial — the MAG may require additional information in order to decide whether to open a criminal investigation. Because the death or injury of civilians during an armed conflict — an unfortunate but inevitable reality of war — does not in and of itself establish a reasonable suspicion of criminal misconduct, the collection of additional information is often critical when addressing allegations of wrongdoing during combat activity. In such cases, the IDF will conduct a preliminary fact-finding assessment in order to develop the factual record so that the MAG can make a fully informed decision whether there is a reasonable suspicion of criminal misconduct that justifies opening a criminal investigation.⁵²⁵

425. **The IDF’s New Fact-Finding Assessment Mechanism.** Soon after the commencement of the 2014 Gaza Conflict, the (then) IDF Chief of General Staff ordered the establishment of a permanent General Staff Mechanism for Fact-Finding Assessments, in accordance with one of the Turkel Commission’s key recommendations.⁵²⁶ The FFA Mechanism is designed to conduct, based on proper expertise, a prompt, professional examination of exceptional incidents that took place during military operations, so that the MAG has sufficient factual information to determine whether allegations give rise to a reasonable suspicion of criminal misconduct. The FFA Mechanism examines all exceptional incidents referred to it by the MAG.⁵²⁷

426. The FFA Mechanism is currently headed by a Major General in the reserves and relies on high-ranking IDF reservist and active duty officers who are outside the chain of command for the operational activity being examined. The FFA Mechanism’s teams include officers with operational expertise, legal qualifications, and professional investigative experience. Each team is also provided with ongoing legal advice from legal officers in the MAG Corps who have particular expertise and experience in international law. In addition, the FFA Mechanism receives legal advice from its own high-ranking legal advisor, who has special expertise in international law as well.

⁵²⁵ *Id.* § 539A(a).

⁵²⁶ See *Operation Protective Edge: Examinations and Investigation*, IDF, MAG Corps (Sept. 10, 2014), available at <http://www.mag.idf.il/261-6858-en/Patzar.aspx>.

⁵²⁷ Previously, the MAG generally relied on “command investigations” (also known as “operational debriefings”) in order to determine whether allegations gave rise to a reasonable suspicion of criminal misconduct. While the FFA Mechanism is now dedicated to providing the MAG with the information required in order to make such a determination, command investigations are still used by the relevant units in order to conduct a “lessons learned” process, including to assess what steps, if any, may be taken to minimise the risk of harm or casualties in the future. The FFA Mechanism is authorised to obtain the results of any command investigation, and the materials used therein, which it deems relevant in order to fulfill its mandate to provide the MAG with a fuller factual examination.



427. The FFA Mechanism has broad-ranging powers to obtain information from within and outside the IDF, and to seek information from civilians and from persons outside of Israeli sovereign territory. IDF soldiers are obliged to cooperate with the FFA Mechanism. To encourage full disclosure of relevant information, Israeli law treats the materials and findings of the FFA Mechanism as privileged.

428. Once an FFA Mechanism examination is complete, the MAG decides whether the findings and collected materials meet the requirements for a criminal investigation. In order to make this decision, the MAG may request supplementary examinations and materials from the FFA Mechanism. The MAG's decision must be prompt, reasoned, and documented. Complainants (including residents from the Gaza Strip and Palestinian NGO's) receive notification of the MAG's decision, which is also made public subject to legal and national security restrictions regarding the scope of information that can be disclosed.

429. If so directed by the MAG, the MPCID must conduct a criminal investigation. MPCID staff may investigate any IDF soldier or officer, collect evidence from a wide range of sources (including witness testimony of Palestinians), and seek counsel from military prosecutors. When the MPCID concludes its investigation, it transfers the case file to the Office of the Military Advocate for Operational Affairs. After a thorough review of the investigation materials, the military prosecutors can — and in many cases do — request supplemental investigations.

430. The MAG may also refer the findings and materials collected by the FFA Mechanism to an Investigative Officer, who is an operational commander outside the chain of command for the operational activity being investigated and who is specifically vested with the same investigatory authorities exercised by the MPCID.⁵²⁸

431. Following a criminal investigation (or investigation by an Investigative Officer), the file is transferred back to the Office of the Military Advocate for Operational Affairs for review. After this review, the MAG decides whether to initiate criminal or disciplinary proceedings. The MAG's decision must be based on the evidence available and the nature of the alleged misconduct. In accordance with well-established principles of criminal law, military prosecutors may file an indictment in the Military Courts if the evidence is sufficient to establish a reasonable chance of

⁵²⁸ Military Justice Law, § 252 et seq.



conviction.⁵²⁹ In the event of an indictment, Palestinian witnesses may testify in Israel with the aid of an interpreter provided by Israel and generally may review the investigation file. The Military Prosecution may appeal an acquittal or a sentencing decision to the Military Court of Appeals, and then may request to appeal the decision of the Military Court of Appeals to Israel's Supreme Court.⁵³⁰

432. Practical and Legal Challenges to Investigations and Prosecutions. Generally accepted understandings of international law recognise the inherent difficulties of conducting investigations in the context of armed conflict.⁵³¹ International legal standards need to be applied in a manner that is considerate of these difficulties, while at the same time remaining true to the ultimate aim of conducting effective investigations.⁵³² On a practical level, investigation of alleged violations of the Law of Armed Conflict inevitably is complicated by numerous challenges, especially in the context of an intensive conflict with a non-state actor like Hamas that embeds its military operations in urban terrain.⁵³³

433. These (often overlapping) challenges include, for example:

- the complex, dynamic nature of certain large-scale military operations involving many different forces and numerous attacks over several hours or days (*e.g.*, in the wide context of

⁵²⁹ Under Israel Supreme Court precedent, a criminal indictment may only be filed where a “reasonable chance to convict” exists in light of all evidence collected, including exculpatory evidence. *See, e.g., Yahav v. State Attorney*, HCJ 2534/97 (June 30, 1997).

⁵³⁰ *See* for example, *Military Prosecutor v. Sgt. Ilin*, C/62/03 ¶ E (May 27, 2003), where the Military Court of Appeals increased the sentence of a soldier convicted of looting, and *Military Prosecutor v. Cpl. Lior and Cpl. Roi*, C/128/03 and C/146/03 ¶ 17 (August 21, 2003), where the Military Court of Appeals increased the sentences of two soldiers serving in the Military Police who were convicted of assaulting Palestinian detainees.

⁵³¹ These challenges were acknowledged by the U.N. Secretary General in a letter to the President of the U.N. Security Council presenting a summary of the report of the U.N. Headquarters Board of Inquiry Into Certain Incidents That Occurred in the Gaza Strip between 8 July and 26 August 2014. The Secretary General “recognize[d] the difficulties that [the U.N. Board of Inquiry] naturally faced in obtaining clear and reliable evidence about what precisely happened in each of the incidents ... occurring, as they did, in a situation of armed conflict, and, in some but not all cases, in close proximity to where intense fighting was taking place.” *Letter dated 27 April 2015 from the Secretary-General addressed to the President of the Security Council*, annexing *Summary by the Secretary General of the report of the United Nations Headquarters Board of Inquiry into certain incidents that occurred in the Gaza Strip between 8 July and 26 August 2014* (U.N. Doc. S/2015/286), at ¶¶ 55, 67, 76, 80 (27 Apr. 2015), available at http://www.un.org/ga/search/view_doc.asp?symbol=s/2015/286. The U.N. Board of Inquiry was established by the U.N. Secretary General to identify any gaps in the U.N.’s procedures and assess any actions that may be taken to prevent the recurrence of similar events in the future. It did not constitute a judicial body nor make any findings of legal liability. The report of the U.N. Board of Inquiry was submitted to the U.N. Secretary General on February 5, 2015, and remains an internal U.N. document, not for public release. While Israel cooperated fully with the Board of Inquiry, it maintains reservations concerning some aspects of the Board of Inquiry’s methodology and findings.

⁵³² *See, e.g.,* Turkel Report, *supra* note 505, at 143, 154, 237.

⁵³³ *See* Chapter IV (Hamas’s War Crimes) and Chapter VI (IDF’s Conduct during the Conflict), Section C.



a battle it can be very difficult to identify the singular cause for damage to a structure — which party is directly responsible, which weaponry caused the damage, and which particular force was responsible for conducting the individual attack or even whether the damage was a result of a direct attack, shrapnel or other secondary causes);

- the inadvertent destruction of evidence during intense fighting, which often makes it difficult, if not impossible, to determine which party was directly responsible for the damage caused (*e.g.*, whether damage was caused by an IDF attack, or Hamas booby-trapping or misfire) or to identify the circumstances surrounding an attack (*e.g.*, whether IDF fire was responding to Hamas fire from a civilian structure);
- the scene of the alleged violation being outside the state's territory;
- the scene of the alleged violation being in an area under hostile control, which makes the collection of evidence difficult and, at best, incomplete, and makes the investigation of the scene difficult (*e.g.*, the collection of forensic evidence is often crucial in order to determine the type of weaponry that caused damage to a civilian structure; aerial photographs are not always sufficient to make this determination, particularly when destruction was the result of a type of weaponry that both parties to the conflict possess);
- the lack of eyewitnesses to certain military activity (such as an aerial bombing or covert ground operations) and the limited reliability of eyewitnesses whose observations occur in the midst of highly intensive combat operations;
- the failure of potential witnesses to come forward, because, *inter alia*, they fear retribution for cooperating with the IDF's investigation or for reporting on terrorist activity;
- the concealing of evidence or planting of false evidence by adversaries (*e.g.*, Hamas has a record of removing evidence of its military activities conducted within civilian terrain and trying to present its militant fatalities as innocent civilians).⁵³⁴

434. As a result of these various challenges and constraints, criminal investigations can take significant time and still fail to obtain evidence considered sufficient to warrant prosecution, either

⁵³⁴ For more information on Hamas's record of trying to present militant fatalities as innocent civilians, see Annex: *Palestinian Fatality Figures in the 2014 Gaza Conflict*, also available at <http://mfa.gov.il/ProtectiveEdge/Documents/PalestinianFatalities.pdf>.



because of a lack of information or because of evidentiary obstacles to the admissibility of information gathered.⁵³⁵ Nonetheless, Israel's mechanism is designed to ensure that investigations are conducted as promptly and effectively as possible.

435. If an investigation progresses to prosecutorial review, additional challenges arise. As in civilian prosecutions, military prosecutors must carefully review all the evidence (both inculpatory and exculpatory) before deciding to take the significant step of bringing criminal charges. In addition, not all operational mistakes are indicative of criminal behaviour. Military prosecutors must assess conduct based on the circumstances known at the time of the decision at issue and strive to avoid the bias of hindsight or the convenience of effects-based condemnations. In evaluating alleged violations of the Law of Armed Conflict, the conduct must be considered from the perspective of the "reasonable commander" based on the information available at the time, not after the fact. Moreover, even if the investigators and prosecutors suspect that a violation of the law may have been committed, the prosecutors may nevertheless conclude — like civilian prosecutors — that the admissible evidence is insufficient to bring criminal charges that can withstand scrutiny in a criminal trial. In such cases, the IDF may still take internal disciplinary action against the personnel involved.⁵³⁶

436. Notwithstanding these challenges, Israel is committed to investigating alleged misconduct and holding wrongdoers accountable, through criminal prosecutions or disciplinary action, as may be appropriate in each case.

B. Civilian Review of the Military Justice System By Israel's Attorney General and Supreme Court

437. As a democratic country committed to the rule of law, Israel subjects the IDF's military justice system to civilian oversight.

⁵³⁵ Turkel Report, *supra* note 505, at 141-142 (including footnotes 273-274).

⁵³⁶ *Gaza Operation Investigations: An Update*, State of Israel (January 2010), available at http://mfa.gov.il/MFA_Graphics/MFA%20Gallery/Documents/GazaOperationInvestigationsUpdate.pdf; *Gaza Operation Investigations: Second Update*, State of Israel (July 2010), available at http://www.mfa.gov.il/MFA_Graphics/MFA%20Gallery/Documents/GazaUpdateJuly2010.pdf.



1. Review by the Attorney General

438. The Attorney General of Israel, who heads the public prosecution system and is the chief legal advisor to the Government of Israel, provides civilian supervision of the military justice system. The professional directives of the Attorney General bind all state authorities, including the IDF.

439. The Attorney General may review any decision of the MAG that the Attorney General considers to be of special public interest.⁵³⁷ Moreover, a complainant or non-governmental organisation can challenge the MAG's decision before the Attorney General as to whether to open a criminal investigation or to file an indictment in cases concerning alleged violations of the Law of Armed Conflict.⁵³⁸

2. Review by the Supreme Court

440. Israel's Supreme Court provides judicial review for the military justice system. Under the Military Justice Law, the Supreme Court may hear direct appeals from a judgment of the Military Court of Appeals "concerning an important, difficult, or innovative legal question."⁵³⁹ Complainants or non-governmental organisations also may petition the Supreme Court, sitting as the High Court of Justice ("HCJ"), against a decision of the MAG or the Attorney General.⁵⁴⁰ The Supreme Court may review and reverse decisions of the MAG and the Attorney General, including decisions whether to open a criminal investigation, whether to file a criminal indictment, whether to bring certain charges, or whether to appeal a decision of the Military Courts.⁵⁴¹

⁵³⁷ See, for example, *Avivit Atiyah v. Attorney General*, HCJ 4723/96 (July 29, 1997), where the Supreme Court ruled that the Attorney General could order the MAG Corps to change its position concerning whether to file a criminal indictment.

⁵³⁸ In light of the recommendations of the Turkel Commission, this procedure was set forth in a new directive issued by Israel's Attorney General in April 2015. According to this directive, an interested individual can seek review of a decision made by the Military Advocate General with respect to certain incidents by referring the issue for review by the Attorney General. See Attorney General's Directive 4.5003, *Review of decisions of the Military Advocate General regarding incidents involving the death of an individual in the course of Israel Defense Forces operational activity, when serious violations of customary international law are alleged* (last updated April 2015), § B(4), unofficial English translation available at <http://index.justice.gov.il/En/Units/AttorneyGeneral/Documents/AGDirectiveRightofReview.pdf> (unofficial English translation) (hereinafter: "Attorney General's Directive 4.5003").

⁵³⁹ Military Justice Law, §440I(a),(b).

⁵⁴⁰ Paragraph 15(D)(2) to the Basic Law: The Judiciary.

⁵⁴¹ For example, the Supreme Court has overturned the MAG's decision not to file criminal charges against a high-ranking field commander, resulting in the filing of such charges and ultimately in the conviction of the commander. See *Jamal Abed al Kader Mahmoud Zofan et al. v. Military Advocate General*, HCJ 425/89 (1989). In another case, Supreme Court hearings prompted the MAG to open a military investigation into an incident that had not previously

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441. The scope of the Court’s review is very broad. According to the jurisprudence and practice of the High Court of Justice, any interested party (including non-governmental organisations) — or any person (including those who are neither citizens nor residents of Israel) who is affected or potentially affected by the actions of a government authority (including the IDF or the Attorney General) — is entitled to petition the High Court of Justice, as a court of first instance, on any claim that a government action or an action of the IDF is *ultra vires*, unlawful, or substantially unreasonable. For example, in the midst of the 2014 Gaza Conflict, the High Court of Justice reviewed a petition concerning the disclosure of information regarding detainees held by the IDF outside the Gaza Strip,⁵⁴² and in recent years the High Court of Justice reviewed the IDF’s early warning procedures, targeted killing policy, supply of fuel and electricity in the Gaza Strip, and investigation policy (which was upheld).⁵⁴³

442. Israel’s Supreme Court has earned international respect and recognition for its jurisprudence, as well as for its independence in enforcing international law. Its landmark rulings in several cases related to the balancing of security and the protection of individuals are highly regarded by jurists and academic scholars of international law, and have been cited favourably by foreign courts, including the Supreme Court of Canada, the House of Lords in the United Kingdom, and the European Court of Justice.⁵⁴⁴

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been investigated. *See Brian Avery v. Military Advocate General*, HCJ 11343/04 (2005). In yet another case, the Supreme Court’s response to a petition arguing that the MAG should have charged a soldier and commander with more serious offenses than “unbecoming conduct” led to the MAG’s issuance of an amended indictment. *See Ashraf Abu Rahma et al. v. Military Advocate General*, HCJ 7195/08 (July 1, 2009).

⁵⁴² On July 29, 2014, an Israeli NGO filed a petition to the Israel’s Supreme Court, requesting that the IDF provide the identities and whereabouts of all persons detained during the 2014 Gaza Conflict and currently held in IDF detention facilities in Israel. On August 4, 2014, during a Supreme Court hearing, the petitioner requested to withdraw its petition after hearing the State’s arguments and comments made by the Court. *See Hamoked Le’haganat Haprat v. IDF*, HCJ 5243/14 (Aug. 4, 2014) (unpublished). For additional details, see Chapter VI (IDF’s Conduct during the Conflict), Section D.5.

⁵⁴³ *See* Turkel Report, *supra* note 505, at 317 (citing *AlBassiouni v. Prime Minister*, HCJ 9132/07 (Jan. 30, 2008) (unpublished) (supply of fuel and electricity); *The Public Committee Against Torture in Israel v. The Government of Israel*, HCJ 769/02, 62(1) 507 (2006) (targeted killing policy); *Adalah – The Legal Center for Arab Minority Rights in Israel v. GOC Central Command, IDF*, HCJ 3799/02, 60(3) 67 (2005) (early warning system). *See also B’Tselem – The Israeli Information Center for Human Rights in the Occupied Territories v. Military Advocate-General*, HCJ 9594/03 (Aug. 21, 2011) (upholding IDF investigations policy).

⁵⁴⁴ *See, e.g., Application Under S. 83.28 of the Criminal Code*, 2004 SCC 42, ¶ 7 (Supreme Court of Canada 2004) (citing the “eloquent” statements of Israel’s Supreme Court on the importance of responding to terrorism within the rule of law); *A and others v. Secretary of State for the Home Department*, 2 A.C. 221, ¶ 150 (U.K. House of Lords 2005) (emphasizing importance of the U.K.’s “retain[ing] the moral high ground which an open democratic society enjoys,” and thereby “uphold[ing] the values encapsulated in the judgment of the Supreme Court of Israel in *Public Committee Against Torture in Israel v. Israel* . . . [that] “[a]lthough a democracy must often fight with one hand tied behind its back, it nonetheless has the upper hand”) (citation omitted); *Kadi v. Council of the European Union*, 3

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C. Review by an Independent Public Commission of Inquiry

443. The Government of Israel from time to time may establish independent public commissions of inquiry to review Israel's practices and policies.⁵⁴⁵ Following the IDF's interdiction of vessels attempting to violate a naval blockade on May 31, 2010 (hereinafter: the "Flotilla Incident"), the Government created an independent public commission of inquiry headed by retired Supreme Court Justice Jacob Turkel.⁵⁴⁶ The Turkel Commission included the late Professor Shabtai Rosenne, General (ret.) Amos Horev, Israeli law professor Miguel Deutch, and former Ambassador Reuven Merhav, as well as international observers Lord David Trimble of Northern Ireland, a Nobel Peace Prize winner and formerly First Minister of Northern Ireland; Brigadier-General (ret.) Kenneth Watkin of Canada, a former Judge Advocate General of the Canadian armed forces; and Professor Timothy McCormack of Australia, who serves as a special advisor to the Prosecutor of the International Criminal Court in the Hague.⁵⁴⁷ The Commission was charged with assessing the legality of Israel's actions during the Flotilla Incident and evaluating Israel's procedures for examining and investigating alleged violations of the Law of Armed Conflict.⁵⁴⁸

444. In February 2013 the Turkel Commission published a 476-page report, which Canadian Brigadier-General Watkin described as "an important reflection of the commitment to the Rule of Law" and the product of "considerable efforts to hear from a wide range of interested groups and individuals in addition to the Government witnesses," including testimony from Palestinians who "provided a reminder of the human impact of [Israel's] investigations."⁵⁴⁹ According to Professor

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C.M.L.R. 41, ¶ AG 45 (European Court of Justice 2008) (quoting Israel's Supreme Court regarding importance of judicial oversight of political decisions, specifically that "[i]t is when the cannons roar that we especially need the laws... It is an expression of the difference between a democratic state fighting for its life and the fighting of terrorists rising up against it. The state fights in the name of the law and in the name of upholding the law. The terrorists fight against the law, while violating it. The war against terrorism is also law's war against those who rise up against it.").

⁵⁴⁵ The Government Law, 5761–2001, LA 1780; The Commissions of Inquiry Law, 5729–1968, LA 548, at Art. 1.

⁵⁴⁶ Resolution No. 1796 of the 32nd Government, Appointment of an Independent Public Commission, Chaired by Supreme Court Justice (ret.) Jacob Turkel, to Examine the Maritime Incident of 31 May 2010 (Jun. 6, 2010).

⁵⁴⁷ The Turkel Commission also benefitted from the contributions of several other reputable experts in the field of international law, including Professor Claus Krefß, Director of the Institute for International Peace and Security Law at the University of Cologne in Germany, and Professor Gabriella Blum, Rita E. Hauser Professor of Human Rights and Humanitarian Law at Harvard University. Professor Michael Schmitt, who was at the time the Chair of Public International Law at Durham University in the United Kingdom, also provided counsel to the Commission until his appointment in September 2011 as Chair of the International Law Department at the United States Naval War College. Turkel Report, *supra* note 505, at 37-38.

⁵⁴⁸ See Art. 5 of the Turkel Commission's Mandate, available (in English) at www.mfa.gov.il/MFA/Government/Law/Legal+Issues+and+Rulings/Independent+Public+Commission+Maritime+Incident+31-May-2010.htm.

⁵⁴⁹ Turkel Report, *supra* note 505, at 24-26 (Observer Letter of Brigadier-General (ret.) Kenneth Watkin, Q.C.).



McCormack, this report “represents the first comprehensive and systematic analysis of the international law of national investigations.”⁵⁵⁰

445. The Turkel Commission concluded that “the examination and investigation mechanisms in Israel for complaints and claims of violations of international humanitarian law and the methods they practice, generally comply with the obligations of the State of Israel under the rules of international law.”⁵⁵¹ With respect to principles of independence, impartiality, effectiveness, thoroughness, promptness, and transparency, the Turkel Commission also compared Israel’s investigations system favourably to the systems of six Western nations (Australia, Canada, Germany, the Netherlands, the United Kingdom and the United States).⁵⁵² In the words of Lord David Trimble, one of the Commission’s international observers, “taken as a whole, Israeli law and practice will stand comparison with the best in the world.”⁵⁵³

446. Consistent with its mandate, the Turkel Commission made various recommendations for how Israel might further improve its system for examining and investigating alleged violations of the Law of Armed Conflict. The Commission emphasised that these recommendations “[do] not necessarily indicate flaws in the past, but rather [signify] the Commission’s aspiration to pave a way towards best practice in this field in the future.”⁵⁵⁴

447. Israel has already implemented some of the recommendations of the Turkel Report, including the establishment of a permanent FFA Mechanism, as discussed in Sections A.2 above,⁵⁵⁵ and new Directives by the Attorney General, as discussed in Section B.1 above.⁵⁵⁶ An inter-agency commission is addressing how to implement the balance of the recommendations and expects to conclude its work in the near future.

⁵⁵⁰ Timothy McCormack, Shabtai Rosenne Memorial Lecture, YouTube (26 Nov. 2014), at 18:45, <https://www.youtube.com/watch?v=UMAmSltyEOE>.

⁵⁵¹ Turkel Report, *supra* note 505, at 49.

⁵⁵² *Id.* at 152-264 (“Comparative Survey of Investigative Systems Relevant to Laws of Armed Conflict”).

⁵⁵³ *Id.* at 22.

⁵⁵⁴ *Id.* at 361.

⁵⁵⁵ The establishment of the FFA Mechanism was fully coordinated with the Attorney General and was endorsed by Dr. Joseph Ciechanover, who heads the inter-agency commission responsible for implementing the recommendations of the Turkel Report.

⁵⁵⁶ Attorney General’s Directive 9.1002, *supra* note 511 and Attorney General’s Directive 4.5003, *supra* note 538.



D. Examination and Investigation of Allegations Arising from the 2014 Gaza Conflict

448. The IDF is currently reviewing hundreds of complaints regarding its conduct of operations during the 2014 Gaza Conflict. These complaints have been made by private complainants, the U.N., NGOs, international and local media, and IDF personnel. Indeed, the Military Advocate for Operational Affairs has requested the cooperation of certain NGOs.⁵⁵⁷

449. The MAG periodically publishes his decisions.⁵⁵⁸ As of March 22, 2015, the date of the MAG's last public report, the FFA Mechanism had been charged with examining approximately 126 incidents so as to provide the MAG with sufficient information to decide whether there is a reasonable suspicion of criminal behaviour such that a criminal investigation should be opened. The FFA Mechanism had completed the examination of 65 incidents. The MAG had ordered criminal investigations into six of these incidents, closed 17 after finding that the IDF's actions did not raise reasonable grounds for suspicion of criminal behaviour, and asked the FFA Mechanism to gather further information for an additional number of cases. As of March 22, 2015, the MAG was reviewing the remaining incidents. In addition, the MAG opened 13 criminal investigations without a prior examination by the FFA Mechanism, based on allegations that *prima facie* raised reasonable suspicion of criminal misconduct.⁵⁵⁹

450. This Section provides information regarding the examination and investigations of several specific incidents that took place during the 2014 Gaza Conflict. In deference to the integrity and independence of the processes underway in Israel, it would be premature to reach any final conclusions now, before those processes are complete.⁵⁶⁰ Nonetheless, given extensive public

⁵⁵⁷ See, e.g., Letter from Lt. Col. Ronen Hirsch, Military Advocate for Operational Matters, to Mr. Hagai El-Ad, B'Tselem Executive Director, regarding Examination of irregular incidents in Operation Protective Edge (Aug. 11, 2014), English translation available at http://www.btselem.org/download/20140811_letter_from_mag_corps_regarding_protective_edge_investigations_eng.pdf. To the extent that external organisations have gathered information related to the 2014 Gaza Conflict, they should provide the information and any evidence on which it is based to Israel to facilitate those investigations.

⁵⁵⁸ See *Decisions of the IDF Military Advocate General regarding Exceptional Incidents that Occurred during Operation 'Protective Edge' – Update No.3*, IDF, MAG Corps (Mar. 22, 2015), available at <http://www.law.idf.il/163-7183-en/Patzar.aspx>; *Decisions of the IDF Military Advocate General regarding Exceptional Incidents that Occurred during Operation 'Protective Edge' – Update No. 2*, IDF, MAG Corps (7 Dec. 2014), available at <http://www.law.idf.il/163-6958-en/Patzar.aspx>. For an earlier report, see *Operation Protective Edge: Examinations and Investigation*, IDF, MAG Corps (10 Sept. 2014), available at <http://www.mag.idf.il/261-6858-en/Patzar.aspx?pos=13>.

⁵⁵⁹ See *id.*

⁵⁶⁰ The U.N. Fact-Finding Mission on the Gaza Conflict that investigated allegations of IDF misconduct during the Gaza Operation 2008-2009 reached erroneous conclusions regarding intentionality based only on the fact of civilian

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discussion about these issues and the frequency with which public statements have preceded rather than followed the evidence, the IDF has decided to provide preliminary information regarding some of the specific incidents examined. This information reflects only what the IDF knows thus far, and what can be released legally and without compromising the integrity and independence of the ongoing, thorough processes.

451. The MAG Corps is making a substantial effort to ensure transparency in the process of examining and investigating exceptional incidents that allegedly occurred during the 2014 Gaza Conflict. To this end, the MAG periodically publishes his decisions with respect to individual incidents, holds press conferences to discuss such decisions as well as general processes, and meets with military attaché and other foreign dignitaries to discuss the examination and investigation processes, as well as individual incidents. Given the nature of the issues involved, however, the extent of information the MAG Corps can disclose may unavoidably be limited by laws protecting the confidentiality of the FFA Mechanism report and of ongoing criminal investigations or by considerations concerning the publication of classified information.

452. An objective analysis of specific incidents where civilians were killed or protected property damaged during the 2014 Gaza Conflict must also take into account the realities of armed conflict and the applicable Law of Armed Conflict. Civilian casualties in wartime are tragic. Damage to civilian property and infrastructure is regrettable. But the Law of Armed Conflict does not condemn military actions simply because they resulted in such casualties or damage. Rather, the law focuses on whether the actions of commanders and soldiers complied with the law at the time of the attack, including whether operations were aimed at achieving legitimate military objectives and were conducted in accordance with the principles of distinction, proportionality, and precautions. Rooted in the idea of the “reasonable commander,” the legal analysis is focused on the circumstances at the time of the incident, in light of information that was known to the commander (or should have been known). Thus, for example, targeting decisions that result in civilian casualties do not, *ipso facto*, indicate a violation of the Law of Armed Conflict, whereas the deliberate targeting of civilians would indicate such a violation. Because civilian casualties are unfortunately unavoidable when engaged in

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casualties. The Chairman of the Committee, Justice Richard Goldstone, has since written: “If I had known then what I know now, the Goldstone Report would have been a different document.” Richard Goldstone, *Reconsidering the Goldstone Report on Israel and war crimes*, Washington Post (Apr. 1, 2010), available at http://www.washingtonpost.com/opinions/reconsidering-the-goldstone-report-on-israel-and-war-crimes/2011/04/01/AFg111JC_story.html. Goldstone also acknowledged that according to a subsequent report issued by the U.N. Human Rights Council on the Gaza Operation 2008-2009, the Council’s final report on this Operation, “Israel has dedicated significant resources to investigate over 400 allegations of operational misconduct in Gaza” while “the de facto authorities (i.e., Hamas) have not conducted any investigations into the launching of rocket and mortar attacks against Israel.” *Id.*



State of Israel

hostilities within the urban terrain — and against an enemy like Hamas, which embeds its operations within the civilian environment⁵⁶¹ — the distinction between these two conclusions will often be highly fact contingent.

453. **Criminal Investigations.** As of the date of this report, the MAG has opened 19 criminal investigations. Thirteen of these criminal investigations were opened without a prior examination by the FFA Mechanism, based on allegations that *prima facie* raised reasonable suspicion of criminal misconduct by IDF forces, including allegations regarding the shooting of a woman in the Dahaniya area on July 18, 2014; allegations regarding a number of instances of looting (the stealing of money) in the Gaza Strip during the Operation; allegations regarding the mistreatment of a 17-year old held by IDF forces in Khuza'a between July 23 and 27, 2014; and allegations regarding the death of a man carrying a white flag and the use of his family as human shields in Khuza'a on July 25, 2014. On April 20, 2015, the MAG decided to file criminal charges against three soldiers with regard to allegations of looting. Two of these soldiers were also charged with obstruction of a criminal investigation.⁵⁶² Meanwhile, two other investigations concerning allegations of looting have been closed following the failure of the complainants to appear and provide testimony, despite the IDF's repeated efforts to coordinate the provision of such testimony, including by the assurance of immunity for witnesses who would come to the Erez Crossing Point to provide testimony to the MPCID.

454. Six of the criminal investigations opened thus far are based on initial examinations by the FFA Mechanism: allegations regarding the death of four children on the Gaza Strip coast on July 16, 2014; allegations regarding 15 civilian casualties resulting from a strike in the vicinity of an UNRWA school in Beit Hanun on July 24, 2014; allegations regarding the death of an ambulance driver in the Khan Yunis area on July 25, 2014; allegations regarding the death of an ambulance driver in the vicinity of a hospital in Beit Hanun on July 25, 2014; allegations regarding the deaths of 27 civilians as a result of strikes on the Abu-Jama House in Khan Yunis on July 21, 2014; and allegations regarding an IDF strike which resulted in casualties and injuries at an UNRWA school

⁵⁶¹ See Chapter III (Objectives and Phases of the Conflict); Chapter IV (Hamas's War Crimes); Chapter VI (IDF's Conduct during the Conflict).

⁵⁶² The indictments charge two soldiers with the looting of 2,420 NIS from a house where IDF forces were situated in Shuja'iyeh. The third soldier is charged with assisting in committing the crime. The MAG opened these criminal investigations during the hostilities, following a report made by the battalion commander to the MPCID in close proximity to the incident. For the MAG Corps' announcement (in Hebrew), see <http://www.law.idf.il/163-7247-he/Patzar.aspx?pos=16>.



and shelter on July 30, 2014. Information about the MAG's decision to open these investigations is available on the MAG's website.⁵⁶³

455. Specific Cases Examined and Closed For Lack of Reasonable Suspicion of a Legal Violation. After review by the FFA Mechanism, the MAG has closed 17 cases where the evidence did not raise a reasonable suspicion of a violation of Israeli law or the Law of Armed Conflict or where no involvement of IDF forces was identified. Israel deeply regrets the civilian deaths, injuries, and property damage that occurred in some of these incidents. Nevertheless, the harm to civilians and civilian property in these cases did not raise a suspicion of unlawful IDF conduct that justifies a criminal investigation. Accordingly, in these cases there was no basis for bringing criminal or disciplinary proceedings. However, in relation to some of these cases, the MAG recommended changes to operational methods in order to reduce the risk of exceptional incidents in the future.

456. By way of example, these cases include:

- Allegations Concerning an Aerial Strike on a Vehicle Marked "TV" in Gaza City on July 9, 2014: The MAG Corps received reports, as well as correspondence from NGO's, alleging that an aerial strike was carried out in the Rimal neighbourhood of Gaza City on July 9, 2014, against a vehicle marked "TV," and which resulted in the death of one person alleged to be a journalist (Ahmed Abdullah Mahmoud Shahab) and in the injury of eight additional persons also alleged to be journalists. Subsequently, and in accordance with the MAG's investigation policy, the incident was referred to the FFA Mechanism.

According to the factual findings and materials collated by the FFA Mechanism and presented to the MAG, the strike was carried out against a vehicle, which intelligence information and direct evidence (specifically, real-time aerial surveillance) indicated was being used to transport weaponry intended to be used against IDF forces or the Israeli civilian population that same day, and whose passengers were involved in the hostilities. It appears that the vehicle was marked "TV" in order to mask the military use made of the vehicle to transport weaponry.

⁵⁶³ *Decisions of the IDF Military Advocate General regarding Exceptional Incidents that Occurred during Operation 'Protective Edge' – Update No.3*, IDF, MAG Corps (Mar. 22, 2015), available at <http://www.law.idf.il/163-7183-en/Patzar.aspx>; *Decisions of the IDF Military Advocate General regarding Exceptional Incidents that Occurred during Operation 'Protective Edge' – Update No. 2*, IDF, MAG Corps (7 Dec. 2014), available at <http://www.law.idf.il/163-6958-en/Patzar.aspx>; see also *Operation Protective Edge: Examinations and Investigation*, IDF, MAG Corps (Sept. 10, 2014), available at <http://www.mag.idf.il/261-6858-en/Patzar.aspx?pos=13>.



The MAG found that the targeting process accorded with Israeli domestic law and international law requirements. The attack was carried out against a military objective, in accordance with the requirements of the principle of proportionality, and the decision to carry out the attack was made by the authorities authorised to do so. It should be noted that, according to the factual findings, at the time of the strike the IDF forces could not discern that the vehicle was marked “TV.” In any event, in light of the military use made of the vehicle for the purposes of transporting weaponry, the marking of the vehicle did not affect the lawfulness of the strike under international law. The MAG further found that the targeting process was carried out after undertaking various precautions with significant efforts to minimise the possibility of civilian harm. Indeed, the strike on the vehicle was at one point delayed, due to the concern that civilians in its vicinity could be harmed. Furthermore, no supporting evidence was found indicating harm caused to persons other than Shahab.

In light of the above, the MAG did not find that the actions of the IDF forces raised grounds for a reasonable suspicion of criminal misconduct. As a result, the MAG ordered the case to be closed, without opening a criminal investigation or ordering further action against those involved in the incident.

- Allegation Concerning a Strike on a Red Crescent Station in Jabalya and Harm Caused to Red Crescent Personnel on July 9, 2014: The MAG Corps received allegations from a number of NGO’s that in the night-time hours of July 9, 2014, a number of persons working at a Red Crescent station were wounded (the various reports differ with regard to the number of wounded persons, with allegations ranging from three up to 15 persons wounded, and also differ with regard to the severity of their wounds, with some allegations of minor wounds caused and others claiming moderate wounds caused) and three ambulances were damaged, allegedly as a result of an IDF strike on agricultural property near the station. Subsequently, in accordance with the MAG’s investigation policy, the incident was referred to the FFA Mechanism.

According to the factual findings collected by the FFA Mechanism and presented to the MAG, Palestinian terrorist organisations had positioned rockets aimed at Israel in underground rocket launching sites a few tens of metres away from the Red Crescent station. The location of the station was known to the IDF forces and was marked in the IDF’s operational systems as a “sensitive site,” which receives special consideration. The rockets and the launchers that were hidden in the underground launch site next to the station were attacked by the IDF, together with an effort taken to avoid any harm to civilians and to the



nearby Red Crescent station. This included selecting the time for attack (at night-time, when it was less likely that civilians would be in the vicinity of the target) and employing appropriate munitions, in an effort to ensure that any damage caused to adjacent buildings, and persons potentially located inside them, would be minor, at most. In actuality, it appears that besides the destruction of the military target, incidental damage was caused to the Red Crescent station, workers inside the station were possibly injured, and ambulances at the location suffered indirect damage resulting from the attack — seemingly as a result of objects that were thrown by the force of the blast.

After reviewing the factual findings and the material collated by the FFA Mechanism, the MAG found that the targeting process accorded with Israeli domestic law and international law requirements, and included significant efforts to minimise harm to civilians. The MAG further found that the damage caused to the Red Crescent station was unavoidable considering the proximity of the rockets placed by the Palestinian terror organisations only a few tens of metres from the station.

In light of the above, the MAG did not find that the actions of the IDF forces raised grounds for a reasonable suspicion of criminal misconduct. As a result, the MAG ordered the case to be closed, without opening a criminal investigation or ordering further action against those involved in the incident.

At the same time, the MAG recommended to the relevant IDF operational entities that they consider specific amendments to the target planning process, which may assist in further minimising the potential collateral damage resulting from IDF strikes on military objectives located in close proximity to sensitive sites.

- Allegations Concerning Two Female Casualties at the “Alambra Association” in Beit Lahiya on July 12, 2014: According to correspondence and reports from various NGO’s, on July 12, 2014, two women were killed and four others injured as a result of an IDF aerial strike on a care centre for the mentally and physically disabled, belonging to the “Alambra Association,” in Beit Lahiya. As a result, and in accordance with the MAG’s investigation policy, it was decided to refer the incident for examination by the FFA Mechanism.

According to the factual findings and materials collated by the FFA Mechanism and presented to the MAG, the strike was directed at a weapons depot located inside the residential home of a senior Hamas commander, in a building comprising four apartments. While the operating forces were aware of the existence of a kindergarten in the same



building, close to the weapons depot, there was no information indicating the existence of a care centre.

Prior to the attack, a number of precautionary measures were undertaken in order to minimise potential civilian harm — including several attempts to telephone the residents of the building and the firing of two warning projectiles towards the structure (as part of the “knock on the roof” procedure). No reaction by the residents was identified, and no presence of persons at the site was discerned prior to the attack. As an additional precaution, the attack was carried out late at night, in order to avoid any possible harm to children attending the kindergarten during the day.

The findings further indicated that at the time the attack was decided upon, the operational assessment concluded that, as none of the precautionary measures resulted in any response, no civilians were present and no civilians were expected to be harmed as a result of the attack.

In light of these factual findings, the MAG found that the targeting process followed in this case accorded with Israeli domestic law and international law requirements. The attack was directed against a military objective, while adhering to the requirements of the principle of proportionality, and the decision to attack was made by the authorities authorised to do so. Further, the MAG found that the attack was carried out after a number of precautions were undertaken intended to minimise the potential for civilian harm, and that the professional assessment at the time of the attack — that civilians would not be harmed as a result of the attack — was not unreasonable under the circumstances. Although seemingly civilians were harmed as a result of the attack — indeed a regrettable result — it does not affect its legality post facto.

In light of the above, the MAG did not find that the actions of the IDF forces raised grounds for a reasonable suspicion of criminal misconduct. As a result, the MAG ordered the case to be closed, without opening a criminal investigation or ordering further action against those involved in the incident.

- Allegation Concerning a Strike on the Al-Shifa Hospital and a Park in the Al-Shati Refugee Camp in the Gaza Strip on July 28, 2014: Various media reports alleged that on July 28, 2014, an incident occurred involving a strike on medical clinics belonging to the Al-Shifa Hospital, as well as a strike on a park where children were present in the Al-Shati refugee camp, and as a result of which ten persons (including nine children) were killed and tens



injured. Some of these reports alleged that the strikes were carried out by the IDF. As a result, and in accordance with the MAG's investigation policy, it was decided to refer the incident for examination by the FFA Mechanism.

Following a thorough review conducted by the FFA Mechanism, such a strike by IDF forces could not be identified. However, Israel's technical systems recorded in real-time the path of a salvo of missiles fired from within the Gaza Strip, seemingly by Hamas or Palestinian Islamic Jihad, which landed in the medical clinics and in the Al-Shati refugee camp at the time of the alleged incident. Under these circumstances, and in light of the fact that the strike on the hospital was the result of rocket fire from Palestinian terrorist organisations, the MAG ordered the case to be closed.

- Allegation Concerning the Deaths of Six Individuals During a Strike on the House of the Al-Bakri Family in Gaza City on August 4, 2014: In media reports, as well as complaints received by the MAG Corps from NGO's, it was alleged that on August 4, 2014, five members of the Al-Bakri family were killed, along with one additional person who was staying at their home, as the result of an IDF strike on the house. According to some of the reports, two of the deceased — Ramadan Al-Bakri and Ibrahim Al-Masharawi — were militants in the Palestinian Islamic Jihad, while the remaining four deceased were civilians. Subsequently, and in accordance with the MAG's investigation policy, the incident was referred to the FFA Mechanism for examination.

According to the factual findings collated by the FFA Mechanism and presented to the MAG, the strike in question was aimed at Omar Al-Rahim, a senior commander, at a rank equivalent to that of a deputy brigade commander, in the Palestinian Islamic Jihad terror organisation. Al-Rahim was staying in the house of Ramadan Al-Bakri, a Palestinian Islamic Jihad militant. During the target-planning process, it was assessed that there might be a number of civilians present in the building but that the extent of the harm expected to these civilians would not be excessive in relation to the significant military advantage anticipated to result from the strike. It was planned that the strike on the building would be carried out using a precise munitions and in a way that would allow achieving the aim of the strike while minimising harm to the surrounding buildings.

After the event, as a result of the strike, the target, Omar Al-Rahim, was severely injured, and Ibrahim Al-Masharawi, who was a senior commander at a rank equivalent to a battalion commander in the Palestinian Islamic Jihad, was killed, along with Ramadan Al-Bakri, a Palestinian Islamic Jihad militant, and four civilians.



After reviewing the factual findings and the material collated by the FFA Mechanism, the MAG found that the targeting process in question accorded with Israeli domestic law and international law requirements. The decision to strike was taken by the competent authorities and aimed at a lawful target — a senior commander in Palestinian Islamic Jihad. The strike complied with the principle of proportionality, as at the time the decision was taken, it was considered that the collateral damage expected from the strike would not be excessive in relation to the military advantage anticipated from it. Moreover, the strike was carried out while undertaking precautionary measures that aimed to mitigate the risk of civilian harm, with an emphasis on those who were present in the surrounding buildings. Such measures included, *inter alia*, the choice of munitions to be used, as well as the deployment of real-time visual coverage. Additionally, it was found that the provision of a specific warning prior to the attack to the people present in the structure in which the target was located, or to those in adjacent buildings, was not required by law and was expected to result in the frustration of the strike's objective.

In light of these findings, the MAG concluded that the actions of IDF forces did not raise grounds for a reasonable suspicion of criminal misconduct. As a result, the MAG ordered the case to be closed, without opening a criminal investigation or ordering further action against those involved in the incident.

457. The process of examining and investigating incidents that took place during the 2014 Gaza Conflict is ongoing. While the IDF dedicates considerable resources to ensuring that examinations and investigations are conducted professionally and promptly, this process takes time. The MAG continues to receive complaints and identify information in public sources that require consideration as to whether to refer them to examination or investigation. Ongoing examinations and investigations take time, due to, amongst other things, the complexity of the issues, the challenges in investigating these types of incidents (as detailed above), and the need to coordinate testimony from third parties. Where additional relevant information may become available after a case has been closed, the case may be re-opened.⁵⁶⁴ Furthermore, decisions made by the MAG are subject to

⁵⁶⁴ There is precedent for the MAG re-opening cases. For example, following the Gaza Operation 2008-2009 the MAG ordered the Israel Air Force to re-open an examination into an incident concerning the El-Bader flour mill after various news media reported in February 2010 that the U.N. was in possession of evidence that contradicted the findings of Israel's initial examination. The MAG also held a meeting with the U.N. representatives who had visited the site of the mill. After reviewing the materials collated in the context of this additional examination, the MAG confirmed that the flour mill had not been intentionally targeted by the Israel Air Force. Accordingly, the MAG determined that there was no basis for additional proceedings in this matter. The MAG periodically published details regarding the progress of the examination and the decisions reached, demonstrating the IDF's commitment to transparency and to properly assessing information in its possession. *See Gaza Operation Investigations: An*

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civilian oversight by the Attorney General of Israel and judicial review by the Supreme Court of Israel. In addition, Israel's system for examining and investigating alleged violations of the Law of Armed Conflict constantly undergoes improvements designed to enhance effectiveness and efficiency. For additional information and periodic updates regarding allegations of violations of international law during the 2014 Gaza Conflict, please visit the MAG Corps' website.⁵⁶⁵

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Update, State of Israel (January 2010), at pages 41-45, available at http://mfa.gov.il/MFA_Graphics/MFA%20Gallery/Documents/GazaOperationInvestigationsUpdate.pdf; *Gaza Operation Investigations: Second Update*, State of Israel (July 2010), at pages 30-31, available at http://www.mfa.gov.il/MFA_Graphics/MFA%20Gallery/Documents/GazaUpdateJuly2010.pdf.

⁵⁶⁵ IDF MAG Corps, <http://www.law.idf.il/14-en/Patzar.aspx>.