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October 2010

Void of Responsibility

Israel Military Policy Not to Investigate Killings
of Palestinians by Soldiers

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Cover photo: Relatives of Yasser a-Tmeizi, who was killed on 13 January 2009 at Tarqumiya Checkpoint, with his photo (Musa Abu Hashhash, B'Tselem, 31 August 2010)

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Summary

From the beginning of the first intifada, in December 1987, to the outbreak of the second intifada, in September 2000, the Military Police Investigation Unit (MPIU) investigated almost every case in which Palestinians not taking part in hostilities were killed. At the beginning of the second intifada, the Judge Advocate General's Office announced that it was defining the situation in the Occupied Territories an "armed conflict," and that investigations would be opened only in exceptional cases, in which there was a suspicion that a criminal offense had been committed. This policy, which led to a significant drop in MPIU investigations of homicide cases, ignored the varying character of the army's actions in the Occupied Territories, and treated every act carried out by soldiers as a combat action, even in cases when these acts bear the clear hallmarks of a policing action.

The primary tool used to determine whether to open an MPIU investigation is the operational inquiry, whose principal purpose is to learn lessons to improve operational activity in the future, and not to identify persons responsible for past failings. In November 2005, in the framework of a hearing on a petition filed by B'Tselem and the Association for Civil Rights in Israel objecting to the policy of not opening MPIU investigations, the army instituted a procedure calling for preliminary investigation, within a limited period of time, of cases in which Palestinians not taking part in hostilities were killed. However, the procedure did not set a time framework for making decisions whether to order an MPIU investigation or to prosecute alleged offenders. As a result, these decisions may be delayed months, even years, thus preventing effective handling of suspected criminal acts within a reasonable time from the day that the incident occurred. The establishment, in 2007, of the Office of the Judge Advocate for Operational Matters, which was intended to improve the efficiency in handling complaints and reduce the handling time, did not bring about significant change.

During the period covered by the report (2006-2009), B'Tselem made a demand for an MPIU investigation in 148 cases. The Judge Advocate General's Office ordered an MPIU investigation in only 22 cases. In 36.3 percent of the cases in which an MPIU investigation was opened, the investigation did not begin until a year or more after the incident occurred. Where an MPIU investigation was carried out, two ended with the Judge Advocate General's Office's decision to close the file without prosecution; the others await decision. In 95 cases, 16 of which date from 2006, preliminary handling by the Judge Advocate General's Office has not been completed, and B'Tselem has not been informed whether an MPIU investigation will be ordered.

The lack of a decision in the vast majority of cases make it impossible to determine the considerations the Judge Advocate General's Office takes into account in deciding whether to order an MPIU investigation or to close the file. To explore the considerations, the report analyzes a number of instances in which the decision was made not to open an MPIU investigation and finds that MPIU investigations were not opened also in cases in which there was a serious suspicion of clear breach of international humanitarian law. Also, it seems that the interpretation of the circumstances of the incident is based solely on the results of the operational inquiry and the testimonies of the soldiers, and not on other eyewitness testimony and evidence that conflicts with the soldiers' description of the incident.

B'Tselem protests the sweeping classification of the situation in the Occupied Territories as an "armed conflict," which effectively grants immunity to soldiers and officers, with the result that soldiers who kill Palestinians not taking part in hostilities are almost never held accountable for their misdeeds. By acting in this way, the army fails to meet its obligation to take all feasible measures to reduce injury to civilians and its obligation prescribed by international law to investigate injuries to civilians. Thus, the army allows soldiers and officers to violate the law, encourages a trigger-happy attitude, and shows gross disregard for human life.

Introduction

Every Friday, a demonstration is held in the village of Bil'in, Ramallah District, against the Separation Barrier that has been built on the village's land. On Friday, 17 April 2009, during the weekly demonstration, a soldier fired an extended-range gas canister directly at Bassem Abu Rahmeh, 30, a resident of the village. The canister struck him in the chest, causing massive internal injuries, from which he died. Video footage of the event clearly shows that at the time he was killed, Abu Rahmeh was standing to the east of the barrier, some 30 meters from the soldiers, and that he was not throwing stones or threatening the soldiers' lives in any way. Gas canisters are a means to disperse demonstrations, and a gas canister is an implement for transferring the gas to a designated place, and not a weapon in its own right. Accordingly, the regulations governing the firing of gas canisters by means of a launcher forbid firing directly at demonstrators, which might endanger life, and permit firing only indirectly, that is, in an arch. B'Tselem's investigation of the shooting of Abu Rahmeh found that the canister was fired directly, in violation of law and army commands.

B'Tselem and Attorney Michael Sfard, who represents Abu Rahmeh's family, wrote to the Judge Advocate General's Office on 21 and 23 April 2009, demanding an investigation by the Military Police Investigation Unit (MPIU). Almost one year later, on 28 March 2010, Major Dorit Tuval, deputy Judge Advocate for Operational Matters, informed Attorney Sfard that, "No support has been found for your claim that firing was executed directly at Abu Rahmeh." The inquiry that was carried out in the unit raised two alternative explanations for the canister striking Abu Rahmeh, without deciding between them. In the first explanation, Abu Rahmeh was standing at a higher altitude than the soldier who fired the canister, "and hence merged with the line of fire." The second possibility was that the gas canister struck wires, changed direction, and hit Abu Rahmeh. In any event, and despite the lack of clarity regarding the firing, Major Tuval determined that the soldiers had not violated the instructions and, therefore, there was no justification for opening an MPIU investigation.¹

An experts' report using three-dimension imaging, commissioned by B'Tselem, clearly showed that the two suggested scenarios raised in the unit's inquiry were impossible given the findings in the field, the video documentation from three different angles, and still photos of the incident. This report was forwarded to the Judge Advocate General's Office, along with the threat of petition to the High Court of Justice if an MPIU investigation was not ordered. On 11 July 2010, some 15 months after the incident, the Judge Advocate General ordered an MPIU

1. Letter of 28 March 2010 to Attorney Michael Sfard from Major Dorit Tuval, Deputy Judge Advocate for Operational Matters.



Bassem Abu-Rahme flying a kite next to separation fence in Ni'lin (Oren Ziv, activistills.org, 25 July 2008)

investigation into the incident. According to the announcement, since Border Police officers were involved in the incident, the investigation would be carried out in coordination with the Israel Police.²

This case is just one of hundreds in which Palestinian civilians who were not taking part in hostilities were killed by soldiers' gunfire.³ From the beginning of the second intifada on 29 September 2000, to 31 December 2009, at least 2,016 Palestinians who were not taking part in hostilities were killed. This figure does not include Palestinians killed in the Gaza Strip during Operation Cast Lead, who are discussed separately by B'Tselem.⁴

The vast majority of these cases have never been investigated. During the first intifada, almost every fatality of a Palestinian not taking part in combat actions

2. Letter of 11 July 2010 to Attorney Michael Sfar from Major Adoram Riegler, legal assistant to the Judge Advocate.

3. B'Tselem maintains a comprehensive database on all persons killed in clashes between Israel and Palestinians since 2000. The classification of fatalities as having taken part, or not, in hostilities is based on criteria established by the International Committee of the Red Cross for defining the circumstances in which civilians lose the protections given them under international humanitarian law and enables them to be deemed a legitimate military target. For further details, see http://www.btselem.org/english/statistics/casualties_clarifications.asp.

4. In Operation Cast Lead 1,390 Palestinian were killed, at least 759 of whom did not participate in hostilities. For updated information concerning the investigations being conducted on this Operation see: http://www.btselem.org/English/Gaza_Strip/Military_Police_investigations_into_Castlead_violations.asp.

was investigated by the MPIU. At the beginning of the second intifada, the Judge Advocate General's Office announced that it had changed its policy: from that time on, the MPIU would only investigate unusual cases raising suspicion of a criminal offense. This change led to a significant drop in MPIU investigations of homicide cases.

This report does not examine the legality of the Open-Fire Regulations applying in the Occupied Territories. Neither does it focus on the conduct of soldiers in cases in which Palestinians not taking part in hostilities are killed, or on the problematic manner in which the MPIU investigations are conducted. The objective of the report is to examine the way the Judge Advocate General's Office has implemented the above-mentioned policy change, and the effects of this change on law enforcement in the army. The first part of the report describes the new policy and presents data and illustrative cases. The second part criticizes the policy and explains its inherently problematic character.

Part One

Military Policy on Investigation of Killings of Palestinians by Soldiers

Investigation of death cases during the first intifada and until 2000

During the first intifada, which began in December 1987, and through the outbreak of the second intifada in September 2000, the army opened an MPIU investigation into every case in which a Palestinian was killed by Israeli security forces, except where Palestinians were killed in what was referred to as "hostile terrorist activity." The completed investigation file was forwarded to the chief military prosecutor, and every decision on taking measures against soldiers or on closing the file required the chief military prosecutor's approval.⁵

According to B'Tselem's figures, in the decade following the outbreak of the first intifada – 9 December 1987 to 8 December 1997 – 1,318 Palestinian were killed in the Occupied Territories. Although an MPIU investigation was opened in the vast majority of these cases, the investigations led to the prosecution of soldiers in only 55 of them. In 14 of these prosecutions, the defendants were acquitted.

The primary reason for the low number of indictments of soldiers involved in homicide was the impact of the policy applied by the Judge Advocate General's Office during this period. Brig. Gen. Amnon Strashnov, the Judge Advocate General during the first intifada, explained this policy, which was known as the "intifada coefficient:"

On the one hand, conduct contrary to commands or which does not conform to proper criteria demanded of an army in a democratic country must not be overlooked. The IDF has always been distinguished by its high level of morality and norms of humane conduct, which distinguished it from all other armies. These norms and this level of conduct must not be discarded, and must be stringently preserved so that IDF soldiers do not deviate from them. On the other hand, we were aware of the difficult situation of the soldiers, the provocations they face, and the missions given them, which they are not accustomed to or trained for. Therefore, we established lenient criteria in their regard relative to previous periods. This determination was often manifested in the kind of offenses alleged against soldiers, the severity of punishment that the military prosecution requested, and primarily in the considerations taken into account in deciding whether to prosecute a soldier before a military court or to settle for a disciplinary proceeding or administrative proceeding against him. I urged this special and

5. Amnon Strashnov, *Justice Under Fire – The Legal System in the Intifada* (Tel Aviv: Yediot Aharonot, 1994), 139; State Comptroller, *Annual Report 43* (1992), 878-880.

lenient consideration, which took into account, among the other considerations in deciding whether to prosecute on criminal charges, the consideration of the "intifada coefficient."⁶

This consideration led the Judge Advocate General's Office to file indictments only "in especially serious and harsh cases, in which orders were violated or there was a particularly extreme and blatant decline in the level of reasonable conduct by soldiers."⁷

In addition to its reluctance to file indictments, the Judge Advocate General's Office preferred to charge offenders with less serious offenses, where the circumstances allowed. Of the 55 prosecutions of soldiers who were involved in homicide, for example, in only 19 were the defendants convicted of homicide. The convictions in the other cases were for abuse, causing injury, illegal use of weapons, disgraceful conduct, or negligence in carrying out duties. Strashnov explains the Judge Advocate General's Office's policy in choosing the offenses alleged in the indictment:

We deliberated considerably concerning the counts that should be brought against the defendant soldiers. Here, too, we took a lenient approach and did not act according to "a strict reading of the law." More than once, we settled for a less severe offense, even if the evidence enabled charging the soldier with a more serious offense. Also, after indictments were filed, our position was to accept the defendant's plea of guilty to a lesser offense, so as not to prosecute him to the full extent of the law, neither regarding the offenses alleged nor the severity of punishment.⁸

The state comptroller's annual report for 1992 sharply criticized the Central Command Judge Advocate's Office, which was responsible for processing complaints concerning the harming of Palestinians by soldiers. Due to the large number of complaints filed during the first intifada, many were handed over to "examining officers" for inquiry, rather than sending them to the MPIU. The state comptroller determined that the examining officers, "who generally do not have legal training or knowledge in the field of the investigation, in many instances carried out superficial inquiries, and the cases in which they delivered a proper file to the Central Command judge advocate were very few in number."⁹

The state comptroller pointed out that most homicide investigation files were closed on the recommendation of the Central Command judge advocate, "after he found that the soldiers acted in accordance with the Open-Fire Regulations. In some of these cases, he ordered that soldiers be brought before a disciplinary

6. *Justice Under Fire*, 158.

7. *Ibid.*, 158-159.

8. *Ibid.*, 161.

9. State Comptroller, *Annual Report 43*, above note 5, 879.

court for a slight deviation from the Open-Fire Regulations.” This practice arose, in part, from the defective performance of the judge advocate’s office:

An examination carried out by the State Comptroller’s Office in September 1992 of some of the files being processed by the Office of the Central Command’s Judge Advocate revealed that the processing of many files had not been completed, even a very long time after the incident, and that many files had been closed by the Command judge advocate due to the following defects: the investigation was not carried out shortly after the incident, and the time that had passed since the incident occurred made it difficult to investigate the incident and locate the soldiers who took part; many examining officers’ files were returned by the Command judge advocate for the completion of missing details, and these files were not returned or were returned after a long time had passed, sometimes years later; there was a significant delay in investigating vital details, which made it impossible to investigate the incident properly; the records kept by the military units in the area did not enable, in many cases, identification of the suspected soldiers; lack of cooperation and failure of witnesses to appear, among them IDF soldiers; failure to locate operational logs of army units that were kept at the times relevant to the complaints that were filed.¹⁰

The outcome of this policy was that despite the opening of MPIU investigations in almost every case in which soldiers killed Palestinians who were not taking part in hostilities, in the majority of cases, the soldiers and officers who were involved did not have to pay for their acts. This was true even in incidents in which the Palestinians did not take part in disturbances and made no attempt to harm soldiers or Israeli civilians, and when medical and other documents attached to complaints raised a suspicion that soldiers acted in violation of the law.¹¹ However, despite all the defects in investigations of homicide cases in the first intifada, the situation became infinitely worse after the outbreak of the second intifada.

Investigation policy since the outbreak of the second intifada

A few weeks after the second intifada erupted in September 2000, the Judge Advocate General’s Office announced that, from that point onwards, the situation in the Occupied Territories would be defined as an “armed conflict short of war.” Based on this definition, the Judge Advocate General’s Office changed its policy and determined that MPIU investigations would not be opened automatically when security forces killed Palestinians. Rather, “as a rule, *MPIU investigations will not*

10. Ibid., 880.

11. For an extensive discussion on this point, see HaMoked: Center for the Defence of the Individual, *Escaping Responsibility: The Response of the Israeli Military Justice System to Complaints against Soldiers by Palestinians* (November 1997).

be opened just because persons were injured as a result of hostilities, where there is no suspicion of serious violation of the binding rules of conduct.”¹²

In October 2003, B’Tselem and the Association for Civil Rights in Israel petitioned the High Court of Justice against the new policy. The High Court has not given its decision on the petition, although the last hearing was held on 20 April 2006.

In its response to the petition, the state explained its position: all events in the Occupied Territories must be treated similarly. Therefore, even if all the actions carried out by soldiers are not “real” combat actions, a distinction cannot be made between “policing actions” and “combat actions.” Curfew, checkpoints, intelligence gathering, and so forth will all be considered combat actions.

The common feature of all these actions is that they are intended to achieve a supreme interest – safeguarding the security of citizens of Israel – and that they pose an enormous danger to the soldiers who take part therein. Regrettably, during the course of combat against terrorist elements, soldiers have been killed while carrying out each and every one of the said kinds of actions. . . . In this kind of combating terrorism, creating a sharp and automatic distinction between “combat” actions and “policing” actions is, generally, superficial and irreconcilable with the reality on the ground.¹³

The state argues that, under international law, “the fact that a civilian is killed during hostilities does not constitute even prima facie proof that a war crime has been committed or that the soldiers who were involved acted in a criminal manner.”¹⁴ The state pointed out that, where soldiers act reasonably in light of the information they had at the time of the action, the action is deemed lawful, even if the action caused unexpected results. The occurrence of tragic consequences of the action does not make it unlawful.”¹⁵

The state based its argument on the principle of proportionality, whereby “a military action is permitted so long as the anticipated military advantage from it is greater than the anticipated injury to innocent persons.” Therefore, if the injury to civilians conforms to this principle, “the action is considered lawful under the laws of war. Accordingly, it is not a war crime, and there is also no reason to investigate the action by means of a criminal investigation.”¹⁶

The state emphasized that an act will be considered a war crime only when there was intent to injure innocent persons: “International law casts blame only when

12. Response of the IDF Spokesperson to B’Tselem’s report, *Illusions of Restraint: Human Rights Violations during the Events in the Occupied Territories, 29 September – 2 December 2000* (December 2000) (emphasis in the original).

13. HCJ 9594/03, *B’Tselem et al. v. The Judge Advocate General*, Supplemental Response of the State Attorney’s Office, 4 July 2004, section 42.

14. Section 84 of the response.

15. Section 88 of the response.

16. Section 85 of the response.

injury to innocent persons is accompanied by the mental element of intent or desire, and not when the injury to innocent persons is unintentional. . . Killing an innocent person that is not accompanied by this mental element is not considered a war crime under the Court's statute."¹⁷ Consequently, the state argues, in the absence of evidence of such a mental element, there is no need for an MPIU investigation.

In addition, the state pointed out practical difficulties in conducting investigations during armed conflict: "During hostilities, it is very hard to carry out criminal investigations. Carrying out investigations during hostilities is complex: it is hard to reconstruct the scene of the incident, gather testimonies from civilians, collect evidence, verify the identity of persons injured on the other side, and so forth."¹⁸

Rather than automatically open an MPIU investigation, the Judge Advocate General's Office decided that the operational inquiry would be the primary tool for investigating incidents in which soldiers killed Palestinians. Operational inquiries are not intended to investigate suspicion of commission of offenses. They are intended to investigate functioning at the operational level and to learn operational lessons, and serve as "the main way for investigating operational activity, and even more so combat activity."¹⁹ The state explained in detail why the operational inquiry is an efficient investigative tool for uncovering the truth.

The operational inquiry has a number of important features. Among them, it should be mentioned that it is carried out by a command-professional official, who is close to the action in the field and well-acquainted with the detailed facets of the operational activity. An operational commander knows well the kind of activity involved, the operational environment, the operational considerations and constraints, and the norms the soldiers are expected to meet. He is able to make findings and give an opinion on the forces' actions. . . . [The inquiry] is executed very close in time to the incident, while this is still "fresh" in the memory of the participants in the inquiry. In a situation of hostilities, when the commanders and soldiers are engaged in dozens of difficult, complicated events within short periods of time, it is especially important to investigate the events shortly after they occurred.²⁰

The state explained that inquiries are carried out by senior commanders. The graver the incident, the higher the rank of the investigator, and "in many problem cases, the OC Command himself conducts the inquiries."²¹

The findings of the operational inquiry are only one of the components in the decision whether to open an investigation. The decision is made "on the basis of

17. Section 89 of the response.

18. Section 11 of the response.

19. Section 29 of the response.

20. Sections 29-33 of the response.

21. Section 30 of the response.

all the existing information regarding the incident. In making the determination, the operational inquiry of the incident, complaints received about the incident, reports in the media, reports of human rights organization, requests made along diplomatic channels, among other things, are examined". Based on this material, a team of senior lawyers, at times also including the Judge Advocate General, decide whether to order an MPIU investigation.²²

In its response to the petition, the state presented data on investigations that had been opened following the introduction of the new policy. Until July 2004, when the response was submitted, operational inquiries had been conducted in more than 800 cases in which there was a suspicion that soldiers killed or wounded Palestinians by illegal gunfire. In about 80 of these cases, MPIU investigations were opened on suspicion of manslaughter or causing injury.²³

It was not until November 2005, in the framework of the hearing on the petition, that an orderly and binding procedure was formulated for determining whether to open an investigation in any case in which a Palestinian "who was not involved in life-threatening hostilities" was killed or injured.²⁴ The procedure provides that, within 48 hours from the time of the incident, a report on the incident will be submitted to the chief of General Staff, the operations branch, and the Judge Advocate General, together with photographs and documentation of the scene of the incident, to the extent possible, operation logs, and all other relevant material. The report will include details of the incident, including "the place and time it took place, the forces involved, the number of injured persons, their condition, sex, and age, documentation of the scene and details on the circumstances of the incident." In addition, in every such incident, an operational inquiry will be carried out under the responsibility of the OC Command. The findings will be forwarded, within 21 days from the day of the incident, to the chief of General Staff, the operations branch, and the Judge Advocate General.²⁵

This procedure, the state argues, enables the Judge Advocate General to become updated, as close as possible to real time, on every case of death or injury of a person who was not involved in life-threatening hostilities, in order to examine, based on preliminary but relatively detailed data, whether an MPIU investigation should be ordered. The procedure incorporates, once again, the making of operational inquiries and providing them within a short period of time to the Judge Advocate General for study, and also documenting the scene of the incident shortly after it occurred.²⁶

22. Section 38 of the response.

23. Sections 57-58 of the response.

24. HCJ 9594/03, *B'Tselem et al. v. The Judge Advocate General*, Supplemental response of the State Attorney's Office of 28 November 2005, section 2.

25. *Ibid.*, sections 3-4.

26. *Ibid.*, section 6.

Rami Samir Na'if Shana'ah, 25, resident of Nablus, killed on 2 June 2007

Testimonies given to B'Tselem indicate that on Saturday, 2 June 2007, 'Alaa Suliman entered a butcher shop in Nablus owned by the father of Rami Shana'ah. Suliman, who works for Palestinian intelligence, was in uniform and armed. He wanted to buy meat and was talking with Rami Shana'ah, whom he knew. He was in the shop for about fifteen minutes and then left. While he was on his way out, shots were heard and Suliman rushed back into the shop, his hand bleeding.

According to eyewitnesses, a few persons in civilian clothes were standing outside the shop, about 20 meters from the door. They were hiding behind the doors of a white car and were firing into the shop. One of them approached and fired from a distance of about three meters from the shop. Rami's brother, Na'if, called out to the persons in the shop to go onto the roof to hide from the shooting. Two employees went with him, but Rami did not.

After a few minutes passed, the shooting stopped. When Nai'f came down from the roof, he saw his brother Rami and 'Alaa Suliman lying on the floor. Rami's neck was bleeding. Within a few minutes, local residents came and took the two injured men to hospital, where Shana'ah was pronounced dead.²⁷

On 1 August 2007, B'Tselem wrote to the chief military prosecutor, demanding that an MPIU investigation be opened. Despite a few reminders sent to the Judge Advocate General's Office, B'Tselem was informed, on 4 February 2010, that the file was still being processed. This was the last information provided to B'Tselem regarding the handling of the case.

Results of processing of requests submitted by B'Tselem

The figures on the number of MPIU investigations opened following the killing of Palestinians by soldiers' gunfire in the Occupied Territories are incomplete. Officials issue figures on MPIU investigations that were opened in shooting cases in general, and do not distinguish between cases in which Palestinians were killed by gunfire and cases in which the shooting resulted in injury but not death, or those where nobody was killed or injured. For example, figures in this format were provided in the state's response of 4 July 2004 in the petition discussed above.²⁸ In a hearing on 22 June 2003 that the Knesset's Constitution, Law and Justice Committee held on the failure to open investigations in death cases, the

27. The testimonies were given to Salma a-Deb'i on 10 June 2007.

28. See footnote 24 above.

Judge Advocate General at the time, Maj. Gen. Menachem Finkelstein, provided the figures in this way:

More than 360 MPIU investigations have been opened in the past two and a half years in combat circumstances. In my opinion, this is an unprecedented number. Of these, 134 dealt with property offenses, theft, looting, harm to property; 153 involved violence; 55 dealt with shooting.²⁹

The figures presented by the current Judge Advocate General, Brig. Gen. Avichai Mandelblit, before the same committee on 14 February 2007, also failed to distinguish between cases in which a person was killed and those in which a person was injured: "Since the beginning of the events, in 2000, 239 MPIU investigations were opened into shooting cases. . . Thirty indictments were filed, 16 defendants were convicted, and two were acquitted."³⁰

B'Tselem repeatedly asked the IDF Spokesperson's Office and the Judge Advocate General's Office to provide it with figures specifically stating the number of MPIU investigations opened in death cases and the results of the investigations. Complete figures have not been provided. The IDF Spokesperson's Office provided a list of cases in which MPIU investigations were opened in death cases, but these figures were partial, imprecise, and, in some instances, contradicted information that the Judge Advocate General's Office had provided to the organization.³¹

In the absence of precise figures, B'Tselem can only base its work on the responses of the Judge Advocate General's Office regarding cases the organization addressed, and to use these to gauge the consequences of the new policy. The figures presented below on the number and results of investigations are accurate as of 22 August 2010.

According to B'Tselem's figures, from 2006 to 2009, the IDF killed 1,510 Palestinians, not including Palestinians killed in Operation Cast Lead. Of these 1,510 deaths, at least 617 were of persons who were not taking part in hostilities. Regarding these 617 fatalities, B'Tselem demanded an MPIU investigation into the deaths of 288 of them, who were killed in 148 incidents.

Ninety-five of these incidents occurred in the Gaza Strip, accounting for 230 of the deaths. The other 53 incidents took place in the West Bank and resulted in the killing of 58 Palestinians. One hundred and four of the fatalities were minors under age 18, 23 were persons 50 and above, and 52 were women. One hundred of the Palestinians whose deaths B'Tselem demanded to investigate were killed in 2006, 86 in 2007, 93 in 2008, and 9 in 2009.

29. Discussion in the Knesset Constitution, Law and Justice Committee, 22 June 2003.

30. Discussion in the Knesset Constitution, Law and Justice Committee, 14 February 2007.

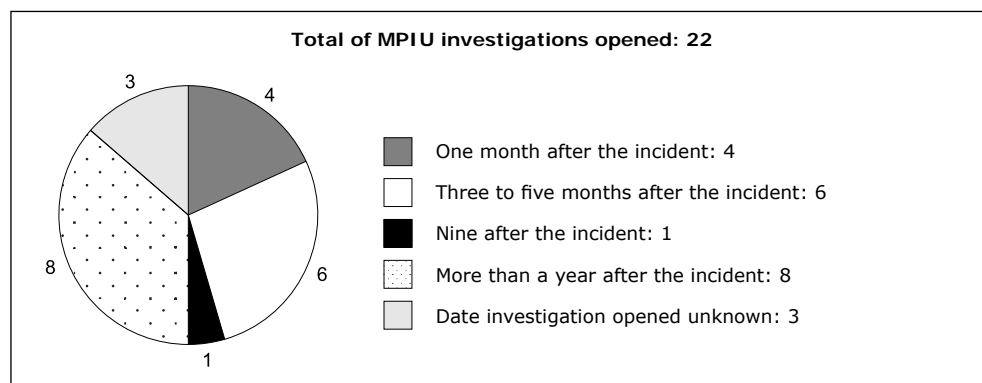
31. Letter of 17 February 2010 to B'Tselem from Captain Rinat Hameiri, Human Rights and Public Relations Officer, IDF Spokesperson's Office.

The cases in the Gaza Strip differed from those in the West Bank. Seventy-five of the Gaza Strip fatalities addressed by B'Tselem occurred during incursions by the army into the Gaza Strip. The army contended that 44 of the Palestinians were killed in response to Palestinian fire. Thirty-four were bystanders who were killed in the course of targeted killings carried out by Israel, and 28 were killed when soldiers fired at persons the army claimed were armed. The other cases raised by Israel involving the Gaza Strip involved Palestinians who were killed when attempting to enter Israel unlawfully, when they were in areas adjacent to the perimeter fence between Gaza and Israel in which the IDF prohibits entry, or from Israeli fire at Hamas institutions.

In the West Bank, on the other hand, 20 of the Palestinians concerning whom B'Tselem demanded an MPIU investigation were killed in operations whose declared purpose was arrest of persons on Israel's wanted list. Eighteen Palestinians were killed during demonstrations. The others were killed when soldiers were allegedly engaged in the "arrest-of-subject procedure" or when the army entered Palestinian communities.

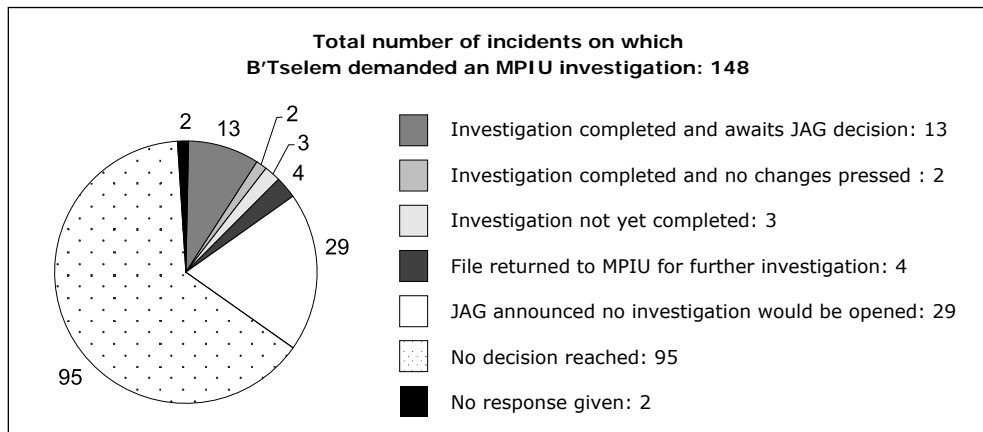
Of the 148 incidents B'Tselem raised with the Judge Advocate General's Office, MPIU investigations were opened in only 22 cases, 18 of which involved incidents that took place in the West Bank. According to B'Tselem's information, only four investigations were opened within one month from the time the incident occurred, six were opened within three to five months after the incident, and one was opened nine months later. Eight investigations were opened more than one year after the incident, one of which was opened two years and two months later, and only after B'Tselem petitioned the High Court of Justice. In three cases, B'Tselem is unaware when the investigation was opened.

In four of the 22 cases in which an MPIU investigation was opened, the Judge Advocate General's Office returned the file to the MPIU for further investigation.



In three cases, the investigation has not yet been completed. In the other cases, B'Tselem was informed that the investigation had ended and the file forwarded to the Judge Advocate General's Office for a decision. In two of these cases, the

Judge Advocate General’s Office informed B’Tselem that a decision had been made to close the file without taking any measures against the soldiers involved. In total, 20 of the 22 MPIU investigations opened still await decision. Nine of these cases took place in 2006, five in 2007, four in 2008, and two in 2009.



In 29 other cases, B’Tselem was informed that it had been decided not to open an MPIU investigation. Twenty of these cases took place in the West Bank and nine in the Gaza Strip. Not a single investigation was opened regarding the mass-fatality incidents, all of which occurred in the Gaza Strip.

Regarding 95 other cases, 15 in the West Bank and 80 in the Gaza Strip, B’Tselem was only informed that the file was still open. Sixteen of these cases took place in 2006, 35 in 2007, 38 in 2008, and 6 in 2009. In three of the cases, B’Tselem was initially informed that the file was still being processed, and later was told that no material was found relating to the incident. In two other cases, B’Tselem received no response.

Yasser Saqer Isma’il a-Tmeizi, 30, killed on 13 January 2009 at Tarqumiya Checkpoint

Around 10:00 A.M. on Tuesday, 13 January 2009, Yasser a-Tmeizi and his seven-year-old son were riding on a donkey on their way to their plot of land. Shepherds from the area told B’Tselem that, around 11:00 A.M., they saw four soldiers speaking with a-Tmeizi on his land. About fifteen minutes later, the witnesses saw one of the soldiers push a-Tmeizi in the chest. A-Tmeizi pushed the soldier back, and the soldier fell to the ground. The four soldiers then knocked a-Tmeizi to the ground and tied his hands behind him. A-Tmeizi’s son told B’Tselem that the soldiers ordered him to leave, but he refused. When his father told him to go home, the child left. When he got home, he told his mother that his father had had a confrontation with the soldiers.

One of the shepherds who was passing by told B'Tselem that he saw the soldiers beat a-Tmeizi. After two or three soldiers aimed their weapons at him, he moved away and continued to watch from a distance. He claimed that the soldiers sat a-Tmeizi on the ground and one of them blindfolded him. About half an hour later, a jeep arrived and the soldiers took a-Tmeizi to it, and they left. It was later learned he had been taken to Tarqumiya Checkpoint. Later in the day, his wife was notified that he had been killed.³²

Ten days after the incident, *Ha'aretz* reported the results of the operational inquiry carried out in the company, in which the commander of the Yehuda Regional Brigade, Col. Uri Ben Moha, and the Judea and Samaria Division commander, Col. Noam Tibon, took part. The article stated that, according to the inquiry, the soldiers stopped a-Tmeizi even though he did not threaten them and was not armed. A reserve-duty soldier at the checkpoint who was supposed to watch him claimed that a-Tmeizi managed to get free and touched his weapon, so he shot him twice. At the end of the inquiry, the commanders determined that the processing of the case "entailed serious failures," and an army official stated that, "it is a serious incident, and one cannot avoid getting the impression that if regular forces had been posted at the site, it would not have happened."³³

On 25 January 2009, B'Tselem wrote to the office of the Judge Advocate for Operational Matters demanding an MPIU investigation. The following day, an MPIU investigator called and informed B'Tselem that an investigation was under way and requested B'Tselem's assistance in coordinating the taking of testimony of one of the shepherds. That same day, the shepherd gave his testimony at Tarqumiya Crossing.

In August 2009, B'Tselem was informed that the investigation had ended and the file forwarded to the office of the Judge Advocate for Operational Matters. B'Tselem's repeated inquiries as to the results of the investigation have gone unanswered.

Sample cases

Since the outbreak of the second intifada in 2000, B'Tselem has not received any response to the vast majority of its demands for an MPIU investigation sent to the Judge Advocate General's Office in cases involving the death of a person at the hands of the army, with the exception of laconic replies that the matter is being processed. In the absence of a decision, it is impossible to gauge the considerations that guide the Judge Advocate General's Office in determining whether to open an

32. The testimonies were given to Musa Abu Hashhash on 13-15 January 2009.

33. Yuval Azulai, "IDF Investigation: Sentry Shoots to Death Bound Palestinian," *Ha'aretz*, 23 January 2009.

MPIU investigation or to close the file. The only way to research these considerations is through the few responses sent to B'Tselem in cases in which a decision was made not to open an investigation. A few examples of such cases follow.

Undercover-unit action in Ramallah, 4 January 2007

On Thursday, 4 January 2007, around 3:00 P.M., the streets of Ramallah were crowded with people shopping for the weekend. An undercover unit entered a place adjacent to the vegetable market, in the city center, to arrest a wanted person. They opened fire at the man, wounding him seriously, but he managed to flee. With the gunfire, the identity of the undercover unit was exposed and people began to throw stones, sticks, iron bars, and empty bottles at them. A few people also fired bullets at them.

Testimonies given to B'Tselem indicate that, following exposure of the undercover unit, a few army jeeps arrived at the scene along with bulldozers and two combat helicopters to rescue them. The witnesses told B'Tselem that the bulldozers crushed dozens of vehicles, market stands, and peddlers' wagons. Security forces – both on the ground and in the combat helicopters – fired at the Palestinians, killing four of them. According to B'Tselem's investigation, none of the four were armed and three of them did not take part in the clashes. The four fatalities were:

- Khalil al-Beirouti, 36, a tea and coffee vendor, was killed next to the vegetable market by a bullet that struck him in the chest.
- Yusuf 'Adur, 24, a vendor in the market, was killed by helicopter fire.
- Jamal Jawalis, 29, a resident of East Jerusalem who was shopping in the market, was shot and killed when he tried to remove his vehicle from where the bulldozers had advanced.
- 'Alaa Hamran, 16, was struck while in the vegetable market by a bullet that hit him in the head, and died at hospital in Ramallah. He took part in the disturbances that broke out but was unarmed.

More than forty Palestinians were injured, ten of them seriously.³⁴

On 21 January 2007, B'Tselem wrote to the Judge Advocate General, demanding that he order an investigation into the events. In its letter, B'Tselem noted that the extensive injury to residents and the great damage to property raised a grave suspicion that the army had breached the principles of discrimination and proportionality in international humanitarian law. It was doubtful that the military advantage from the arrest of one person exceeded the anticipated harm to civilians, as occurred in this case. B'Tselem also pointed out that actions by

34. The testimonies were given to Iyad Hadad on 5-8 January 2007.



Vegetable market in Ramallah after undercover-unit action, 4 January 2007 (Reuters)

undercover units inside a civilian population, carried out in the afternoon in the city center, endangers bystanders who are completely unaware that they are in danger. The fact that, shortly after the undercover unit was exposed, a rescue force arrived indicated that the planners anticipated such a possibility, and they should also have anticipated the serious risk that civilians would be injured.

B'Tselem also demanded that the army cease using undercover units. Such use contravenes binding rules applying to the sides to an armed conflict as well as rules applying to law-enforcement operations. The laws of armed conflict prohibit "perfidy," in this case dressing up as civilians. The prohibition is aimed at protecting civilians, in that it requires the combat forces to distinguish themselves from the civilian population in a way that allows them to be identified. Regarding law-enforcement actions, the rules on opening fire differ from those applying in combat actions, and are much more restrictive. The actions of undercover units do not comport with these rules.

On 7 April 2008, 15 months after B'Tselem's first letter, Major Yehoshua Gortler, legal assistant to the Judge Advocate General, responded to B'Tselem as follows:

3. Having examined the inquiry of the incident and its findings, along with other relevant material (including material from B'Tselem and other human rights organizations), the Judge Advocate General concluded that it was not proper to order an MPIU investigation in the matter.

4. The findings of the inquiry reveal that the use of force by IDF forces during the incident was in response to massive gunfire at them, and in response to the hurling of heavy, dangerous objects at them from various sources and by various people, which posed a real and present danger to the soldiers' lives. The findings of the inquiry (including the aspects relating to the scope of the involvement of "undercover" forces in the incident), did not raise a suspicion of commission of criminal offenses by IDF soldiers who took actions in the framework of the incident (in this context, it should be made clear that the findings of the inquiry do not indicate a connection between the involvement of the "undercover" forces in the action and the harm that was caused during its course to uninvolved persons, as described in your letter).
5. The Judge Advocate General also does not believe that the use of "undercover" forces in the incident is contrary to Israel's obligations under the laws of war of international law, or that these laws require that an order be given, as you request, to end completely the use of forces in disguise.

Major Gortler's response is unconvincing and does not justify the refusal to open an MPIU investigation. Firstly, the letter does not relate to the decision to engage in the action in the given circumstances or to the considerations taken into account by the decision makers. It is unclear whether the decision makers considered in advance the anticipated harm to civilians and whether this consideration was weighed against the military advantage anticipated from the arrest of the person they sought.

Secondly, Major Gortler ignores the fact that three of the Palestinians who were killed did not take part in the clashes with the soldiers and were not killed in the specific area where they took place. They did not throw any objects at soldiers, so it cannot be argued that they threatened them in any way. 'Alaa Hamran, who took part in the clashes, was not armed, and it is doubtful that it could be argued he endangered the soldiers' lives in this case.

Thirdly, Major Gortler's response regarding the participation of undercover forces in an "armed conflict" is unsatisfactory, as it provides no explanation for the Judge Advocate General's determination on this point. The response does not explain why the Judge Advocate General believes that the use of undercover personnel is lawful, and whether he classifies the incident as a combat action or a law-enforcement action, each of which is subject to different laws. One way or the other, the use of undercover soldiers in this incident was not lawful: if it was a combat action, the use of undercover forces was unlawful in that it breached the prohibition on perfidy. After the forces found themselves in trouble, the principle of discrimination and the obligation to take precautionary means were breached. On the other hand, if the action was carried out within the law-enforcement framework, although the

use of undercover forces was proper, in this case, the soldiers grievously violated the Open-Fire Regulations applying in law-enforcement actions.³⁵

'Anan Muhammad As'ad a-Tibi, 52, resident of Nablus, killed on 26 February 2007

On Monday, 26 February 2007, the army placed a curfew on Nablus to make it easier for forces to make arrests in the city. Testimonies given to B'Tselem indicate that, around noon, 'Anan a-Tibi, a 52-year-old resident of the city, went onto the roof of his house to repair the water tanks. A short while later, two of his sons, Mu'adi, 12, and Ashraf, 22, joined him.

While on the roof, Ashraf saw soldiers in the orchard behind their house. He told his father and brother that they should get off the roof, and they began to walk toward the stairs. Before they reached them, a shot rang out, wounding Ashraf in his right hand. Ashraf and his brother ran, bent over, to the stairs and rushed down them. Then they heard two more shots, and their father fell on the stairs, his head facing down and his legs in the direction of the roof. His two sons called to him, but he did not respond. Ashraf noticed that his father had been hit in the neck.

Ashraf told B'Tselem that he called for an ambulance, which arrived within 10 minutes or so. A paramedic checked 'Anan a-Tibi and said he was dead. They put him on a stretcher and wanted to take him to the ambulance, but, the paramedic said, soldiers delayed their exit from the house. One soldier removed 'Anan a-Tibi's identity card from his pocket and only then let the paramedics continue on their way.

The paramedics gave Ashraf first-aid at the scene, and soldiers then took him in a jeep, with an army medic inside. After driving for about 40 minutes and an additional wait of about 30 minutes, Ashraf was taken to a Palestinian ambulance, which took him to hospital in Nablus, where he underwent surgery and his hand was put in a cast.³⁶

On 19 March 2007, B'Tselem wrote to the chief military prosecutor, demanding an investigation into the incident. More than a year later, on 15 May 2008, Lt. Col. Sigal Mishal-Shehori, the Judge Advocate for Operational Matters, responded that a decision had been reached not to open an investigation. She explained the decision as follows:

35. *Code of Conduct for Law Enforcement Officials*, adopted by General Assembly Resolution 34/169 of 17 December 1979; *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders (Havana, Cuba, 27 August to 7 September 1990). The documents are not binding, but they reflect broad international consensus on proper conduct, which are to be applied and taken into account in drafting domestic state legislation.

36. The testimonies were given to Salma a-Deb'i on 27 February, 8 March, and 11 March 2007.

On and around the day of the incident, an operation was carried out in which framework IDF forces operated in the area, and on the proximate days an operation was carried out in the Kasbah of the city, a crowded area. During the action, and while the city was under curfew, the forces identified three persons standing on the roof throwing objects at IDF forces. Later, the three began to run bent over and later also ran. At the same time, IDF forces wanted to enter the said building. Accordingly, there was a fear that these persons would harm IDF forces, who were at that very time under the house, and shots were fired at them.

As stated above, it should be noted that the action took place during curfew, so that innocent persons were not supposed to be moving about outside. Also, around the time of the incident, there were serious disturbances and fire at IDF forces operating on the ground. Our examination also revealed that the military force allowed the Red Crescent personnel to enter the place and care for the injured.

The letter provides no justification for not opening an investigation. The description of the events in the letter is apparently based primarily on the soldiers' version given in the course of the operational inquiry. This version completely contradicts the version eyewitnesses gave to B'Tselem, and it is unclear if any attempt was made to confront the different versions. In any event, such contradictions should be reconciled in an MPIU investigation, and it is wrong to rely solely on the statements of soldiers who were involved in the events, since they will bear the consequences if it is found that they acted improperly.

The contention that the gunfire was justified because of the curfew is astonishing, and implies that the regulations permit gunfire at any person moving about during a curfew. Shooting persons just because they are in a place they are forbidden to be breaches the principle of distinction and the obligation to take precautionary measures in the course of an attack, as prescribed in articles 51 and 57 of the First Additional Protocol to the Geneva Convention. Furthermore, 'Anan a-Tibi and his sons were not "moving about outside," but were standing, according to the testimonies, on the roof of their house. In addition, it is unclear why Lt. Col. Mishal-Shehori mentions that there were disturbances close to the a-Tibi house, and how this assertion justifies the killing of 'Anan a-Tibi.

Muhammad Khalil Muhammad Salah, 35, resident of Deir Salah, Bethlehem District, killed on 5 December 2007

On Wednesday, 5 December 2007, the Palestinian police put up a checkpoint in Bethlehem to stop smugglers of goods. Two armed police officers, members of the Palestinian national security apparatus, were posted at the checkpoint. Testimony given to B'Tselem indicates that, around 4:00 P.M., a commercial vehicle pulled up to the checkpoint. The policemen ordered the driver to stop,

and he stopped about five meters from the checkpoint. Then, one shot was fired from inside the vehicle. It hit one of the policemen, Muhammad Salah, in the chest. The other policeman fled.

According to an eyewitness, four masked armed men were inside the vehicle. After the shooting, the driver of the vehicle backed up, and Salah fired at them. The masked men then opened fire again and rushed from the scene. Palestinians in the area took Salah to hospital, where he was pronounced dead.³⁷

Later that day, it was learned that the passengers in the commercial vehicle were undercover security forces who had come to carry out an operation and apparently feared their identity would be exposed if they were checked at the checkpoint.

On 17 December 2007, B'Tselem wrote to the chief military prosecutor, asking whether an MPIU investigation had been opened. Despite numerous reminders, it took until 16 March 2009 for the office of the Judge Advocate for Operational Matters to inform the organization that the investigation was continuing. Since then, B'Tselem has not received any update.

'Abd Shaker Muhammad al-Wazir, 69, resident of Nablus, killed on 16 October 2007

'Abd Shaker Muhammad al-Wazir, 69, resident of the Ras al-'Ein neighborhood of Nablus, was killed by soldiers' gunfire on 16 October 2007, during an arrest operation in the city.

Eyewitnesses told B'Tselem that soldiers came to the neighborhood around 2:00 A.M. and encircled the building in which al-Wazir lived. His wife, Subhiya, told B'Tselem that she and her husband had awoken when the soldiers arrived. They heard gunfire for two hours or so but did not know what was happening outside their house. Around four o'clock, soldiers ordered one of the residents in the building, Hakam Sabih, to call to all the occupants to leave their apartments. Sabih told B'Tselem that he asked the soldiers to stop the shooting before he did as they instructed.

According to testimonies given to B'Tselem, 'Abd and Subhiya al-Wazir went to the front door of the building following the calls to leave. An instant before they managed to exit the house, 'Abd asked his wife if she had taken her identity card. She said she hadn't and she went back to get it. The moment she turned around, she heard two shots and saw her husband fall to the ground, bleeding heavily.

37. The testimony was given to Suha Zeid on 7 December 2007.

A few neighbors came and took al-Wazir outside. Soldiers standing there ordered them to put him down and arrested some of them. Finally, a half an hour later, following repeated demands by the neighbors, the soldiers allowed a Red Crescent ambulance to enter and remove al-Wazir to hospital in Nablus, where he was pronounced dead.³⁸

At about 10:00 A.M., soldiers encircled the adjacent building and remained there until 7:30 P.M. They arrested two Palestinians who were on the wanted list and had been hiding in the building. The IDF Spokesperson's announcement stated that two M-16 rifles and a mortar shell had been seized.

On 25 October 2007, B'Tselem wrote to the chief military prosecutor, demanding an MPIU investigation into the killing of 'Abd al-Wazir. More than a year later, on 25 November 2008, Lt. Col. Mishal Shori, the Judge Advocate for Operational Matters, responded as follows:

3. A comprehensive inquiry conducted with the relevant military officials indicated that, on the aforesaid day, there was an operation to capture wanted persons in Nablus, in which five of the targets were captured, two of them (wanted persons) in a hiding place for weapons inside a building, and another hiding place for weapons was found that contained a large amount of materiel.
4. Indeed, there is no dispute that the deceased was not involved in any hostile terrorist activity at the time of the events. However, from the view of the events in the eyes of the military force, the deceased was perceived as a dangerous terrorist who threatened the lives of the force, when he appeared suddenly in front of the force, while there was an exchange of gunfire between the force and the wanted persons in the heart of crowded Nablus, while the force was convinced that a terrorist was facing them, as appears from its [the force's] statement prior to the gunfire ("terrorist, terrorist").
5. Following examination of the findings, the Judge Advocate General determined that, despite the regrettable death of Mr. al-Wazir, the circumstances of the case do not justify a criminal investigation.

The response is based on the findings of the operational inquiry and on the soldiers' statements. It presents a completely different version from that given by eyewitnesses. This difference is sufficient to warrant a criminal investigation, so as to reconcile the contradictions between the two versions.

Moreover, Lt. Col. Mishal-Shehori ignores the fact that it was the soldiers who ordered the occupants to leave their apartments, so it is unclear how one can argue that al-Wazir "appeared suddenly." Lt. Col. Mishal-Shehori also ignored the fact that al-Wazir was 69 years old and, according to eyewitnesses, the exchange

38. The testimonies were given to Salma a-Deb'i on 17 October 2007.

of gunfire had stopped at that stage, precisely to enable the occupants to leave their homes.

Taking the above into account, a comprehensive investigation should have examined the soldiers' claim that their lives were in danger and what formed the basis of their belief, taking into account all the relevant circumstances.

On 18 December 2008, B'Tselem sent another letter to the Judge Advocate General's Office in which the organization demanded that the decision be reconsidered. The correspondence remains unanswered.

Hani Sh'aban Muhammad Na'im, 44, resident of Gaza, killed on 7 February 2008 in Beit Hanun

Hani Na'im, 44, was a teacher in the agricultural school in Beit Hanun. Testimonies given to B'Tselem indicate that, on 7 February 2008, about 7:30 A.M., Na'im arrived at the school and passed through the gate with three 17-year-old pupils. While they were still in the yard and about 60 meters from the entrance of the school building, a missile fired by the army landed in the yard. The missile was apparently fired in response to earlier Palestinian fire from nearby. Hani Na'im was killed on the spot. The three students – Thair Qasam, Nidal al-Kafarna, and 'Imad al-Kafarna – were injured, the latter two seriously.³⁹

On 20 February 2008, B'Tselem wrote to the office of the Judge Advocate for Operational Matters, demanding an MPIU investigation into the incident. More than a year later, on 5 May 2009, Lt. Col. Mishal-Shehori, the Judge Advocate for Operational Matters, wrote to B'Tselem:

2. An inquiry made with the relevant military officials indicated that, on the aforesaid date, around 7:30 A.M., a band of Qassam missile launchers was identified at the Agricultural College in Beit Hanun. Members of the band were moving from one hiding place to another rapidly so as not to be observed. When the conditions permitted, a missile was fired at them, but a few seconds before the missile hit the ground, when an uninvolved group of persons was identified near the location, the missile was diverted from its original destination, so as to minimize the harm to the uninvolved persons. Diversion of the missile prior to its striking prevented greater harm to uninvolved persons.
3. It goes without saying that, contrary to the contents of your letter, under the above-described circumstances, the attack did not breach international law, in that it was directed precisely at terrorists who endangered IDF forces in

39. The testimonies were given to Muhammad Sabah on 7 February 2008.



Mother, father, and sister of Hassan Hamid, with his photo (Noa Tal, B'Tselem, 31 August 2010)

the area and citizens of the State of Israel (the principle of distinction), and at the time it was carried out, no uninvolved civilians were in the proximity of the said terrorists, who were liable to be injured in the attack. In any event, the attack certainly was not one in which the likelihood of harming civilians as a result of it was excessive in relation to the military advantage to be gained from the attack (the principle of proportionality; for this purpose, as you know, examination of the legality of the action is not made retroactively, *post facto*, based on the result of the attack, but on the facts that the commander had at the time the decision was made to carry out the attack).

4. In these circumstances, the deputy Judge Advocate General believes that there are no grounds for opening an MPIU investigation.

The response is based on an imprecise interpretation of international humanitarian law. The principle of distinction states that it is permitted to direct an attack only at a person who is taking part in hostilities or at an object used in hostilities. Therefore, it is forbidden to direct an attack at a target that is not a specific military object or to use a weapon that is not sufficiently precise to distinguish

between military and civilian objects.⁴⁰ In this case, and according to the response of Lt. Col. Mishal-Shehori, even if the first firing was directed at a legitimate target and conformed to the principle of distinction and the principle of proportionality, it is necessary to examine the decision to divert it from its path.⁴¹ This examination will determine the legality of the action.

In addition, the principle of proportionality indeed states that the legality of an action is to be based on the facts known to the commander in the field at the time the action was taken. However, it is necessary to take into account what the commander should have known, and not only what he actually knew. It is not possible to state that an action was lawful solely on the fact that the commander did not know that civilians might be injured. Primarily, it is necessary to examine what he should have known, whether the necessary measures were taken to ensure that he had possession of all the possible information,⁴² and whether reasonable precautionary measures were taken since the action took place in a densely-populated civilian area, in which a school was located. In this case, the commander should have known that diversion of the missile into a schoolyard in the early morning would necessarily harm civilians who were not involved in firing the Qassam rockets.

On 7 May 2009, B'Tselem wrote the Judge Advocate General, demanding reconsideration of the decision not to open an investigation. The organization did not receive a reply.

Hassan Muhammad Hassan Hamid, 17, resident of Tekoa', Bethlehem District, killed on 13 September 2008

Testimonies given to B'Tselem indicate that, on Saturday, 13 September 2008, a few young persons from the village of Tekoa' threw stones at two army jeeps parked on the main road of the village. The confrontation was minor and the soldiers did not open fire.

40. The principle of distinction is enshrined in article 48 of the First Additional Protocol to the Geneva Conventions, of 1977 (hereafter – Protocol I). Articles 51 and 52 of Protocol I prohibit attacks directed at civilians and civilian objects and prohibit indiscriminate attacks. Israel is not party to Protocol I, but the above-mentioned provisions express principles of customary international law, which is binding on Israel. On the binding customary status of the provisions, see, for example, Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules* (ICRC, 2005), Ch. 1-3, pp. 3-45.; Jean-Marie Henckaerts, "Study on customary international humanitarian law: A contribution to the understanding and respect for the rule of law in armed conflict," *International Review of the Red Cross*, vol. 87 number 857 (March 2005), 24-25, Rules 1-13 (hereafter – Study on customary international humanitarian law). The study is available at [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/review-857-p175/\\$File/irrc_857_Henckaerts.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/review-857-p175/$File/irrc_857_Henckaerts.pdf).

41. The principle of proportionality is enshrined in articles 51(5)(b) and 57(2)(a)(iii) of Protocol I and expresses customary law. It is, therefore, binding on Israel. See *Study on customary international humanitarian law*, 25 (Rule 14).

42. See, for example, *Study on customary international humanitarian law*, 37 (Rule 153); article 28 of the Statute of the International Criminal Court.

The eyewitness testimonies indicate that, about 2:30 P.M., Hassan Hamid, a high-school student, was on his way from afternoon prayers at the mosque. His cousin was with him. The street was empty. Near his house, the two separated, and his cousin continued on his way home. When his cousin had gone about 15 meters, Hamid called to him and asked him to wait for him. Hamid walked five meters toward his cousin and then an army jeep arrived from the main road. The cousin related to B'Tselem that he heard a shot and saw the jeep drive off. He rushed to Hamid and saw him lying on the road, bleeding from the chest. Hamid's two sisters came to the scene. People took him to a medical clinic in the village and from there to hospital in Beit Jala, where he was pronounced dead.⁴³

On 21 September 2008, B'Tselem wrote to the office of the Judge Advocate for Operational Matters, demanding that an MPIU investigation be opened in the matter. More than one year later, on 11 October 2009, Lt. Col. Mishal-Shehori, the Judge Advocate for Operational Matters, responded, indicating that the Judge Advocate General decided not to open an MPIU investigation.

An inquiry made with the relevant military officials indicated that, in the afternoon of the day of the incident, a military force entered the village of Tekoa' following stone throwing at a major traffic route, which injured two tourists from the United States. The objective of the force was to locate the stone throwers. While the force was engaged in its activity in the village, extremely violent disturbances broke out in a very narrow, winding alley. The disturbances included the throwing of cinder blocks from roofs of the houses, rocks, and iron bars at the force, whose way was blocked by boulders. Therefore, when the force encountered a situation that was liable to deteriorate to a life-threatening situation for the soldiers, the force reacted with a single shot that *was not aimed at the persons causing the disturbances*, so as not to endanger anybody.⁴⁴

The response ignores the suspicion that the soldiers acted with forbidden haste in selecting the direction to fire so as not to hit the persons causing the disturbance, without ensuring that the shot would not endanger bystanders. Since this hastiness led to the death of a person, a criminal investigation should have been opened.

B'Tselem sent another letter to Lt. Col. Mishal-Shehori, on 24 November 2009, demanding reconsideration of the decision. The letter pointed out that the response of the Judge Advocate for Operational Matters, like the findings of B'Tselem's inquiry, indicated Hamid was not taking part in any violent activity and that despite this, the soldier shot him with live ammunition. B'Tselem also noted that firing of live ammunition at a person in a non-life threatening situation breaches the Open-Fire Regulations. This fact alone warrants opening an investigation.⁴⁵

The letter remains unanswered as of the time of writing.

43. The testimonies were given to Suha Zeid on 14 September 2008.

44. Letter of 11 October 2009 from Lt. Col. Sigal Mishal-Shehori, the Judge Advocate for Operational Matters, to B'Tselem. Emphasis in the original.

45. Letter of 24 November 2009 from Attorney Smadar Ben Natan to Lt. Col. Sigal Mishal-Shehori, Judge Advocate for Operational Matters.

Wahib Musalah Na'if a-Dik, 28, resident of Kafr a-Dik, married with four children, plasterer, killed in the village on 14 December 2006, while his wife was pregnant⁴⁶

On 14 December 2006, Wahib a-Dik, 28, was working at the archeological restoration site of a palace located in the middle of Kafr a-Dik, Salfit District, a project funded by a Swedish organization. During the day, soldiers entered the building and shot a-Dik to death. *Ha'aretz* reported that, according to army officials, a paratrooper unit entered a building while chasing stone throwers. Then, according to army officials, the commander saw a-Dik about to throw a cinder block at soldiers from high on the stairs, and fired two shots at him.⁴⁷

B'Tselem's inquiry indicated a different reality. Testimonies of persons working at the site indicated that, in the morning, they heard children shouting and the sound of bullets outside the building. Around 11:00 A.M., seven soldiers entered the building. Nabia Naji, who worked in construction, asked the soldiers what they wanted. One of the soldiers told him they were looking for stone throwers, and Naji said no stone throwers were in the building.

According to eyewitnesses, at that moment, Wahib a-Dik came out of one of the rooms on the second floor. He was carrying two pails of cement. The soldier, who saw him leave the room, aimed his rifle at him, and fired a volley of bullets. A-Dik, who was hit in the chest and right hand, fell five meters and landed in the yard.

Naji related that he asked the soldier to help in taking a-Dik to hospital, but the soldier refused. Residents who came to the site took a-Dik by car to hospital in Ramallah, where he was pronounced dead.⁴⁸

The same day, B'Tselem wrote to the chief military prosecutor, demanding an MPIU investigation. An MPIU investigation was not opened until one year later, on 11 February 2007. A month later, MPIU investigators came to B'Tselem and took testimony and medical documents, and on 27 March 2007, eyewitnesses gave testimony to the MPIU. Almost two years later, on 16 March 2009, B'Tselem was informed that the investigation had been completed and the findings forwarded to the Judge Advocate General's office for decision.

On 4 February 2010, three years after a-Dik was killed, the office of the Judge Advocate for Operational Matters informed B'Tselem that the file was still being processed.

46. For more on this incident, see B'Tselem's website, at http://www.btselem.org/english/Firearms/20061214_Killing_of_Wahib_a_Dik.asp.

47. Michal Greenberg, Amos Harel, and Avi Issacharoff, "Rocket Lands in Residential Area in Sderot Damaging Buildings and a Parked Car," *Ha'aretz*, 14 December 2006.

48. The testimonies were given to 'Abd al-Karim Sa'adi on 16 and 19 December 2006.

Part Two

Criticism of Israel's Position

The policy Israel adopted at the beginning of the second intifada regarding the investigation of cases in which Palestinians not taking part in hostilities are killed is contrary to international humanitarian law and prevents accountability for breaches of law. First, the sweeping definition that everything that has occurred in the Occupied Territories since 2000 as “armed conflict” is detached from the reality in the area in recent years, certainly regarding the West Bank. Second, even if there is armed conflict in the Occupied Territories, breaches of the law must be investigated. Third, the alternate process established by the Judge Advocate General's Office, in which the operational inquiry is the principal investigative tool, is ineffective and incapable of uncovering the truth.

Armed conflict does not exist in the Occupied Territories

In its response to the petition filed by B'Tselem and the Association for Civil Rights in Israel,⁴⁹ the state relates to all the army's actions in the Occupied Territories as one block, defining them all as “operational activity.” To strengthen its argument, it brings a number of examples of cases soldiers have to cope with in the Occupied Territories. All the cases indeed involve combat incidents – cases in which Palestinian bystanders are injured by soldiers' gunfire at armed persons, exchanges of gunfire while making arrests in the middle of the night, and shooting of Palestinians in good faith, believing the Palestinians intended to attack them.⁵⁰ The cases that the state presents as examples of instances in which it was decided not to open an investigation also describe incidents involving armed Palestinians, or Palestinians suspected of being armed.⁵¹

However, the army admits that some actions of soldiers in occupied territory are not carried out in a combat framework. For example, the Judge Advocate General, Maj. Gen. Avichai Mandelblit, said at a hearing in the Knesset that, in the course of the second intifada, there were cases in which he ordered an investigation without waiting for the results of the operational inquiry, after he determined that combat actions were not involved:

There were a number of cases, not many, but certainly a few, I can recall two cases from December and I can note another few incidents, in which I ordered an immediate investigation. Why? Because in those cases, in one case, a girl was killed during disturbances. These were policing cases, not combat cases. I

49. Discussed above at pages 14-16.

50. See, for example, sections 10, 39 and 92 of the Supplemental Response of the State Attorney's Office, of 4 July 2004, above note 13.

51. Ibid., sections 66-69.

identified it immediately. I said we wouldn't wait for an operational inquiry, straight to an MPIU investigation. Another case involved very serious injury to a civilian in the seam zone, also during disturbances. This stood out. I said there was no reason to wait because this was not a combat incident. So the investigation was opened immediately.⁵²

In addition, analysis of the responses of the Judge Advocate General's Office on death cases in the West Bank indicates that the reasons for not opening an MPIU investigation draw on concepts relating to policing actions and not to combat actions. In regard to 20 incidents involving 24 fatalities, B'Tselem was informed that a decision had been made not to open an investigation. In 11 of these incidents, the response indicated that the decision was based on the claim that the soldiers fired after they believed their lives were in danger; four responses stated that the person was killed when soldiers were acting in the framework of the arrest-of-suspect procedure; in two cases, no reason was given for the decision. In only three cases did the response mention that the shooting was carried out at a person because he was armed, but it emphasized that the person was involved in an action – laying an explosive charge, firing at soldiers, and training. In no case was it mentioned that the gunfire was carried out only because the person was armed, even though such gunfire would be justifiable as a combat action performed in the course of an armed conflict.

At a hearing before the Knesset's Constitution, Law and Justice Committee on 22 February 2005, Judge Advocate General Mandelblit said:

Were a clear change in the situation to occur, and I very much hope we are going in that direction, [though] I am still not one hundred percent convinced, I will change the policy and return to the policy carried out in the past, that every case of injury to an innocent person is forwarded immediately to the MPIU for investigation.⁵³

Since 2005, there has been a sharp drop in the number of attacks against Israeli civilians and security forces.⁵⁴ In 2008, the number of Palestinians killed by security forces in the West Bank dropped sharply, and in 2009, the army removed many of the checkpoints and physical obstructions it had placed in the West Bank. The number of detainees also dropped. Despite the decline in the intensity of the confrontations, which led to these changes, the definition of the overall situation in the Occupied Territories, or at least in the West Bank, as an "armed conflict" has not been changed.

52. The comments were made at a hearing of the Knesset's Constitution, Law and Justice Committee on 14 February 2007.

53. Hearing before the Knesset's Constitution, Law and Justice Committee, 22 February 2005.

54. See, for example, the summary report of the Israel Security Agency, "Analysis of Characteristics of Terrorist Attacks in the Past Decade, 2000-2009," available, in Hebrew, at http://www.shabak.gov.il/SiteCollectionImages/Hebrew/TerrorInfo/decade/DecadeSummary_he.pdf.

This definition was problematic from the outset. Even during the second intifada, security forces carried out policing actions, such as supervision of Palestinian traffic at checkpoints, imposing and enforcing curfews, dispersing demonstrations that included stone throwing, and so forth. Many of the Palestinian civilians who were killed were killed in the framework of such actions, and not in combat actions.

The state correctly argues that the distinction between policing actions and combat actions is not always clear, and at times the dividing line is hazy. However, one cannot conclude from this that the distinction does not exist. Col. Liron Libman, head of the army's International Law Department, distinguished between policing actions and combat actions in an opinion asserting that Israel is not required to investigate every incident in Operation Cast Lead that resulted in death:

The purpose of a "policing" action is always arrest and prosecution – and any killing, whether of a "target" of the action or of others, is not supposed to occur. Contrarily, in a "combat" action, it is assumed that lethal force will be used against "targets" of the action, namely, anyone comprising the armed forces of the adversary.⁵⁵

The question whether the case involves a combat action or a policing action is connected to the totality of the circumstances of the event and the objective of the action, and not the danger posed to the persons involved. Police officers, too, act to protect civilians, endangering their lives and sometimes suffering injury in the course of carrying out purely policing actions. Clearly, this fact does not turn the entire police force into a force carrying out combat actions. Therefore, even if actions are intended to safeguard "the security of Israeli citizens," as the state claims in its response to the petition to the High Court of Justice, and even if soldiers' lives are in danger, and even if soldiers are killed in the course of the action, these factors do not in themselves turn the actions into combat actions.

One reason the state prefers to retain the definition is because "operational actions" are perceived as providing immunity to criminal investigation. For example, in 1996, an indictment was filed against four officers who shot to death an Israeli citizen who did not stop at a checkpoint. The officers petitioned the High Court to nullify the indictment. In the hearing on the petition, the chief of General Staff, Amnon Lipkin Shahak, pointed out the consequences of prosecuting them for negligence in the course of operational actions, claiming that the army has other tools to cope with violations:

Initiating criminal proceedings for a mistake in judgment or for negligence during an operation that is not exceptional is liable to harm the army. Operational activity is, as noted above, replete with dangers to soldiers and their commanders who have responsibility for their soldiers, if we add also the fear

55. Letter of 3 September 2009 from Col. Liron Libman, head of the army's International Law Department, to the Attorney General. The letter was sent to Attorney Limor Yehudah from ACRI by Attorney Raz Nizri, senior assistant to the Attorney General, on 10 September 2009.

of criminal prosecution for a mistake in judgment that is not exceptional, under conditions in which the risk of error is great, there is fear that the number of those willing to bear the burden will fall. . . Furthermore, a commander who must take risks in operational missions is liable to refrain from taking the risks out of fear that it will later be found that he erred and he will find himself an offender being prosecuted. In such a situation, commanders are liable to prefer ways of action or conduct that remove or reduce the responsibility on their shoulders. It is superfluous to emphasize the harsh consequences this is liable to have on the army's actions.⁵⁶

The High Court denied the petition, holding that the discretion of the Judge Advocate General was reasonable and there was no reason to interfere in his decision. However, in another case, the High Court distinguished between "operational actions" and "criminal actions," holding that "the point of departure regarding an operational incident is that it does not involve a criminal incident. . . The cases in which an investigation will be carried out by an investigative body regarding an operational incident are the exception."⁵⁷ The justices added:

Operational activity has a unique character and objectives that clearly distinguish it from criminal actions. An attitude that views the actions of security forces as being close to criminal actions strikes at the ethical basis of actions of the security forces and is liable to impair their motivation in carrying out their functions faithfully. The readiness of soldiers, commanders, and defense personnel in carrying out their functions, in taking risks and in acting on behalf of national interests, at times endangering their lives, when they are acting under pressure and uncertainty, is liable to be significantly impaired if they know that the actions are liable to result in their being prosecuted as criminal suspects.⁵⁸

Indeed, there is a fundamental difference between the two kinds of actions. However, the claim that it is impossible to describe a situation in which soldiers engaging in operational actions violate the law and are even convicted for a criminal offense is baseless. Negating in advance the possibility that soldiers involved in operational actions might commit any offense – from illegal use of weapons, to negligence, to intentionally causing actual injury – is inconsistent with the obligation to comply with all provisions of the law.

The argument that prosecuting soldiers on criminal charges will impair their functioning is also insufficient to negate the need for a criminal investigation. The army cannot completely ignore the interest of holding offenders accountable, certainly not in cases in which a person dies. Dr. Oded Mudrik, a judge in the Tel Aviv District Court, objects to this sweeping position, which in effect negates any possibility of holding persons involved in operational actions criminally responsible for their acts.

56. HCJ 2702/97, *A. v. Minister of Defense et al.*, para. 10.

57. HCJ 2366/05, *Al-Nebari v. The Chief of General Staff et al.*, para. 7.

58. *Ibid.*, para. 9.

I do not accept the basic assumption behind the military's argument that certain kinds of conduct by commanders should be made nonjusticiable. According to the definition of "negligence" in the Penal Law, a sufficiently broad breadth of conduct of commanders is liable in any event to be found outside the defined area of an offense. . . The supremacy of the value of protection of human life is evident, and to ensure compliance with this value among commanders, it is not proper to make a fundamental determination negating criminal responsibility. . . It is wrong to agree with an idea that defines a segment of the population, citizens of the state, and place its actions above the law. Persons who so argue are saying that the commanders are permitted – and even required – to perform military actions, but are exempt from criminal responsibility for the consequences of these actions. There is no legal system anywhere in the enlightened world that grants immunity to the command echelon of its army and places them above the law.⁵⁹

Ghazi Maher Ghazi a-Z'anin, 12, resident of Beit Hanun, northern Gaza Strip, injured by IDF fire on 4 September 2009 and died the following day

On Friday, 4 September 2009, around 1:30 P.M., Maher a-Z'anin drove to his plot of land, which is situated some 600 meters from the border with Israel. In the car with him were his four sons, his nephew, and two of his friends, to whom he intended to sell some of the land, and a few of their children. They arrived at the plot around 2:00 P.M., and the children began to joke around and play between the trees. It should be mentioned that the army has declared the area 300 meters from the perimeter fence a no-go zone.

Five minutes after they arrived, a-Z'anin and his friends noticed an army jeep driving from east to west within Israel, toward the border with Gaza. According to eyewitnesses, the jeep stopped, two soldiers got out, aimed their weapons, and fired in their direction, without giving warning. The Palestinians



Ghazi a-Z'anin (Courtesy)

59. Oded Mudrik, "Responsibility of Commanders – Procedural Perspective," *Plilim*, vol. 9, 285 (5761 – 2001), 361-364.



A-Z'anin family, with Ghazi second from left in back row (Courtesy)

ran to their vehicle to flee from the area. As they ran, a bullet struck Ghazi a-Z'anin, 12, in the head. The soldiers continued to fire at the vehicle while it was moving, and two shots hit it.

A-Z'anin and his friends drove to the hospital in Beit Hanun. From there, Ghazi was taken to a-Shifaa Hospital, in Gaza city. He died the following night.

On 14 October 2009, B'Tselem wrote to the Judge Advocate for Operational Matters, demanding an MPIU investigation into the matter. On 28 October 2009, the organization was informed that its letter had been forwarded to the relevant army officials. B'Tselem has not received any further reply regarding the incident.

A duty to investigate also exists in armed conflict

The state is right in its argument that the fact that a civilian not taking part in hostilities is killed does not, in of itself, necessarily indicate a breach of law. However, the sweeping conclusion that the state derives from this argument, that it is not necessary to conduct a criminal investigation in such cases, is misleading and contrary to international humanitarian law.

The principal objective of international humanitarian law is to reduce the number of civilian casualties in wartime. For this reason, international humanitarian law contains clear rules arranging when it is permissible to open fire and against whom. The principle of distinction states that the adversaries must distinguish between combatants and civilians in the course of hostilities and that attacks directed at civilians and civilian objects are forbidden. The principle of proportionality states that, when an attack is directed at a legitimate military object, the attacking party must do everything feasible to verify that the military advantage anticipated from

the attack is greater than the anticipated injury to civilians. Under this principle, the army must take all feasible measures to reduce the injury to civilians and to use means that will prevent to the extent possible the loss of life.⁶⁰ Consequently, injury to civilians is an undesirable result of hostilities and not an integral part of it, even if, in certain circumstances, the injury is not considered a breach of law.

The prohibition on directing attacks at civilians leads to the obligation to investigate cases in which civilians are killed, even in an armed conflict, the objective being to determine whether security forces breached this prohibition. For example, for the death of civilians not to be deemed a breach of law under the principle of proportionality, a number of conditions must be met, among them: the attack must be directed only at legitimate objects, the army must do everything feasible to reduce the injury to civilians, and the military advantage anticipated from the attack must be greater than the anticipated incidental injury to civilians. These aspects must be examined in an investigation before it can be determined that the death was not the result of a breach of law.

If there are no investigations, security personnel can all too easily allege that they were acting on the assumption that lethal force was necessary because they were facing imminent attack or that the rebels died in crossfire. In many such circumstances the only way to achieve a result is through an independent investigation in which not only the security personnel can be heard but also witnesses supporting the victims' or their families' view.⁶¹

The state argues that it must investigate only cases in which soldiers intended to strike civilians, and that in the absence of such intention, there is no need for a criminal investigation. However, it is unclear how one can determine intention if no investigation is undertaken.

Moreover, there is no basis for this argument under international law or Israeli law. First, article 146 of the Fourth Geneva Convention prescribes that states must investigate grave breaches of the Convention and prosecute persons who committed or ordered the commission of such breaches. The article further requires that states take measures "necessary for the suppression of all acts contrary to the provisions of the present Convention," even when these acts do not constitute grave breaches of the Convention or war crimes.

According to the International Committee of the Red Cross's interpretation of the article, the contracting parties must act against all acts contrary to the Convention, integrate the prohibitions in domestic legislation, and provide for the punishment

60. See, for example, articles 51-57 of Protocol I. As noted above, the relevant provisions in these articles are considered customary law, binding on Israel. *Study on customary international humanitarian law*, supra, 24-25.

61. Cordula Droege, "Elective affinities? Human rights and humanitarian Law," *International Review of the Red Cross*, vol. 90, number 871 (September 2008), 501, 541-542. See also: *Report for the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, Phillip Alston, UN Doc. E/CN.4/2006/53, 8 March 2006, par. 36.

of offenders. The authorities of the states should give instructions in conformity with the Convention and should institute judicial or disciplinary punishment for breaches of the Convention.⁶²

Second, the obligation of the army does not end with the prohibition on intentional attacks on civilians, which constitute a war crime. The army must also verify that soldiers and officers carry out the army's orders and Israeli law. These orders and laws prohibit, in addition to gunfire intended to kill civilians, a long list of acts, including causing death by negligence and lesser offenses, to which the obligation to investigate and prosecute soldiers suspected of committing these offenses applies. Clearly, the intentional killing of civilians is a grave offense, and even constitutes a war crime, but there are no grounds for the claim that, since the gravest offenses were not committed, the army acted in accordance with international humanitarian law.

One of the claims raised by the state justifying this policy is that, during armed conflict, there are technical obstacles that make it difficult to carry out criminal investigations of the events. These difficulties cannot be ignored. Conducting an autopsy, gathering evidence from the scene of the incident, and collecting eyewitness testimonies are not possible in some cases. However, there is substantial difference between making a sweeping determination that, because of such difficulties, MPIU investigations would not be opened, and the decision not to open an investigation in a specific case, or to close the investigation file after it was opened, due to these difficulties.⁶³

An operational inquiry is not a tool for uncovering the truth

The operational inquiry is the tool that the Judge Advocate General's Office has used since the beginning of the second intifada to determine whether to order an investigation in cases in which soldiers killed a person not taking part in hostilities. Although the state's response to the petition filed in the High Court, discussed above, states that the operational inquiry is only one of the factors on which the decision is based, the examples presented in its response to the High Court of Justice, and in its letters to B'Tselem, show that the decisions are based solely, or almost solely, on the findings of these inquiries.⁶⁴

However, the operational inquiry, as an internal work tool the army uses for study purposes, is not a suitable tool for uncovering the truth. Its main function is "to reach conclusions and learn lessons, to prevent failures and mistakes with an eye to the future."⁶⁵ A criminal investigation, on the other hand, is aimed at serving

62. Jean S. Pictet, *Commentary: The Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (Geneva: ICRC, 1985), 593-594.

63. Droege, above note 61, 542.

64. Supplemental response of 4 July 2004, above note 13, sections 62-69.

65. *Al-Nebari*, above note 57, para. 6.

the judicial process, so its eye is to the past and its objective is to uncover the truth, hold a fair trial, and bringing offenders to justice.⁶⁶ The Supreme Court explained the function of the operational inquiry, as follows:

The operational inquiry is a procedure of internal review by means of examining an incident, analyzing it, and making conclusions from it, and, as a result of these actions, formulate recommendations regarding future conduct in similar situations. In the framework of the inquiry, planning and execution of the actions being investigated are examined, as is the relationship between the planning and actual execution. The inquiry enables study and learning of lessons for the immediate period, as well as constant examination of fundamental assumptions and instructions according to which the army units operate. Therefore, it enables the revision of instructions, procedures, and modes of operations, and their conformity to changing conditions and the reality on the ground confronting the army units. It enables innovation and advances movement toward excellence and taking responsibility. . . . The operational inquiry constitutes, therefore, a most important systemic learning tool that enables maintenance of the army's capabilities and their improvement. It is an important organizational tool to locate mistakes, to correct them, and for re-organization, and is necessary for maintaining the IDF's professional and operational capability, sometimes to the extent of saving lives.⁶⁷

The operational inquiry plays an important role in improving the performance of the army and is vital in preventing mistakes and in rectifying defects and operational mistakes. However, learning lessons cannot replace taking measures against persons responsible for the killing of a civilian not taking part in hostilities who did not pose a threat to soldiers' lives. It is necessary to clearly distinguish between the need to learn lessons and learn from mistakes and a criminal investigation and measures taken against lawbreakers. Settling for improvement of the army's operational capability, while ignoring breaches of the law, is equivalent to saying that the army's operational capability is more important than human life. This is an ethical determination that is hard to accept.

Apart from the fact that the operational inquiry is not the suitable tool for investigating the incidents, the way the inquiries are conducted impairs their credibility. The investigating officers are military personnel and do not have the training to carry out inquiries of this kind.

In addition, to advance the likelihood of success of the operational inquiry, and therefore the army's operational capability, the Military Justice Law prescribes that, if an MPIU investigation is opened following a operational inquiry, the material of the operational inquiry is not allowed to be shown to the MPIU. Also, material gathered in the course of the operational inquiry may not be used as

66. Ibid. para. 10.

67. Ibid., para. 11. See, also, Military Court of Appeals, Misc Appl 42/03, *Chief Military Prosecutor v. Sgt. Eldad Binyamin*, para. 27-28.

evidence in the criminal proceeding or disclosed "to any person." The material of the operational inquiry is provided only to entities within the army which require it for the purpose of carrying out their functions.⁶⁸

However, since the results are used by the Judge Advocate General in deciding whether to order an MPIU investigation, the soldiers have no interest in providing precise details of the event, and they will want to refrain from incriminating themselves or their comrades. There is, therefore, a contradiction between the operational inquiry as a learning tool and its use to advance a legal proceeding: it is hard to expect the soldiers to be totally frank when they have to worry about the consequences the operational inquiry's will have for them. So, not only is the operational inquiry not suitable for examining the events that took place, it also is liable to impair the likelihood of success of the MPIU investigation. The Supreme Court recognized this fact.

The demand that the persons involved in an operational incident report the truth seems obvious, but it is liable to place them between a rock and a hard place. On the one hand, they are required to tell the whole truth. On the other hand, the possibility that the testimonies they give will ultimately form the basis for a conclusion that their conduct in the incident indicates a criminal offense means that if they say everything they know, they might have dug a hole into which they will fall.⁶⁹

The operational inquiry also exposes the soldiers involved to the versions given by other soldiers. Judge Mudrik explained this, as follows:

The operational inquiry might disrupt the [MPIU] investigation because it does not maintain the rules of evidence; it enables transfer of information from one person being questioned to another person who is questioned (especially – and this is common – when the operational inquiry is carried out in "group" fashion, that is, all the participants in the incident are present at the operational inquiry and respond to what others said); "inspiration" from the memory of a particular soldier under questioning to the memory of another soldier under questioning, and even coordination or synchronization of versions (consciously or sub-consciously) among the persons involved in the incident.⁷⁰

Reliance on the operational inquiry also delays opening the criminal investigation, to a time when the scene of the incident has changed. The investigation begins when it is no longer possible to perform an autopsy of the body, to gather evidence on the ground, when the memory of eyewitnesses is not clear, and soldiers have already heard the versions of other soldiers. Clearly, such delay impairs the effectiveness of the investigation. Col. (res.) Ilan Katz, who served as

68. Military Justice Law, 5715 – 1955, section 539A.

69. *Al-Nebari*, above note 57, para. 15. See, also, *Binyamin*, above note 67, para. 31-39.

70. Mudrik, above note 59, 328.

Deputy Judge Advocate General at the beginning of the second intifada, said in this context:

Even if, at the end of the operational inquiry, the Judge Advocate General decides to order an MPIU investigation, an investigation at this stage is almost impossible. The reason is that, when commanders carry out an operational inquiry, they destroy the scene of the incident and months later it is hard to find shreds of evidence on the ground. It is impossible to examine even the weapon from which the shot was fired, because, by the time the MPIU investigation begins, many shots have been fired from the rifle, or, in some cases, the weapon has changed hands, and it is very hard to trace its movement.⁷¹

Judge Mudrik adds that, "Carrying out the operational inquiry before the MPIU investigation is liable to negate the information advantage the criminal investigator has over the person who is being questioned. This is an advantage that no investigator in a criminal investigation would be willing to have taken from him and given to the person being questioned."⁷²

'Abd al-'Aziz Hamed 'Abd al-'Aziz al-Matur, 28, resident of Sa'ir, Hebron District, married with three children, taxi driver, killed on 5 April 2007, next to Nebi Musa, while his wife was pregnant

On Thursday, 5 April 2007, seven residents of the village of Sa'ir drove to collect scrap-iron in a firing zone next to Nebi Musa. Around 1:30 P.M., the group arrived and began to dismantle an old tank on the site. About an hour later, two army jeeps appeared. Four of the Palestinians fled in the vehicle they had come in. The other three men hid, two behind a sand pile, and the other, 'Abd al-'Aziz al-Matur, about ten meters from them.

One of the jeeps stopped and two soldiers got out, went over to the two men hiding behind the sand pile and demanded their identity cards. At that moment, al-Matur tried to run away. One of the soldiers chased him, firing in the air and calling out to him to stop. Al-Matur continued to run. The soldier kneeled down and fired, hitting al-Matur, who fell to the ground.

One of al-Matur's friends wanted to run and aid him, but the soldier alongside him did not let him. The soldier who fired returned and said he had killed al-Matur. Al-Matur's two friends ran to him and the soldiers followed. One of the friends asked the soldiers to take al-Matur in the army jeep to get medical treatment, but the soldiers refused. They only agreed that his friends could take him to the nearby army base. They arrived at the base 30 minutes later. An ambulance team that was summoned tried to resuscitate al-Matur, but failed.

71. Amir Rappoport, "The MPIU Does not Know the Job," *nrg*, 1 January 2005.

72. Mudrik, above note 59, 330.

Shortly afterwards, the second jeep arrived. Inside were the four Palestinians who had fled. An hour later, the soldiers returned the identity cards to them and ordered them to leave.⁷³

The following day, *Ha'aretz* reported that the activity of the unit that killed al-Matur had been suspended pending an investigation of the incident, and that OC Central Command had ordered an inquiry into the matter.⁷⁴

On 12 April 2007, B'Tselem wrote to the chief military prosecutor, demanding an MPIU investigation into the matter. On 14 June 2007, the Chief Military Prosecutor's Office informed B'Tselem that an MPIU investigation had been opened. On 3 April 2008, the office of the Judge Advocate for Operational Matters informed B'Tselem that the file was being processed. On 16 March 2009, the office informed B'Tselem that the MPIU investigation had been completed and the findings forwarded to the Office of the Judge Advocate General. On 4 February 2010, B'Tselem was again informed that the investigative file was being processed.

Problems in applying the new procedure

An examination of the manner in which the Judge Advocate General's Office applies the new procedure indicates the many difficulties and substantial delays in making decisions.

In the framework of the hearing on the petition filed by B'Tselem and the Association for Civil Rights in Israel, discussed above, clear time tables were set for reporting an incident in which a Palestinian was killed and for transfer of the investigative material to the Judge Advocate General. The petitioners demanded also limits on the time given to the Judge Advocate General's Office to make a decision, but the Judge Advocate General's Office refused, and the High Court accepted the refusal. In a letter of 27 November 2005 to Attorney Limor Yehuda, of ACRI, Captain Timor Balan wrote, on behalf of the Judge Advocate General, that, "Setting a time framework for making decisions on whether to prosecute based on an investigation file is unacceptable and does not exist in any other area of the law-enforcement system, military or civil, and we do not believe that it is proper to establish such a rule in these cases."⁷⁵

73. The testimonies were given to Musa Abu Hashhash on 9-10 April 2007.

74. Amos Harel and Avi Issacharoff, "IDF Killed Palestinian in Firing Zone; Unit's Activity Suspended," *Ha'aretz*, 6 April 2007.

75. Letter of 27 November 2005 from Captain Timor Balan, legal assistant to the Judge Advocate General, to Attorney Limor Yehudah from ACRI.

Without a binding time frame, the process becomes ineffective, since decisions in the Judge Advocate General's Office are delayed for months and years. This is true regarding both the decision whether to open an MPIU investigation and whether to file an indictment or close the file after the Judge Advocate General's Office receives the findings of the MPIU investigation. Until decision is made on further processing of the investigation file, the file cannot be obtained from the Judge Advocate General's Office. Accordingly, it is not possible to question the manner of processing of the investigation or the decision of the Judge Advocate General's Office within a reasonable period from the time that the incident occurred.

In late 2007, the Office of the Judge Advocate for Operational Matters was established. The objective was to centralize the processing of complaints of unlawful conduct of soldiers in the Occupied Territories, in place of the various District Attorney offices. The principal reason for establishing the office was to achieve greater efficiency.

This organizational change and establishment of a judge advocate's office earmarked for the aforesaid sphere – under a number of offices that processed it in the past – is intended to bring about improvement and efficiency in processing of requests and to shorten the time needed for investigation and response. The change results from the recognition of the special importance of optimal processing of claims alleging misconduct of soldiers, and the clear interest of the public and of the army to investigate these allegations without delay.⁷⁶

In practice, the establishment of the office of the Judge Advocate for Operational Matters has not brought about any significant change in the processing of complaints. As mentioned above, of the 148 incidents that took place in 2006-2009 as to which B'Tselem demanded an MPIU investigation, no decision had been made in 95 of them as of 22 August 2010, although most had occurred a few years earlier. In 19 of the 22 cases in which an MPIU investigation was opened, the investigation's findings were forwarded to the Judge Advocate General's Office for study. Of these, 17 still await decision on the action to be taken in the file, although some were opened as far back as 2006.

One of the main reasons for the prolonged delay in dealing with the files is the severe shortage of staff. At a meeting between B'Tselem and the Judge Advocate General's Office on 19 March 2009, the Chief Military Prosecutor, Col. Zhena Modzagvrishvili, said that the office of the Judge Advocate for Operational Matters suffered from a serious lack of personnel and had to set an order of priorities. As a result, the processing of files was delayed in cases in which it was reasonable

76. Letter of 13 November 2007 from Major Ran Cohen, head of the detention litigation division of the Judge Advocate General's Office, to B'Tselem.

to believe that measures would not be taken against the soldiers involved. On the other hand, there were files in which soldiers were detained. These files were given priority because of the limitation on the period of detention. This was the reason, the chief military prosecutor explained, that most files relating to events in which Palestinians were killed, also those who were not taking part in hostilities, were placed at the bottom of the pile and barely any action was taken on them.

In a letter of 24 August 2009 to Attorney Michael Sfar, Col. Modzagvrishvili confirmed that the office of the Judge Advocate for Operational Matters was operating "with a much reduced personnel complement that is absolutely insufficient in number (albeit of incomparable quality, professionalism, and devotion)." She added that processing of files might be delayed also because of the "need to carry out supplemental actions and additional investigative work." In conclusion, she noted that, "I agree with you that it is proper to do everything possible to reduce the processing time, and we have recently taken real steps in this direction, which clearly appear likely to improve the situation."⁷⁷

This letter was sent in August 2009. Over the course of the year since Col. Modzagvrishvili's letter, B'Tselem has not noticed any improvement in the work of the Office of the Judge Advocate for Operational Matters.

77. Letter of 24 August 2009 from Col. Zhena Modzagvrishvili, Chief Military Prosecutor, to Attorney Michael Sfar.

Conclusions

In its response to the petition B'Tselem and the Association for Civil Rights in Israel filed objecting to the Judge Advocate General's Office's policy not to open an MPIU investigation automatically in cases in which security forces killed Palestinians, the state asserted that:

The fact that the IDF is engaged in hostilities has great importance. However, this does not mean that cases in which innocent persons are injured are not investigated, nor does it mean that the possibility of opening a criminal investigation is not examined in a substantive and professional manner in each case, nor does it mean that the soldiers are granted immunity from criminal investigations, nor does it mean that criminal investigations are not opened in practice.⁷⁸

These assertions do not reflect the reality or the manner in which the military system processes cases in which Palestinians not taking part in hostilities are killed. There have been cases in which soldiers were prosecuted, but these were exceptions, and not the rule. As this report has shown, the Judge Advocate General's Office has not processed the vast majority of cases that B'Tselem sent to it, cases that raised the suspicion that soldiers had acted in contravention of law. Only in isolated cases were MPIU investigations opened, and most still await decision.

The fact that soldiers killed a person not taking part in hostilities does not necessarily mean that they breached the law. However, if an independent and effective investigation is not conducted, it is impossible to know whether soldiers violated orders or acted improperly. This explains why such an investigation is vital.

These comments do not mean that the army must open an MPIU investigation in every case in which a civilian who did not take part in hostilities is killed. Such a practice in the past did not necessarily lead to more effective enforcement of the law. Moreover, MPIU investigations raise many problems, the main one being that the investigation is conducted within the army. The killing of civilians who did not take part in hostilities requires an effective, unbiased investigation, carried out within a reasonable time after the incident.

The state's policy grants soldiers and officers de facto immunity: a soldier who kills a Palestinian not taking part in hostilities is almost never brought to justice for his act. At the most, they are required to explain their actions in the framework of the operational inquiry. In this way, the army fails in its obligation to take all feasible measures to reduce injury to civilians. It enables soldiers and officers to

78. Supplemental response of 4 July 2005, above note 13, section 25.

act in contravention of law, encourages a trigger-happy attitude, and shows a blatant disregard for life.

Taking measures against lawbreakers is vital in deterring soldiers and commanders from breaching the law and in preventing similar killings of Palestinians not taking part in hostilities. A legal system without an enforcement mechanism loses its meaning and gives soldiers serving in the field no external incentive to obey the law. Supreme Court justice Ayala Procaccia noted the importance of the military law-enforcement system in regulating the conduct of soldiers in the Occupied Territories:

This case emphasizes the importance of the contribution of the legal authorities in the army to law enforcement in Israel, in order to eliminate the phenomena of deviant conduct among IDF soldiers and commanders directed against local residents, who are in an inferior position and are helpless, and to establish norms of respect for their fundamental right to life, bodily integrity, and dignity. The military legal system, which is charged with applying ethical values of conduct in the IDF, must transmit a resolute message of consistent and decisive protection of basic values to society and to the army, and of uncompromising enforcement, at all levels – educational, command, and punitive – of basic principles shared by Israeli society and the Israeli army, which grant them their ethical and humane characteristics.⁷⁹

The situation in the West Bank differs greatly from that in the Gaza Strip; the nature of Israeli military control and the character of military actions are not the same in the two areas. However, in the Gaza Strip, too, there have been incidents in which Palestinians not taking part in hostilities have been killed. These cases must be investigated in accordance with international humanitarian law. In addition, regarding its investigation policy, the state relates to the two areas as one entity: B'Tselem has done the same in drafting this report.

Based on the findings and analysis presented above, B'Tselem calls for the nullification of the definition of the situation in the Occupied Territories as an "armed conflict" and for an independent and effective criminal investigation to be undertaken in every case in which Palestinians not taking part in hostilities are killed. Until then, the Judge Advocate General's Office must implement the procedure it declared before the High Court of Justice and ensure that decisions to open an MPIU investigation are made within a reasonable time, in order to ensure an effective investigation of the events and action against those responsible.

79. HCJ 7195/08, *Ashraf Abu Rahmeh et al. v. The Judge Advocate General et al.*, judgment, para. 88.

Appendix

Data Update

After the report was completed, and less than one day prior to its publication, the office of the Judge Advocate for Operational Matters sent B'Tselem an update relating to the office's handling of matters that B'Tselem had raised since 2002 involving incidents in which Palestinians were killed by soldiers, as well as other matters. It should be noted that the report was sent to the authorities for response more than a month prior to its publication, and the authorities' full response appears in the report.

The recent update includes information relating to cases appearing in the report. Regarding 20 of these cases, the letter provides information that B'Tselem did not have. Initial examination of the updated data indicates there is no reason to change the report's conclusions. Indeed, the data strengthen them.

The relevant data, following the update, follow.

Of the 148 cases referred to in the report, in which B'Tselem demanded that the office of the Judge Advocate for Operational Matters open an MPIU investigation,

- an MPIU investigation was opened in only 23 of them. Of these, eight were closed with no measures being taken against anybody, four are still being investigated by the MPIU, and three were returned to the MPIU for supplemental investigation. In the remaining eight cases, the Judge Advocate General's Office has not yet decided whether to file an indictment.
- in 41 cases, the Judge Advocate General's Office decided not to order an investigation into the incident.
- in 84 cases, the Judge Advocate General's Office has not yet decided whether to open an MPIU investigation.

Response of the Ministry of Justice



**State of Israel
Ministry of Justice**

The Department for International Agreements and International Litigation

Date: 21 Elul 5770

31 August 2010

Ref: 4212

Ms. Naama Baumgarten-Sharon
B'tselem
8 HaTa'asiya St.,
Jerusalem 91531

Dear Madam,

**Re: Our Response to the Draft B'Tselem's Report on Investigation of
Deaths of Palestinians**

The following is our response to the above-referenced report.

1. Regarding the report's fundamental arguments, the vast majority were raised some time ago in the written statements and hearings held in the framework of the petition that B'Tselem filed regarding the investigations' policy (HCJ 9594/03, *B'Tselem v. The Military Advocate General*).
2. The State responded to these arguments comprehensively and thoroughly, both in writing and orally, and the draft report even quotes from the various responses that were filed by the State Attorney's Office in the framework of the judicial proceeding. As noted in the draft report, the petition is still pending; consequently, it would not be proper, in this response, to relate to the aforesaid arguments.
3. Therefore, we shall relate below to the specific cases mentioned in the draft report, in the order in which they appear.

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The Department for International Agreements and International Litigation

- 3.1 **Death of Bassem Ibrahim Abu-Rahmeh during a demonstration near the village of Bil'in (17 April 2009)** - As stated in the draft report, the Military Police Investigative Unit's (MPIU) investigation of this incident was opened about a month and a half ago and is still ongoing. Regarding the period of time that passed since the incident occurred until the time the MPIU investigation was opened, it should be noted that, during the intervening period, a comprehensive command investigation was conducted, and its findings formed the basis for a prolonged dialogue with the representative of the family of the deceased.
- 3.2 **Death of Rami Samir Na'if Shana'ah in Nablus (2 June 2007)** - The findings of the investigation of this incident's circumstances are currently being studied by the Military Advocate General's Office.
- 3.3 **Death of Yasser Saqer Isma'il a-Tmeizi at the Tarqumiya checkpoint (13 January 2009)** - The MPIU investigation file is currently being studied by the Military Advocate General's Office.
- 3.4 **Death of Khalil al-Berouti, Yusuf 'Adur, Jamal Jawalis, and 'Alla Hamran during IDF activity in Ramallah (4 January 2007)** - As pointed out in the draft report, more than two years ago, B'Tselem was given a detailed and reasoned response, for the Military Advocate General's decision not to order an MPIU investigation into the incident. To the best of our knowledge, this decision was not appealed. B'Tselem is invited to raise the criticism of the Military Advocate General's decision that it raises in the report, by appealing the matter to the Military Advocate General's Office, the Attorney General, or the Supreme Court.
- 3.5 **Death of 'Anan Muhammad Ass'ad a-Tibi during IDF activity in Nablus (26 February 2007)** - As noted in the draft report, more than two years ago, B'Tselem was given a detailed and reasoned response, for the decision of the military advocate for operational matters not to order an MPIU investigation into the incident. To the best of our knowledge, this decision was not appealed. B'Tselem is invited to raise the criticism of the military advocate for operational matters decision that it makes in the

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report, by appealing the matter to the Military Advocate General's Office, the Attorney General, or the Supreme Court.


- 3.6 **Death of Muhammad Khalil Muhammad Salah near Bethlehem (5 December 2007)** - The incident is being examined by the Military Advocate General's Office, based on the response of military officials regarding the incident.
- 3.7 **Death of 'Abd Shaker Muhammad al-Wazir, in Nablus (16 October 2007); death of Hani Sh'aban Muhammad Na'im, in Beit Hanun (7 February 2008); fatal injury of Hassan Muhammad Hassan Hamid, in Tekoa' (13 September 2008)** - The appeals that B'Tselem filed against the decisions not to order an MPIU investigation in each of these three incidents are being handled by the Military Advocate General's Office.
- 3.8 **Death of Wahib Muslah Naif a-Dik in Kafr a-Dik (14 December 2006)** - Following an examination of the MPIU file, it was found that the material arising from the investigation was insufficient to warrant the initiation of legal proceedings against any IDF soldiers, and therefore the investigation file was closed on 7 February 2010.
- 3.9 **Fatal injury of Ghazi Maher Ghazi a-Z'anin near the border with the Gaza Strip (4 September 2009)** - This incident is currently being examined by the Military Advocate General's Office, based on the responses of military officials regarding the incident.
- 3.10 **Death of 'Abd al-'Aziz Hamed 'Abd al-'Aziz al-Matur in the Jericho area (5 April 2007)** - The MPIU investigation file is currently being studied by the Military Advocate General's Office.

Sincerely,

Hila Tene-Gilad, Adv.
Director (Human Rights and
Liaison with International
Organizations)

In addition to our hundreds of individual donors in Israel and abroad, B'Tselem thanks the following donors for their generous support:

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בצלם

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