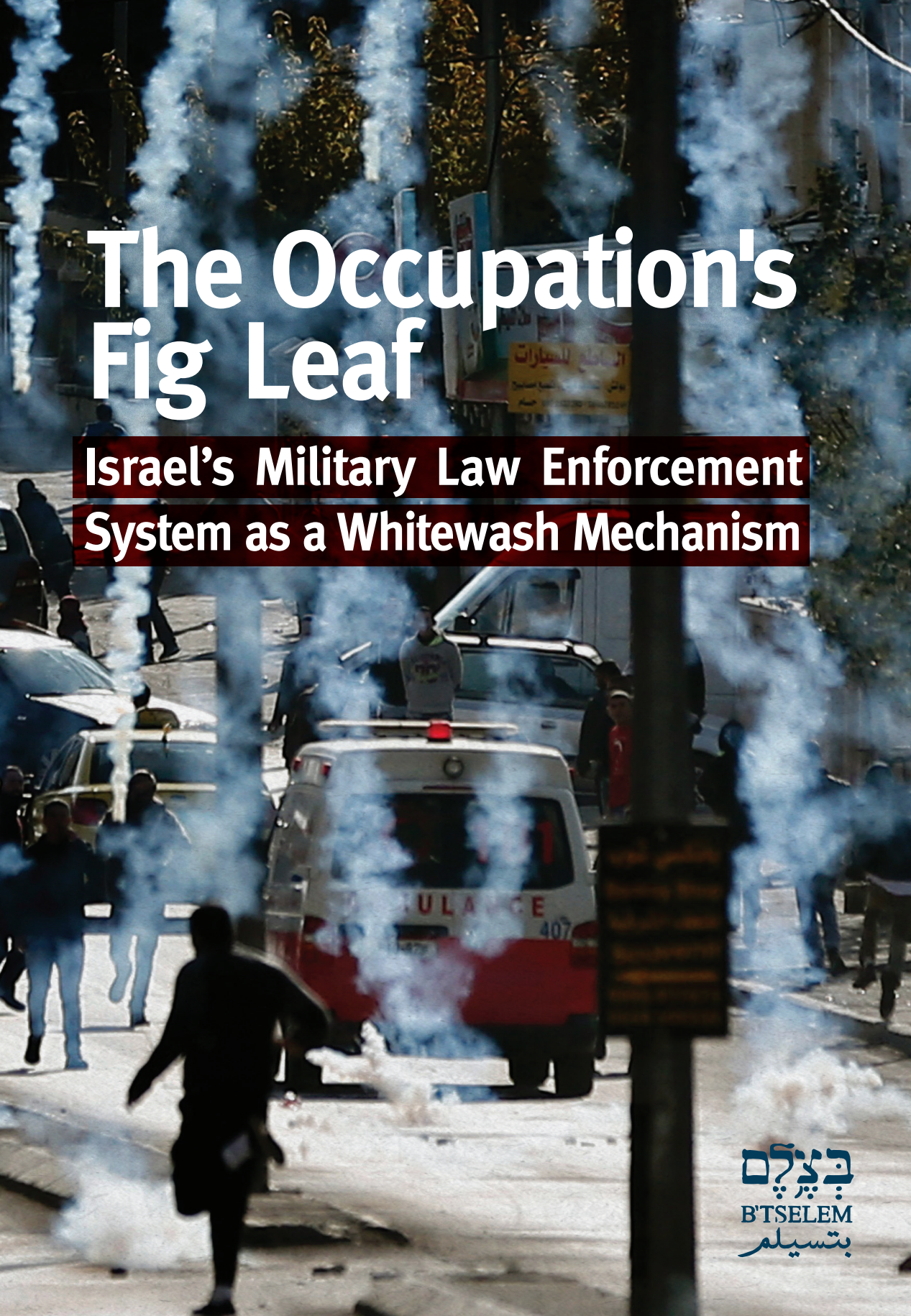


The Occupation's Fig Leaf

Israel's Military Law Enforcement System as a Whitewash Mechanism



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Introduction

This paper focuses on the military law enforcement system and how it handles complaints filed against soldiers for harming Palestinians in the West Bank, including cases of violence and gunfire that resulted in injury or death. Such harm is endemic to the occupation, which has been in place for nearly fifty years.

Ever since B'Tselem was established more than 25 years ago, it has applied to the Military Advocate General Corps (MAG Corps) regarding hundreds of incidents in which Palestinians were harmed by soldiers, demanding the incidents be investigated. Some of B'Tselem's applications led to the launching of criminal investigations. In many cases, B'Tselem assisted investigators in making arrangements for them to collect statements from Palestinian victims and eyewitnesses, and by obtaining medical records and other relevant documents. Once the investigations were concluded, B'Tselem followed up with the MAG Corps to get information as to the case outcome. In some cases, B'Tselem appealed the MAG Corps' decision to close a case, and in a few instances, even petitioned Israel's High Court of Justice (HCJ) against a decision to close a case, or regarding unreasonable delays in the MAG Corps' processing of a case.

Even so, B'Tselem's many years of working with the military law enforcement system have not brought the victims justice, because – as detailed below – the system operates in a way that fails to hold accountable soldiers who caused harm and fails to deter others from similar actions. The military law enforcement system thereby fails to fulfill its function and does not provide Palestinians protection from harm. For years B'Tselem has been aware of the system's ineffectiveness and the problems plaguing it. Yet in the absence of viable alternatives, B'Tselem continued to demand investigations and to work with the law enforcement establishment,

while pointing to necessary improvements and modifications to the work process of these bodies.

B'Tselem has gradually come to the realization that the way in which the military law enforcement system functions precludes it from the very outset from achieving justice for the victims. Nonetheless, the very fact that the system exists serves to convey a semblance of law enforcement and justice.

Now, after a long process of careful consideration, B'Tselem has reached the conclusion that continuing to file complaints to the military law enforcement system does more harm than good. Because B'Tselem has no desire to help the system create a mere semblance of doing justice, we have decided to stop applying to the military law enforcement system. This decision holds even in cases of suspected unlawful actions by soldiers, and even though we realize that Palestinian victims currently have no other recourse for filing complaints against those who have done them harm.

This decision is based on knowledge gained from hundreds of complaints B'Tselem filed with the military law enforcement system. In addition to the vast amount of information collected with respect to the processing of these cases, over the years B'Tselem has requested and received scores of investigation files from the Military Police Investigations Unit (MPIU). B'Tselem staff members have also met with officials inside the military law enforcement system dozens of times over the years, and corresponded at length with the MAG Corps and other military officials. All this information has helped B'Tselem gain a great deal of experience and given it vast and detailed organizational knowledge regarding how the system works and what considerations guide it.

This paper does not address incidents that took place in East Jerusalem which is not subject to the military law enforcement system. Although East Jerusalem is occupied territory, Israel has annexed it and applied its laws there. Nor does this paper address the investigation of incidents in the Gaza Strip. Already in the summer of 2014, B'Tselem stated that it would not demand investigations into combat incidents in the Gaza Strip, even in cases of strong suspicion of unlawful conduct on the part of the military.¹ This decision was made in view of structural failings in the extant investigative

mechanism, as a consequence of which there is currently no official Israeli body capable of handling this type of suspicion.

Below, we review the structure and methods of operation of the military law enforcement system, as described by various officials. We follow with a review of the structural problems plaguing the system and the issues affecting the exercise of powers given to it, based on B'Tselem's monitoring of hundreds of complaints it filed over the years.

1. B'Tselem, "Israeli authorities have proven they cannot investigate suspected violations of international humanitarian law by Israel in the Gaza Strip", September 2014, see: www.btselem.org/accountability/20140905_failure_to_investigate.

The military law enforcement system: In theory

Officials, including the MAG and the Attorney General, do not dispute that the state has an obligation to investigate this type of incident. It is their contention that the military law enforcement system is successfully living up to this obligation.

In dozens of documents written on this topic – running to thousands of pages – and submitted to various official institutions in Israel and abroad, these Israeli officials applaud the system's performance and its underlying values. These documents describe the system's structure and modes of operations, the agencies and mechanisms involved in the process, the oversight agencies supervising the system, and the cooperation between these bodies.

Some of these documents were submitted to the HCJ in connections with a petition regarding the policies practiced by the MAG Corps.² Others were written by Israel's Ministry of Foreign Affairs, mostly after the conclusion of Operations Cast Lead and Protective Edge in the Gaza Strip.³ Other documents

were submitted to the Turkel Commission, which addressed, as the second part of its mandate, the military law enforcement system and its conformity to Israel's obligations under international law.⁴

These documents emphasized the system's merits and effectiveness. For example, former MAG Maj. Gen. Dan Efroni wrote:

*We examine and investigate violations of the laws of war, because, those who violate them, as a matter of fact also violate the IDF's norms and values; because those who violate the laws of war, generally violate the IDF's orders and instructions which entrench the IDF's combat values. It is a difficult task, and enforcement carries a price, a heavy one, but it is a necessary task, which is another expression of the fact that we are committed to international law as well, not because we fear external criticism, but because it matches the values that guide the IDF both in emergencies and during routine operations.*⁵

2. HCJ 9594/03 B'Tselem and the Association for Civil Rights in Israel v. Military Advocate General, Supplementary Notice on behalf of the State, 4 July 2004 (Hebrew).

3. See, e.g.: "The Operation in Gaza, 27 December 2008 – 18 January 2009: Factual and Legal Aspects, July 2009"; "Gaza Operation Investigations: An Update, January 2010"; "The 2014 Gaza Conflict, 7 July – 26 August 2014: Factual and Legal Aspects, May 2015": <http://mfa.gov.il/ProtectiveEdge/Documents/2014GazaConflictFullReport.pdf> (hereafter MFA Report).

4. In May 2010, the Israeli navy overpowered six vessels en route from Turkey to the Gaza Strip for the professed purpose of breaking the Israeli blockade on Gaza. When Israeli navy soldiers tried to board the Mavi Marmra, one of the six vessels, they met with violent resistance from the passengers. In what ensued, Israeli soldiers killed nine passengers and wounded 20; ten soldiers were wounded. Following the incident, the Israeli government appointed a commission of inquiry, chaired by retired Supreme Court Justice Jacob Turkel. The first part of the Commission's deliberations focused on the maritime closure Israel imposed on the Gaza Strip and whether the actions taken during the flotilla incident complied with international law. In the second part of the deliberations, the Commission examined "whether the mechanism for examining and investigating complaints and claims raised in relation to violations of the laws of armed conflict, as conducted in Israel generally, and as implemented with regard to the present incident, [the maritime incident of 31 May 2010], conforms with the obligations of the State of Israel under the rules of international law". The Commission's conclusions on the second part of its deliberations were published in February 2013. The documents submitted to the Commission are available in Hebrew on the Commission's website: www.turkel-committee.gov.il (some of the submissions and testimonies have been translated into English by the Commission and are also available on the website).

5. Dan Efroni, "The Military in the Jaws of the Law?", *Mishpat ve'Tzava* [IDF Law Review], January 2015, Vol. 21(a) (Hebrew)

And this is what State Attorney Shai Nitzan – then Deputy State Attorney (Special Prosecutions) – wrote in a document submitted to the Turkel Commission on behalf of the Attorney General:

[T]he State of Israel has an advanced legal and institutional system – one of the most modern in the world – for investigating claims of violations of martial law. This system was founded and operates from the State's commitment to morality and the

Purity of Arms which has been an integral part of it since its formation, as well as to the principles of international law.⁶

Below follows a review of the workings of the military law enforcement system as portrayed in these official documents. The information is presented in the same order as the process in which complaints by Palestinians against security forces are handled.

6. Letter from Shai Nitzan, Deputy State Attorney (Special Prosecutions) to Adv. Hoshea Gottlieb, Turkel Commission Coordinator, dated 6 April 2011 (hereafter: Attorney General position paper), sec. 4. (See Turkel Commission website: www.turkel-committee.gov.il/files/wordocs/Letter_to_Joshua_Gottlieb.pdf).

A. Lodging a complaint

Officials emphasize that Palestinians may lodge complaints against soldiers directly to the MPIU or the MAG Corps. They say that complaints may also be submitted on behalf of complainants by their lawyers, by human rights organizations or by security forces personnel who had witnessed harm to Palestinians.

A report the Ministry of Foreign Affairs published in May 2015 with respect to the fighting in Gaza in the summer of 2014 stated as follows:

Israel has multiple avenues for obtaining information regarding alleged misconduct by IDF soldiers, and the MAG Corps constantly reviews any complaints and other information that may suggest IDF misconduct, regardless of the source. As an open and democratic society, Israel has a free press and an active community of domestic and international non-governmental organisations, which are a source of many of the allegations of misconduct.⁷

In his testimony before the Turkel Commission on behalf of the Attorney General, Shai Nitzan said: “[A]ccessibility [to the law enforcement system] is absolute, including Palestinians residents of the occupied territories”.⁸ Brig. Gen. Meir Ohana, former Chief Military Police Officer, clarified in his testimony before the Commission that complaints may come from a variety of sources: the victims themselves, who can come to the MPIU base in Anatot, or go to police stations which then forward the complaints to the MPIU; lawyers representing Palestinians; human rights organizations; and commanders of soldiers who become aware of suspected offenses.⁹ Later in his testimony Brig. Gen. Ohana stressed:

We can take complaints from all channels ... I don't think that is something getting in the way of anyone complaining, the fact that there is no MPIU or military police base in the area at present.¹⁰

7. MFA Report, see supra note 3, para. 422.

8. Testimony of Deputy State Attorney (Special Prosecutions) before the Turkel Commission, 10 April 2011 (hereafter: Deputy State Attorney Testimony), p. 147. For similar statements, see testimony of Attorney General Yehuda Weinstein, (hereafter: Attorney General Testimony) pp. 13-14. (English version of the transcripts of these testimonies available as single document on Turkel Commission website: www.turkel-committee.gov.il/files/wordocs/1478Testimony_AG.pdf).

9. Testimony of Chief Military Police Officer Brig. Gen. Meir Ohana before the Turkel Commission, 14 April 2011, p. 10 (Hebrew).

10. *Ibid.*, p. 42.

B. Investigation policy: When is an MPIU investigation launched?

According to the document submitted to the Turkel Commission by then MAG Maj. Gen. Avichai Mandelblit (now the recently appointed Attorney General), the decision whether or not to launch an MPIU investigation is made according to the investigation policy in effect at the time. The MAG said that: "Via this policy the IDF fulfills its duty to conduct a reliable and effective examination of claims of this nature and this was, remains and will continue to be one of the IDF's enduring assets as an army of a democratic state where the rule of law constitutes its very ethos".¹¹

In the document he submitted, the MAG made clear that, according to MAG Corps investigative policy, an MPIU investigation is launched immediately in complaints alleging *prima facie* criminal conduct – such as violence, abuse of detainees and looting.¹² As for investigating instances in which Palestinians were killed or injured by soldiers' gunfire, the MAG Corps policy has undergone changes over the years.

Until the second intifada broke out in September 2000, the MPIU investigated every case in which soldiers killed a Palestinian. In his position paper, the MAG explained that this policy was based on the fact that until that time, as sovereign in the area, the military was engaged in law enforcement activities. With regard to this type of activity "severe restrictions applied to the use of force by IDF forces, and accordingly fatality cases (and under certain circumstances, also the wounding)

of Palestinian residents in the course of operational activity were considered during most years of the military government, as a most deviant incident, as such that by its very occurrence established suspicion that a criminal violation had been committed and therefore mandated, in most cases, the opening of a [MPIU] investigation".¹³

In the beginning of the second intifada, the MAG Corps changed its policy. The MAG explained that during this time: "A substantial change ensued in the characteristics of Palestinian terror" and as a result, the military began engaging in "combat activity". The number of troops operating in the occupied territories grew significantly and the methods and means of warfare changed, along with the open-fire regulations which "now permitted the use of force – even lethal force – against those identified as being involved in the fighting or in terror activity in certain circumstances".¹⁴ This led to changes in investigation policy: if soldiers killed a Palestinian, the troops involved would first conduct an operational inquiry and then, based on the findings of the inquiry in conjunction with other information, the MAG Corps would decide whether the case involves suspected criminal conduct to a degree justifying an MPIU investigation.¹⁵

In 2003, B'Tselem and the Association for Civil Rights in Israel (ACRI) petitioned the HCJ against the change in policy, arguing that the new policy allowed soldiers

11. Position Paper submitted by the MAG Maj. Gen. Avichai Mandelblit, 19 December 2010 (hereafter: MAG position paper), p. 8 (English version available on Turkel Commission website: www.turkel-committee.gov.il/files/wordocs/niar_emda_eng.pdf).

12. *Ibid.*, pp. 14-15.

13. *Ibid.*, pp. 9-10.

14. *Ibid.*, p. 12.

15. *Ibid.*, pp. 10-14.

to violate the law with near complete immunity. The proceedings in the petition went on for years. Then, in April 2011, at the Turkel Commission hearings, the MAG announced he had decided to change the investigative policy targeted in the petition. In the second submission the MAG made to the Commission he wrote: “[T]he investigation policy is dynamic by its very nature, and must reflect the legal and operational policy that exists in the field in which it is being implemented”.¹⁶ The MAG noted that “Recently there has been a significant change to the character of the military operations of the Israel Defense Forces in the Territories, mainly in that there is no longer a blatant combative nature to it”.¹⁷ He goes on to explain:

*Insofar as the reality on the ground was one of heightened armed conflict, so that the dominant factor in the military operations of the Army in the Territories was combative (as opposed to enforcement), there was congruence between it and the way the investigations policy was implemented in respect to cases of deaths of Palestinians; however, when the intensity began to gradually decline – the enforcement component began to rise, at the expense of the combative component, in the military operations of the Forces – the gap between the security situation and the investigations policy became clearer.*¹⁸

According to the new policy, “in general, in an incident where a Palestinian resident is killed as a result of army activity an immediate [MPIU] investigation will be held

(like the incidents of deaths following the disturbances and breaches of order at the checkpoints)”. However, in cases in which the action “had a clear combative nature (such as cases where fire was exchanged and a non combatant is injured)”, the decision whether or not to launch an MPIU investigation will be made only after the results of the operational inquiry and other materials are received.¹⁹

The MAG clarified that operational inquiries will remain part of the new investigative policy as they are vital to the functioning of the military. He stated that, because of their importance, operational inquiries must be given precedence over criminal investigations, as the latter may be lengthy, in some cases lasting years, and the crucial process of drawing operational conclusions cannot be deferred until the criminal investigation is completed. According to the MAG:

*You have to understand that an operational inquiry is the core of existence, I’m not exaggerating, for the army. Even successful events have to be investigated in order to produce lessons and improve for the next time, and certainly lessons should be drawn from events that are not successful, and an event where a civilian is injured or killed is in itself, I’m not speaking of a fear that it’s criminal, it’s not a good thing. Not good, disheartening, and certainly should be examined, it should be investigated first in order to draw lessons so that it doesn’t happen again.*²⁰

16. Letter from MAG Maj. Gen. Avichai Mandelblit to Attorney General, Yehuda Weinstein, dated 4 April 2011, para. 4. [See Turkel Commission website: www.turkel-committee.gov.il/files/worddocs/Letter_to_Joshua_Gottlieb.pdf, MAG letter begins on page 31].

17. *Ibid.*, para. 27.

18. *Ibid.*, para. 29.

19. *Ibid.*, paras. 31-33.

20. Testimony of MAG, Maj. Gen. Avichai Mandelblit before the Turkel Commission, 11 April 2011 [hereafter: MAG Testimony], p. 50 [See Turkel Commission website: www.turkel-committee.gov.il/files/worddocs/Chief_MAG_testimony_minutes.pdf].

C. MPIU investigations

An MPIU investigation is launched on the orders of the MAG Corps. According to the MAG's testimony before the Turkel Commission, his own decision is not required in each and every case, and the decision of a prosecutor with the Military Advocacy for Operational Affairs is sufficient, but he is involved in decisions on investigating fatalities.²¹

Officials stress that the MPIU is an independent body that lies outside the military chain of command. In a document submitted to the Turkel Commission, former MPIU Commander, Col. Haim Sasson clarifies that the MPIU, "like every other division within the Military Police Corps, acts to uphold the law, regardless of the identity of the criminal, from the lowest ranking soldier to the most senior officer" and that the MPIU "is a completely independent investigating body which is subordinate only to the rule of law".²²

Col. Sasson explains that, as part of the unit's independence, the MPIU receives professional direction from the MAG Corps rather than the Chief Military Police Officer. Sasson added that in cases relating to the laws of armed conflict, the Military Advocacy for Operational Affairs closely follows the investigation. Col. Sasson said that investigators undergo legal training by the MAG Corps, including on international law; after their training, the MAG Corps empowers them to act as senior investigators in cases of this kind.²³ The paper issued by the Ministry of Foreign Affairs says investigators receive training

on "reconstruction of battlefield situations, and gathering of evidence from witnesses and alleged victims outside Israeli territory".²⁴

In the document he submitted, Col. Sasson described the various stages in an investigation. After consulting with the MAG Corps, the investigation begins with collecting the basic facts related to the complaint, such as the location and date of the incident, and who was involved. Then "efforts are made" to find a record of the incident and the relevant military unit in military documents, particularly in the operations logs of units serving in the area pertinent to the complaint. Next, says Sasson, "[a]ssuming that the Force which operated in the area has been identified", MPIU investigators collect a statement from the unit commander (a brigade or battalion commander), in order to locate the soldiers mentioned in the complaint and their direct superiors. The MPIU then collects statements from the soldiers "who were identified as having been involved". The statements are collected "anywhere in the country (at various IDF and [MPIU] Bases, police stations or offices)".²⁵

At the same time, the investigators contact the complainant to collect his or her statement and obtain relevant documents – death certificates, medical records, photographs, receipts, etc. According to Col. Sasson, this stage is usually carried out through "the organization which filed the complaint". The Commander of the MPIU also clarifies that "statements are usually taken [...]"

21. *Ibid.*, p. 25.

22. Position Paper submitted by MPIU Commander Col. Haim Sasson, 29 March 2011 (hereafter: MPIU Commander Position Paper), para. 6. (See Turkel Commission website: <http://www.turkel-committee.gov.il/files/wordocs/Pre-testimony-submission.pdf>).

23. *Ibid.*, paras. 9-12.

24. MFA Report, see *supra* note 3, para. 419.

25. MPIU Commander Position Paper, para. 27.

in designated rooms or offices located at or near check points between the territories of Judea and Samaria and the Gaza Strip and the State of Israel”, and that MPIU investigators use interpreters. MPIU investigators sometimes contact other units that may

be of assistance. For instance, they obtain photos from the air force, or contact “expert witnesses” who may help with questions that require “technical or other expertise”, such as understanding specific weapons systems.²⁶

D. The MAG Corps

For years the MAG Corps was in charge of law enforcement inside the military as well as providing legal counsel to the various military authorities. In 2007, these two areas of responsibility were structurally separated and the military prosecution is no longer responsible for providing legal counsel to the bodies it may eventually prosecute. The MAG is the only official whose position was not divided and he remains responsible for both areas. Nevertheless, in the position paper the MAG submitted to the Turkel Commission, he asserted that his independence is not thereby undermined, because he is appointed by the Minister of Defense, a civilian, and therefore not professionally subordinate to the military chain of command.²⁷

2007 also saw the establishment of the Military Advocacy for Operational Affairs as part of the MAG Corps. The prosecutors working in this new unit “specialize in the handling of cases involving ostensive violations of the Laws of War, and acquire the requisite dexterity to contend with the many challenges aroused by these cases”.²⁸

According to the MAG’s testimony before the Turkel Commission, on the one hand, the staff of the MAG Corps work with MPIU investigators and closely monitor the investigations, adding that they try to gain expertise in the field because it “is a whole and complete world of content. I believe it requires some better professionalization in the field”. On the other hand, MAG Corps staff are also in contact with officers in the field: “There is a good connection between an operational issues attorney and mainly brigade commanders, in the West Bank. There are regional brigades in the West Bank, in Judea and Samaria, it is very important that they be in close contact with the commanders, they meet with them, they talk to them”.²⁹

Once the MPIU investigation is over, the file is transferred to the Military Advocacy for Operational Affairs. After the investigative material is reviewed, the military prosecutor may – and often does – order a supplementary investigation.³⁰ After the supplementary investigation is completed, the MAG Corps makes a decision whether to pursue criminal or military action against the soldiers involved or simply close the case.

26. *Ibid.*, para. 27.

27. MAG position paper, pp. 72-73.

28. *Ibid.*, p. 2.

29. MAG Testimony, p. 35.

30. MFA Report, see *supra* note 3, para. 428.

E. Civilian oversight

The report by the MFA state: “As a democratic country committed to the rule of law, Israel subjects the IDF’s military justice system to civilian oversight”³¹ by both

the Attorney General and the Supreme Court sitting in its role as the HCJ.

F. The Attorney General

The Attorney General heads the prosecutorial system and serves as the legal adviser for all governmental bodies. As such, he issues professional directives that are binding on all authorities, including the military and the MAG Corps.

The document Shai Nitzan submitted on behalf of the Attorney General to the Turkel Commission stresses that the Attorney General has sole authority to give professional direction to the MAG. He is “authorized to give instructions to the IDF regarding how to interpret provisions of the law, and therefore, is also authorized to give instructions regarding these matters to the Military Advocate General. In addition, the Attorney General stands at the head of the military prosecutorial system”.³² As the official overseeing the MAG, the Attorney General has the power to review any decision made by the MAG. Any individual or organization may appeal to the Attorney General regarding decisions by the MAG in cases related to violations of the laws of armed conflict.³³

For years, the relationship between the Attorney General and the MAG was determined only through

case law. Only in April 2015 was it officially codified in guidelines issued by the Attorney General. According to the guidelines, the Attorney General will intervene in the MAG’s discretion only in rare cases, when the decisions are of special public interest, when they have implications outside the military context, when they exceed accepted legal norms, or when they depart from the overall policy dictated by the Attorney General.³⁴

The MAG emphasizes the close working relations between him and the Attorney General, “both in formulating policy, as well as on fundamental issues and individual decisions of importance – in a manner that almost totally obviates the need for the ... Attorney General to subsequently intervene in decisions by the MAG”.³⁵ Consultations may be initiated by either of these parties, when dealing with petitions filed with the HCJ, on policy issues and in “individual and sensitive matters”. In any event, the final authority is in the hands of the Attorney General, and where differences of opinion arise, he has the power to make the final decision and instruct the MAG to change his position.³⁶

31. *Ibid.*, para. 437.

32. Attorney General position paper, par. 9.

33. MFA Report, see *supra* note 3, paras. 438-439.

34. “Military Advocate General”, *Attorney General Guidelines*, No. 9.1002, April 2015. See also, HCJ 4723/96, Atia Avivit v. Attorney General, and Attorney General position paper, para. 11.

35. MAG position paper, p. 7.

36. Attorney General position paper, paras. 12-18.

G. The Supreme Court

Oversight by the Supreme Court is mostly carried out in its capacity as the HCJ, hearing petitions against decisions made by the MAG, such as decisions to not launch an investigation, not criminally prosecute or decisions on the indictment charges the MAG chose to bring against soldiers.³⁷

The document published by the Ministry of Foreign Affairs emphasizes that nearly anyone may file a petition to the HCJ against the MAG or the Attorney General, noting that standing in Israel is very broad, extending also to organizations and non-citizens.³⁸

Both the MAG and the Attorney General have broad discretion, which is why the Supreme Court is not inclined to intervene in their decisions. Yet, “notwithstanding that the majority of the petitions that are filed against its decisions regarding what measures must be taken following operational incidents are dismissed, in cases that are found to be relevant, the Supreme Court has not hesitated to intervene in decisions made by the Military Advocate General, including those decisions that involve prosecutions for acts committed during or related to operational activities”.³⁹

Official documents repeatedly reference two rulings: The Zufan case, in which the HCJ struck down the MAG’s decision during the first intifada to opt for disciplinary action only and not criminally prosecute

an officer who gave orders to beat Palestinians.⁴⁰ The other is the Abu Rahma case, in which the HCJ ordered the MAG to indict on more serious charges a battalion commander who ordered a soldier to shoot at a handcuffed detainee in the foot.⁴¹

In his testimony before the Turkel Commission, Shai Nitzan addressed the scope of the HCJ’s oversight:

*Even the Attorney General and the MAG’s decisions, the prosecution and State Attorney’s decisions – HCJ supervises. Any decision, if a case is closed or an investigation is not opened, one can file a petition with the HCJ, if an investigation is carried out and they decide not to file an indictment, a petition can be filed with the HCJ and even if it is decided to file an indictment, even then a petition can be filed with the HCJ.*⁴²

Responding to panel member Migel Deutsch’s charge that in practice, the authority of the HCJ is rarely exercised, Nitzan explained that many cases are closed even before they make it to the HCJ, by undergoing pre-HCJ proceedings with the State Attorney’s Office prior to filing a petition. Nitzan noted that “this of course reduces the HCJ’s intervention in cases by quite a lot because it has already passed the State’s Attorneys filter”.⁴³

37. MAG position paper, pp. 7-8.

38. MFA Report, see supra note 3, paras. 440-441.

39. Attorney General position paper, para. 70.

40. HCJ 425/89 Jamal ‘Abd al-Qader Mahmoud Zufan et al. v. MAG et al. Ruling dated 27 December 1989.

41. HCJ 7195/08 Ashraf Abu Rahma et al. v. MAG et al. Ruling dated 24 June 2013. For references to these two rulings, see Attorney General position paper, para. 70 and MAG position paper, p. 8.

42. Deputy State Attorney Testimony, p. 117.

43. Ibid., p. 119.

The military law enforcement system: In practice

Ever since its establishment in February 1989, B'Tselem has contacted the MAG Corps to demand an investigation in hundreds of cases of alleged criminal conduct by soldiers. Since the second intifada began in late 2000, B'Tselem has demanded an investigation in 739 incidents in which soldiers killed, injured, beat Palestinians or used them as human shields, or damaged Palestinian property.

An analysis of the responses B'Tselem received as to how the military law enforcement system handled these 739 incidents shows that in a quarter (182) no investigation was ever launched, in nearly half (343), the investigation was closed with no further action, and only in very rare instances (25), were charges brought against the implicated soldiers. Another thirteen cases were referred for disciplinary action. A total of 132 cases are still in various processing stages, and the MAG Corps was unable to locate 44 others.⁴⁴

Similar statistics regarding the percentage of indictments emerge from a report published by Israeli human rights NGO Yesh Din,⁴⁵ as well as figures provided to B'Tselem by the IDF Spokesperson.⁴⁶

On their own, these numbers do not necessarily mean there is any problem with the way the military law enforcement system operates. But the figures on how the system handles complaints of harm to Palestinians by soldiers must be viewed in a wider context. B'Tselem has been monitoring the system for many years, including observing the considerations that guide it and the various processing stages of a complaint. Our monitoring shows systemic failures which are neither random, nor case specific. This reality, which will be described in detail below, underlies the very low prosecution rate and the fact that at least 70% of all complaints end with no action taken whatsoever.

44. See table below on page 38.

45. Yesh Din, *Alleged Investigation: The Failure of Investigations into Offenses Committed by IDF Soldiers against Palestinians*, August 2011, <http://yesh-din.org/userfiles/file/Reports-English/Alleged%20Investigation%20%5BEnglish%5D.pdf> [hereafter: Yesh Din Report].

46. Letter from IDF Spokesperson to B'Tselem, dated 30 August 2015.

A. The operational inquiry

In all cases of Palestinian fatalities, and in some cases of non-fatal violence, the criminal investigation is begun only after an operational inquiry is conducted in the military unit involved. For about a decade, from the beginning of the second intifada until April 2011, in case of fatalities, the findings of this inquiry were forwarded to the MAG Corps, and formed the basis for its decision as to whether a criminal investigation of the case is even warranted.

An operational inquiry is fundamentally different from a criminal investigation. It is an internal military tool for evaluating past performance and learning how to improve for the future. The inquiry is conducted by officers in the unit, not trained investigators, and its primary function is pre-empting the recurrence of problematic scenarios. As such, it is forward-looking, whereas a criminal investigation is meant to uncover the truth about a past event and ensure that individuals who broke the law are held accountable for their actions.

Underlying the workings of the military law enforcement system is the premise that improving the military's operational capacities is more important than dealing expeditiously and effectively with transgressors. It is this same premise that also dictates at what point the system's mechanisms will kick into action. However, internal evaluations for future improvement are no substitute for law enforcement and taking action against those who break the law.

Moreover, the link between the operational inquiry and the criminal investigation undermines the reliability and efficacy of the latter. First, while the inquiry itself is classified and the materials it gathers are not disclosed to MPIU investigators, its findings are conveyed to the MAG and form the basis for his decision whether or not to launch an MPIU investigation. Consequently, in a bid to avoid incriminating themselves or their comrades, soldiers may not give true accounts of what happened. Second, the precedence the military law enforcement system gives operational inquiries over criminal investigations inherently inhibits the potential success of the investigation because implicated soldiers hear other soldiers' accounts of what happened. Even if this is an unplanned result of the process, soldiers have a chance to compare stories and "coordinate statements", thereby impeding the MPIU's ability to later investigate the incident.

Furthermore, the inquiry itself may take weeks or even months, so that even if a criminal investigation is ultimately opened, the scene of the incident is no longer intact, or no longer exists, no physical evidence can be collected from the field and some of it no longer exists (for instance, a gun which has been fired numerous times since the incident or else reassigned to another soldier). In addition, witnesses' memory of the incident, Palestinians and soldiers alike, fade over time so they would have a hard time recalling and providing specific details. This state of affairs undermines the effectiveness of the investigation.

B. The MPIU investigation

The dozens of investigation files received by B'Tselem over the years and reports by other organizations indicate that the way the MPIU investigates incidents practically precludes any chance of getting at the truth. The problems noted are not limited to random, individual cases. They are systemic issues that affect almost each and every case examined by B'Tselem.

As MPIU Commander Col. Sasson explained in the document he submitted to the Turkel Commission, criminal investigations into Palestinian complaints against soldiers focus on the incident itself and investigates only those individuals directly involved. Therefore, for the most part the soldiers under suspicion and the Palestinian victims are the only ones questioned. In some cases, the investigators also question eyewitnesses. Investigations never explore the legality of the directives underlying soldiers' actions, nor do they examine the underlying reasoning and rationale that guided soldiers and their commanders. The sole subject investigators examine is the conduct of the implicated soldiers during the incident itself.

In some cases, the soldiers' commanders, and sometimes even senior officers, do get questioned. However, even when the investigation focuses on military action carried out based on an operating procedure or directive that led to outcomes suspected as unlawful, MPIU investigators do not examine the directives themselves nor do they question the commanders about the rationale behind them. At best, they ask for clarifications on what the directives mean, and what exactly they permit.

Moreover, MPIU investigators rarely collect external evidence, even from the scene. In fact, investigators seldom arrive at the scene of the incident, even when this is feasible. The process of finding the soldiers involved in the incident also takes place from an office,

over the telephone or via e-mail, and investigators do not go out in person to military bases to locate the soldiers.

Many of the witnesses, both soldiers and Palestinians, are asked after giving their statement whether they would be willing to undergo a lie detector test or be confronted with the complainant or the suspected soldier. Although the vast majority consent, lie detector tests were hardly ever carried out, and B'Tselem does not know of a single case in which soldiers and Palestinian complainants were confronted with each other, even in cases in which their accounts were clearly contradictory.

Even though the investigation is based almost exclusively on statements by soldiers and officers and by Palestinians, MPIU investigators have great difficulty scheduling statement interviews. As a result, in many cases statements are only taken down months after the incident. In addition, as explained below, statements are taken in a way that makes getting to the truth virtually impossible.

Collecting statements from Palestinians

Not one of the many official documents written on the subject notes any professional training for MPIU investigators on collecting statements from Palestinian complainants, some of whom are crime victims or had witnessed harm to relatives. This type of situation require special sensitivity and understanding of the difficulties these witnesses and victims face when giving their statements, This is particularly true given that the statements are given to representatives of the very body whos soldiers caused the harm to the persons interviewed themselves or their relatives, that the questions are asked through an interpreter, yet another stranger, whith whom the witness must share his or her story.

In some cases, not only is this requisite sensitivity absent, but in practice, the conduct of MPIU investigators in dealing with Palestinians who had suffered harm is quite the reverse. Investigators do not believe statements made by Palestinians and, in what appears to be an attempt to find justification for the soldiers' conduct, demand the Palestinians prove they themselves are not to blame for the violence they were subjected to. Witnesses are sometimes also asked about relatives and involvement in activities against Israel. Questions along these lines certainly do not encourage complainants to provide a full account of what happened.

In addition, notwithstanding that to date MPIU investigators have collected hundreds of statements from Palestinians, every time a statement must be collected, the self-same difficulties arise with respect to arranging a time and place for an interview. Since collecting statements from Palestinians is not a rare occurrence, it stands to reason that the system ought to have devised a permanent solution for these matters, which come up in almost every single investigation.

MPIU investigators do not contact complainants directly in order to make arrangements for an interview, obtain relevant documents or collect the statement itself. Instead, they use external help, mostly turning to the human rights organization or lawyer who filed the complaint; sometimes they use interpreters provided by the military or the District Coordination and Liaison Offices (DCO). When complaints are filed by B'Tselem, one of the first things investigators do is contact B'Tselem in order to make arrangements for the complainant to give a statement and to obtain the required documents. This is done even when the complainant's contact details are provided in the original complaint. Over the years, B'Tselem has assisted in making arrangements for hundreds of Palestinian witness interviews.

This practice is not a predestined, unavoidable state of affairs. It is part of the inherent inaccessibility of the law enforcement system. MPIU investigators always prefer to contact a complainant via Israeli human rights organizations and lawyers, whom they know and with whom they have had dealings for many years, rather than try talking directly to the Palestinian complainants, who are perceived as inaccessible.

Finding a time to conduct the witness interview is not the final hurdle. The MPIU has no bases in the West Bank, and Palestinians are not allowed to enter Israel without a special permit, which is not granted for the purpose of giving testimony against soldiers. And so, the statements are usually collected in one of the DCOs in the West Bank. However, in dozens of cases documented by B'Tselem, when a complainant arrived at the DCO as arranged, staff refused to let him or her in, on the grounds that they did not know of any such scheduled meeting. There were cases in which investigators scheduled several witness interviews to be held back to back, but did not coordinate this with the DCO, and the DCO closed before all the witnesses were able to give their statements. In other cases, investigators were late for the appointment or cancelled it for technical reasons, such as having no access to a bulletproof vehicle. Cancellations were often last-minute, after the complainant had already left for the interview, and sometimes after he or she had already arrived and was waiting at the appointed meeting place.

This conduct has sometimes resulted in witnesses choosing to decline to give their statements – because of the waste of time, the loss of work days or the many inconveniences involved. When this happened, the MPIU then issued notice that it was closing the investigation forthwith. B'Tselem has met with the commander of the MPIU on several occasions and sent letters about this conduct to senior MPIU and

MAG Corps officers, in which it protested the disregard for the witnesses' time and the humiliating attitude towards them. Nonetheless, the situation persists.⁴⁷

Collecting statements from soldiers

Unlike their practice vis-a-vis Palestinian victims and witnesses, MPIU investigators do attempt to locate the soldiers implicated in the incident in the complaint on their own. Dozens of MPIU investigation files reviewed by B'Tselem show that this task takes investigators a long time, sometimes even months.

Tracking down the units involved and the suspected soldiers is done through their commanders. Investigators do not even attempt to contact the soldiers directly. A review of MPIU investigation logs reveals that in some cases, investigators have to make many telephone calls just to make the initial contact with the commanders. Even when they do reach them, investigators are hard put to arrange a time for an interview which does not clash with some other activity the soldiers have, such as military operations, seminars or vacations – which always take precedence.

Even when a soldier's statement is finally collected, if an operational inquiry preceded the investigation – as is the case in almost all incidents involving fatalities and in some other instances as well – the soldiers will heard each other's accounts. This allows them to "compare stories" and change their accounts to match those given by their comrades. In addition, MPIU investigators often summon several soldiers for interviews at the same time – waiting together gives them another opportunity to compare stories.

The delay in opening investigations and the difficulties encountered in tracking down the persons involved often mean that soldiers give their statements long after the incident itself, after at least some

of them have been discharged from the military, having completed their mandatory service. Also, some complaints involve reservists. In both cases, when the persons in question are civilians, MPIU investigators try to find them themselves to schedule an interview. Investigation logs indicate that they manage to do so only after many telephone calls, and even then, interviews are often cancelled by either the ex-soldiers or the investigators, and then the entire process starts all over again.

However, the key issue is not the arrangements for the witness interview but rather how it is ultimately conducted. The interview is cursory, with the investigators functioning more as stenographers than investigators tasked with getting to the bottom of the incident and understanding exactly how events unfolded. Investigators use no interrogation tactics whatsoever, not even the most rudimentary. Soldiers are asked nearly identical questions and their answers are taken down verbatim, with hardly any requests for clarification or follow-up questions. The practice of posing a list of predetermined questions is particular conspicuous when the soldier is interviewed by an MPIU investigator other than the one in charge of the investigation. This happens, for instance, when a soldier opts to give his statement at a venue closer to his home. In such cases, the investigator in charge sends the list of questions to the investigator who will conduct the interview, and the answers given comprise the full extent of the statement collected from the soldier. This means the investigator interviewing the soldier knows nothing about any of the other material in the case, and does no more than write down what the soldier says.

MPIU investigators follow this practice even when the account given by the soldier is inconsistent with other facts uncovered in the file, or when it contradicts prior statements collected from other soldiers or

47. For more details and examples on this issue, see, Yesh Din report, supra note 45, pp. 53-60.

from the complainants. At best, soldiers will be asked to provide an explanation for an account given by another soldier or the victim. This explanation will then be taken down verbatim, without any follow-up questions or attempts to understand the source of the contradiction. In

the vast majority of cases, soldiers simply deny the contradicting account and that is the end of the interview. Investigators do not go back to witnesses for follow-up when contradictory accounts arise later in the investigation, and rely on the soldier's initial testimony.

C. The MAG Corps

The MAG Corps has exclusive, far-reaching powers with respect to investigating soldiers suspected of offenses against Palestinians. These powers relate both to the question of whether to launch a criminal investigation and what measures, if any, to take against those implicated once the investigation is completed. The considerations weighed by the MAG Corps in deciding these questions leads, almost by definition, to closing cases without pursuing any further action.

What needs to be investigated?

The military law enforcement system investigates criminal offenses. According to the MAG Corps, actions such as bribery, looting and violence constitute “total prohibitions to the Laws of War”, and therefore warrant immediate criminal investigation.⁴⁸

However, as far as use of firearms which results in death or injury goes, the answer to the question whether the soldiers had even committed a criminal offense warranting investigation depends on how the MAG Corps sees the situation on the ground at the time, and what it considers to be a criminal act at that time. In the past, MPIU investigations were launched in almost every gunfire incident that resulted in death or injury. Early on in the second intifada, the policy was changed, and investigations were launched in exceptional cases only. Today, according to official policy, all fatal shootings in the West Bank are investigated immediately, unless they took place in what are defined as “combative incidents”. These cases, as well as all incidents in which Palestinians were killed in the Gaza Strip, or wounded by gunfire will be investigated only after the operational inquiry’s findings are reviewed.

The argument that “combative incidents” are, as a rule, exempt from criminal investigation served as justification for the previous investigation policy – in effect for about a decade – under which only a handful of Palestinian fatalities caused by the military were investigated. This argument remains as unsound today as it was then. While it is true that a civilian fatality during fighting does not necessarily mean an illegal act was committed, the fact that a gun battle was underway does not mean that the soldiers acted lawfully.

International humanitarian law (IHL), which regulates the conduct of parties to hostilities, does not grant such a sweeping exemption from investigating civilian fatalities. Instead, it stipulates a number of rules designed to minimize harm to civilians and civilian objects. Under IHL, attacks must target military objectives only, such as combatants, arms and munition stores; the weapons used must be capable of hitting the military target only; and when an attack on a military target may result in harm to civilians and civilian objects, parties are obligated to ensure that such harm is not disproportionate or excessive with respect to the anticipated military advantage. Therefore, before a determination can be made as to whether a fatality was the result of an illegal act, it is first necessary to check whether the soldiers and their commanders followed these rules and did everything in their power to avoid harm to civilians.⁴⁹

The MAG Corps left only one avenue by which investigations may be launched in cases involving gun battles, and it depends on the findings of the operational inquiry. However, as shown above,

48. MAG position paper, pp. 14-15.

49. For more on this issue see, B’Tselem, *Void of Responsibility: Israel Military Policy Not to Investigate Killings of Palestinians by Soldiers*, September 2010, pp. 40-42 (www.btselem.org/download/201009_void_of_responsibility_eng.pdf).

the operational inquiry is not an effective tool for examining criminal liability. Rather than serving to uncover the truth, it actually undermines the investigation.⁵⁰ Moreover, by electing to rely on the findings of the operational inquiry to decide whether to investigate, the chances of there being criminal proceedings are reduced from the outset. Amichai Cohen and Yuval Shany address the difficulties faced by the MAG Corps when it orders an investigation under such circumstances:

Once a decision is made to approach an anomalous case with non-criminal law tools, the justice system will not tend to backtrack. While this is not a conclusive presumption, and the decision can be changed, it seems to us that the chances of that actually occurring are rather low, both because of the tendency not to look at anomalous cases from a criminal angle, as reflected in the very decision to take the route of an operational inquiry (despite its being a problematic tool for conducting criminal investigations) and because of the problems involved in an investigation that begins at a late stage and after an operational inquiry has already been held. For all these reasons, the choice to refer an incident to an operational inquiry cannot be taken as a “neutral” move that has no impact on the final decision. On the contrary. In most cases, choosing the operational inquiry leads to a decision not to prosecute.⁵¹

The empirical findings support these hypotheses: According to figures the IDF provided to the Turkel Commission, since the Military Advocacy for

Operational Affairs was established in 2007, 267 operational inquiries have been reviewed. Only 30 (about 11%) resulted in an MPIU investigation.⁵²

Decisions to close cases or not to investigate

A review of the responses the MAG Corps sent to B'Tselem over the past decade with respect to complaints in cases of fatalities and violence in which a decision was made not to investigate, or to close the investigation with no further action, shows that the MAG Corps provided reasons for its decisions in only 111 of the 220 cases. In the rest of the cases, the MAG Corps just stated that the case had been closed or that a decision had been made not to launch an investigation, without providing the grounds for its decision.

Absence of guilt

In 65 of the 111 cases of fatalities and violence in which the MAG Corps did cite grounds for closing the case or for not launching an investigation, the reason given was absence of guilt.

The MAG Corps' decisions regarding investigations of Palestinian fatalities clearly indicate that it cites the same grounds for closing investigation files as for deciding not to launch an investigation in the first place. Consequently, despite the fact that as of April 2011 MPIU investigations have been launched in nearly all cases in which soldiers killed Palestinians in the West Bank – after almost a decade in which such investigations were launched in exceptional cases only – the change has had little effect on the

50. See above, p. 15

51. Amichai Cohen and Yuval Shany, *The IDF and Alleged International Law Violations: Reforming Policies for Self-Investigation*, Israel Democracy Institute, Policy Paper No. 93, December 2011, p. 72, (Hebrew; English abstract available on IDI website: www.idi.org.il/media/233388/takzir_e_93.pdf).

52. MAG Testimony, pp. 44-45. For more on the operational inquiry, see B'Tselem, *Void of Responsibility*, supra note 48, pp. 42-45; Cohen and Shany, supra note 51 pp. 68-72.

ultimate decision. The vast majority of the cases whose processing has been concluded since the policy changed were closed without any further action. The determination that an act was not criminal and that the soldiers were not guilty has simply been deferred to a later stage in the process. Instead of deciding up front not to investigate on the grounds that there was no criminal act, the cases are now closed for the very same reason, with the decision being made after investigations are carried out. Although the investigation policy was ostensibly altered in response to a change in the situation on the ground – the period of the second intifada versus the years of relative calm that followed it – and the attendant change in open-fire regulations, there has been no discernible change in the final outcome as far as the criminal proceeding goes.

A review of the answers and reasons provided by the MAG Corps shows that its conclusion that the soldiers acted lawfully often relies on incomplete information and on an extenuating reading of the circumstances of the incident. The vast majority of decisions to close an investigation file or not investigate in the first place are not based on external evidence – which is very rarely collected to begin with – but on the soldiers' accounts as given to the MPIU or during the operational inquiry that was forwarded to the MAG for review. This practice virtually ignores the fact that the soldiers being interviewed are suspected of criminal offenses, sometimes serious ones, and would therefore naturally be inclined to defend themselves. This, in turn, would require a measure of skepticism regarding their statements.

The MAG's near complete faith in soldiers' statements is particularly striking in cases of Palestinian fatalities in which the soldiers claim they fired because they felt they were in mortal danger.

This was the reason provided by the MAG Corps in 26 out of 60 cases of Palestinian fatalities regarding which B'Tselem was informed that investigations had been closed – or never opened – on the grounds of absence of guilt.

Clearly, soldiers may find themselves in life-threatening situations during military operations in the West Bank. However, soldiers saying they felt their lives were in danger is insufficient in itself for deciding not to pursue any measures against them. At the very least, the MAG Corps must ascertain that the soldiers had in fact been in mortal danger and not simply take their word for it. Moreover, a situation of mortal danger does not give soldiers an automatic *carte blanche* for all and any actions. Among the issues that must be examined are whether the danger was immediate and necessitated deadly fire; whether the soldiers had other, non-lethal options for retaliating; and whether they were in some way responsible for being in a situation of mortal danger.⁵³

Any claims of being in mortal danger must be thoroughly examined, especially since they are being made by armed, well-protected soldiers trained to handle exactly this type of situation. Therefore, even if the soldiers were in fact in mortal danger, the MAG Corps must also explore broader issues that go beyond the specific incident. For example: what orders were the soldiers given – either orally or in writing – and do they conform to the law; what responsibility do the commanders bear for the soldiers finding themselves in mortal danger; were the soldiers adequately trained to handle the situation they found themselves in; and did the soldiers have other options for dealing with the situation. Questions along these lines, which may broaden the responsibility of both soldiers and commanders, are not examined at all.

53. Regarding these requirements, see, e.g. CrimA 4191/05 Arnold Altgauz v. State of Israel; CrimA 6056/13 Muhammad Shibly v. State of Israel.

Some of the responses the MAG Corps sent B'Tselem cited mortal danger, but also claimed the soldiers had performed suspect-apprehension procedure. Open-fire regulations rightfully make a distinction between situations of mortal danger and a situation in which soldiers following suspect-apprehension procedure fire at a person. An individual facing immediate mortal danger certainly cannot be expected to follow suspect-apprehension procedure step by step: first ordering the individual who poses a threat to halt, next firing a warning shot in the air, and only then taking aim at the person's legs. Making both claims together to justify closing a case raises concerns regarding the sincerity of the claim that the soldiers were in mortal danger.

The responses sent by the MAG Corps also indicate that, as a rule, it grants soldiers a good deal of latitude. Even in cases where it is ultimately found that the person killed had not, in fact, imperiled the soldiers' lives, or that he was unarmed, the MAG Corps still accepts the soldiers' claim of being in mortal danger. In cases of Palestinian fatalities that soldiers said occurred in the course of suspect-apprehension procedure – which is not meant to have a fatal outcome – the MAG Corps accepts the soldiers' claim that the fatal injury was the result of an error.

Obviously, mistakes can happen during military operations, both in reading the situation and in implementing operating procedures. However, incidents that occur in the course of military operations require closer examination of soldiers' claims, including but not limited to, what was done prior to deployment in order to avoid this type of mistake, who was responsible for the mistakes and whether any steps were taken to avert recurrence of the same mistake. The MAG Corps does not probe

these issues either and is satisfied with making a determination that the soldiers had erred.

Absence of evidence

In some of the cases in which the MAG Corps provided a reason for closing the file, it said this was done due to the "absence of sufficient evidence to meet the standard required under criminal law for proving any of the implicated IDF soldiers had committed an offense". Of 111 cases of death and violence in which the MAG Corps provided the reason for its decision not to investigate, 46 were closed for lack of evidence. In most cases, the MAG Corps did not specify what evidence was missing. In some cases, the MAG Corps did provide the details and in others, B'Tselem received the MPIU investigation files and was able to see what evidence had been collected.

The MAG Corps often notes that the complainant refused to give a statement to the MPIU or withdrew cooperation with the procedure. This is noted particularly in cases of violence. Complainants refused to give a statement to the MPIU in 21 of the 35 cases that the MAG Corps informed B'Tselem were closed or not investigated for lack of evidence.

The MAG Corps also often places the blame for closing a file on B'Tselem in cases where B'Tselem originally referred the complaint. For instance, Military Prosecutor Lieut. Hadar Hagai wrote to B'Tselem taking issue with the fact that a complainant refused to give a statement about the violence he was subjected to. This was more than six months after the man had been beaten. The officer noted in his letter that this was "an outrageous waste of resources".⁵⁴ In other cases, the MAG Corps complained that, despite being asked to do so several times, B'Tselem had not provided medical records needed by the MPIU.

Yet the MAG Corps has at its disposal all the resources necessary to reach complainants and obtain medical records from hospitals in the West Bank. Putting the blame for failed investigations on B'Tselem, as if it were an official investigative authority, is ludicrous. B'Tselem helped file the complaints, but the responsibility for investigating, uncovering the truth and seeing justice done lies with the investigating authorities alone.

In at least seven cases, the MAG Corps informed B'Tselem the investigation file was closed without any legal action because MPIU investigators had been unable to locate the soldiers implicated in the complaint. However, information about the soldiers' whereabouts should, at the least, be available to their commanders. Moreover, the military police – which operates from within the military – could reasonably be expected to have relatively free access to soldiers and the relevant military bases. The fact that investigation files are closed because investigators fail to locate the soldiers indicates either a lack of professionalism or a lack of sufficient powers given to investigators to carry out their task.

The MAG Corps monitors and oversees MPIU investigations, and it created the reality in which superficial, inadequate investigations have become the norm. Therefore, any conclusion the MAG Corps reaches based on investigation findings is the product of its own faulty conduct. This means

responsibility for the unsatisfactory results lies with the MAG Corps.

There is no dispute that a decision to bring criminal charges against an individual has to be based on evidence that meets a high standard which offers a significant chance of proving guilt. There is also no dispute that, as officials often claim, investigating incidents in the West Bank – particularly cases of gunfire – might come up against some objective difficulties, including difficulties accessing the scene, which is sometimes located in areas termed “hostile”; speedy burials or the family's refusal to an autopsy; difficulties locating eyewitnesses who agree to speak to the military; and Palestinian witnesses' difficulty identifying soldiers who often operate with their faces covered.

Nevertheless, these difficulties, as well as the fact that criminal investigations by the MPIU hardly ever lead to effective results and therefore the MAG Corps cannot use their findings to support any indictments, have been known to all officials involved for years. Nevertheless, the law enforcement system has taken no action over the years to try and overcome these difficulties, even somewhat, not has it attempted to resolve them. Instead, the system continues to use absence of evidence as an excuse for closing investigations as if this is a surprising and unique feature in a given case.

54. Letter from Lieut. Hadar Hagai, Military Prosecutor, dated 26 May 2014.

D. The MAG as sole ruler: No oversight mechanisms

Civilian oversight of the military law enforcement system is necessary in order to ensure an efficient functioning system that strives to see justice done. However, in the case of the Israeli military law enforcement system, civilian oversight fails to achieve these goals. While officials repeatedly stress the fact that the Attorney General and the Supreme Court oversee the operations of the military system, this oversight is not carried out on a substantive level, nor can it be.

Structural issues: The MAG's centralized authorities

The law gives the MAG broad, exclusive powers. Professor Eyal Benvenisti demonstrated that, unlike the civilian system, the MAG is vested with the powers of the three branches of government all rolled into one:

*The MAG has legislative powers, as he instructs the IDF on what is permitted and what is not permitted in warfare (he does follow international law in doing so, but as the current MAG document shows, the MAG believes he has a great deal of latitude in interpreting the norms of international law); the MAG has executive powers, when he directs the military's operative legal counseling ahead of and during hostilities, and finally, the MAG has enforcement and quasi-judicial powers when he decides to launch an investigation; and the investigation, or lack thereof, determines whether or not offenses will be prosecuted.*⁵⁵

The official position is that the conflict of interests within the MAG Corps, a body responsible for both legal counseling and law enforcement, was resolved

when the two departments were separated in 2007. Nevertheless, there is still a potential conflict of interests, as the soldiers serve as part of the same unit and their promotions all depend on the same person, the MAG.⁵⁶

In addition, the MAG himself still has a dual role, which means he clearly has a conflict of interests if directives he himself approves serve as the basis for illegal acts. The MAG claims his role is comparable to that of the Attorney General, who provides legal counsel to government ministries while at the same time heading the general prosecution. However, as noted by Prof. Benvenisti, the Attorney General's role is different:

*The comparison to the office of the Attorney General is unconvincing because the Attorney General does not determine the norms he requires the various government ministries to implement. These norms are determined by the legislature and interpreted by the courts. By the same token, the Attorney General does not oversee the offices that execute his directives. Rather, this is done by the various government ministries. In addition, there is tighter public scrutiny of the Attorney General, arising from the checks and balances between him and the various government ministries, as well as public opinion.*⁵⁷

Shany and Cohen also cite a number of differences between the MAG and the Attorney General. For example, they note that the MAG is far more likely to find himself in a conflict of interests than the Attorney General, as the legal counsel the MAG oversees sometimes touches on issues involving violations of

55. Prof. Eyal Benvenisti, "The Duty of the State of Israel to Investigate Violations of the Law of Armed Conflict", Expert Opinion submitted to the Turkel Commission, 13 April 2011, p. 24 (Hebrew).

56. *Ibid.*, p. 28.

57. *Ibid.*, p. 24.

fundamental rights, mostly the right to life: “Legal counsel on such questions may frequently lead to practical outcomes that will have to be examined also through criminal law tools. Therefore, the conflict of interests here is at a much higher level”. In addition, the Attorney General heads a much larger system than the MAG, so that “if a personal conflict of interests arises, the role of legal counsel and the role of law enforcer can be more readily separated. In contrast, the MAG himself is involved in providing legal counsel about specific military actions and he is the one who makes the decisions regarding prosecution. Separating his ‘two hats’ is, in some cases, virtually impossible”.⁵⁸

Do oversight mechanisms actually oversee?

Such extensive centralization of powers in the hands of a single person is undesirable to the proper functioning of any system, and all the more so in the case of the military law enforcement system, in which oversight mechanisms do nothing to ensure the system actually fulfills its official role.

Although he has the necessary authority to do so, the Attorney General rarely intervenes in the decisions of the military law enforcement system. The Attorney General also refrains from making independent decisions on matters related to the powers of the MAG Corps in general and the MAG himself in particular. A case in point: in January 2009, after Operation Cast Lead, B’Tselem contacted the Attorney General with a demand to investigate 20 cases of suspected unlawful conduct by the military. B’Tselem chose to approach the Attorney General because of the

MAG’s personal involvement in determining the military’s policy during the fighting. The Attorney General, however, immediately transferred all the communications to the MAG, asserting that the MAG was the official competent to consider them and clarifying that the MAG’s involvement in shaping the military orders did not constitute an issue. A similar communication was sent to the Attorney General by six law professors. Adv. Raz Nizri from the Attorney General’s Office wrote back, saying their letter had been referred to the MAG Corps, which then prepared the detailed opinion he enclosed. He added that the Attorney General was in agreement with the MAG Corps’ opinion.⁵⁹ The Attorney General’s submission to the Turkel Commission also did not elaborate beyond stating that the “positions held in the Military Advocate General document are accepted by the Attorney General’s Office”.⁶⁰

Prof. Benvenisti stated that, “in practice, the Attorney General is satisfied with fully and broadly delegating his powers in the critical sphere of the laws of armed conflict, and in so doing, eschews its duty”.⁶¹ Shany and Cohen also addressed the lack of oversight by the Attorney General on the operations of the MAG, both in terms of law enforcement and of the legal counsel provided to the military:

Because the MAG Corps is the center of knowledge with respect to humanitarian law, there is, in effect, no real civilian oversight of how the MAG Corps implements international law both in terms of legal counsel and in terms of investigations. As a result, there is no true civilian oversight of how the MAG Corps handles

58. Cohen and Shany, supra note 51, pp. 92-94.

59. Letter from Adv. Raz Nizri, Senior Assistant to the Attorney General to Prof. Eyal Benvenisti, Prof. Yaffa Zilbershats, Prof. Barak Medina, Prof. Claude Klein, Prof. David Kretzmer and Prof. Yuval Shany, dated 13 September 2009.

60. Attorney General position paper, para. 5.

61. Benvenisti, supra note 55, p. 25.

*these matters. From Israel's internal constitutional perspective, this is an area where the military has a clear edge over civilian authorities, and at any rate, there is no effective civilian oversight of the military to speak of in this area.*⁶²

Moreover, in his testimony before the Turkel Commission, Shai Nitzan said that the Attorney General is party to the formulation of MAG Corps policy, and that the Attorney General and the MAG routinely consult one another on policymaking as well as decisions in cases considered to be of importance. This cooperation makes the Attorney General's retrospective oversight of MAG decisions "problematic, to put it mildly".⁶³

The HCJ is the second mechanism for oversight of the military justice system cited by officials. However, the Supreme Court, in its role as HCJ, cannot really be cited as an oversight mechanism. The court is an institution to which persons who believe themselves to have been harmed can apply. They do so on their own initiative and with their own funding, based on information which is often only at the disposal of the military and the MAG Corps. The HCJ cannot, of its own volition, initiate oversight of the MAG's work.

The HCJ has not had much occasion to review decisions made by the MAG, as only a very small number of petitions were filed against the military law enforcement system over the years. It is no coincidence that the same two aforementioned judgments are the ones cited as evidence that the HCJ oversees the MAG Corps: they are the only

two judgments in which the HCJ intervened in the MAG's discretion.

Even when the HCJ was petitioned on technical issues, mostly seeking that the MAG make a decision in cases long pending before him, the court's contribution was negligible. While the justices might have been expected to expedite the process, given that the delay was the cause of the petition in the first place, in reality, the legal proceeding itself took a very long time, sometimes years.⁶⁴

Given this reality, the argument that Israel has effective civilian oversight over the work of the military law enforcement system must be rejected. As Prof. Benvenisti concludes:

*From an internal-constitutional Israeli perspective, it is difficult to grasp the way in which the civilian system eschews its obligations and responsibilities relating to the laws of armed conflict when it delegates to the military system the exclusive authority to define the rules for warfare, the rules for investigation and examination, and even the procedures for prosecution and judgment. Civilian control over the military is a basic requirement in any democracy. To have this control, it is necessary to have close civilian oversight of every aspect of the military's work.*⁶⁵

62. Cohen and Shany, *supra* note 51, p. 105.

63. *Ibid.*, p. 104.

64. See, e.g. proceedings in H CJ 2295/15 Subhiya Abu Rahma et al. v. MAG et al. and H CJ 2303/04 Ahmad Muhammad 'Awad et al. v. MAG et al.

65. Benvenisti, *supra* note 55, p. 25.

E. Problems with the conduct of the military law enforcement system

The military law enforcement system is plagued by a host of problems which prevent it from functioning properly. These issues are endemic to the entire system.

Inaccessibility of the military law enforcement system to complainants

The official position is that any Palestinian who wishes to make a complaint against soldiers can do so easily by contacting the MPIU directly or lodging a complaint at any police station in the West Bank.

Reality, however, is very different. A Palestinian who wants to lodge a complaint against soldiers cannot do so independently and has no direct access to the military law enforcement system. Palestinians cannot file complaints with the MPIU directly as it has no bases of its own in the West Bank, and Palestinians are not authorized to enter Israel for the purpose of making a complaint. While the MPIU's Jerusalem unit is housed in the Anatot military camp which is in the West Bank, it is located inside a large military base which is off limits to Palestinians. B'Tselem is not aware of a single case in which a Palestinian managed to get into the base to file a complaint. The quality of the investigation is obviously compromised when the initial information is provided by mediators rather than the complainants themselves.

Although Palestinians may file complaints with police officers in the DCOs or in police stations in the West Bank, even this seemingly simple act is fraught with difficulty. B'Tselem's years of experience show that neither Palestinians nor DCO staff know in advance when a police officer might be available at the DCO. Even when the police

officer's schedule is known and complainants are informed of it, there is no guarantee that the police officer will actually be there at the time. Moreover, even when the police officer is there, complainants often have to wait for hours before they can make the complaint, or else the officer does not speak Arabic and there is no interpreter on hand, so the complaint cannot be filed. Finally, even if the complaint is filed with a police officer, there have been cases when it was later discovered that it was never forwarded to the MPIU.⁶⁶

Once a complaint has been filed, complainants have no way of finding out what was done with it. In reference to this issue, members of the Turkel Commission demanded that the MAG introduce a system to provide updates to complainants. The MAG agreed, and said: "I do accept that and think it is our duty to update the complainants and it doesn't matter whether they are victims or not victims, that's irrelevant. There is a complainant and we should aspire to give him as much information as we can as quickly as we can, I certainly accept that".⁶⁷ As far as B'Tselem is aware, procedures have not been changed and the situation remains as it was.

If an investigation file is closed and complainants want to get a copy of it so they can appeal the MAG's decision, they must apply – in Hebrew – to the MPIU's Investigation Supervision Department. Several months after the initial contact is made, and usually after several follow-up telephone calls and reminder letters, the Supervision Department notifies the complainant that the file is ready for photocopying at the MPIU base in Tel HaShomer, a large military base located near Tel Aviv, in Israel.

66. See, inter alia, Yesh Din report, supra note 45, pp. 46-52.

67. MAG Testimony, pp. 43-44.

No Palestinian resident of the West Bank can do this. They are not familiar with the procedures, which are known only to those who deal with MPIU investigations on a regular basis; Palestinians do not always speak Hebrew; they would not get a permit to enter Israel for the purpose of photocopying the file, and even if they do have permit to enter Israel, they would certainly not be allowed to enter a military base.

As the MAG, the Attorney General and the MPIU commander say, complainants can in fact ask a human rights organization or a lawyer to file the complaint on their behalf and mediate between them and the authorities. Yet any decent law enforcement system cannot rely on mediators as a systemic, permanent solution.

Lack of transparency

In a discussion that came up regarding updating complainants and the organizations who contact the military on their behalf, the MAG said: "I am for transparency".⁶⁸ Yet, the situation on the ground suggests the opposite. The MAG Corps operates in secrecy. It refuses to provide information about cases under its responsibility or cases it is handling, and seems to consider itself exempt from informing the public of its operations.

The military law enforcement system forces complainants to contact it through mediators, be they human rights organizations or lawyers, but makes it extremely difficult for these mediators to obtain information for the complainants. Both the MPIU and the MAG Corps fail to practice transparency. Any attempt to obtain information from them requires repeated communications and in many cases, the information that is ultimately provided is incomplete.

It is nearly impossible to obtain complete figures on the work of the military law enforcement system. Over the years, B'Tselem has often asked the MAG Corps and the IDF Spokesperson for clear information and figures about the work of the military law enforcement system. For example, B'Tselem has asked the MPIU receives complaints, how many of these complaints were investigated and for details about the results – including the number of cases closed with no further action, the number of cases that led to indictments and the results of the trials in those cases. B'Tselem has also asked for information about how investigations were handled, with breakdown by type of incident (i.e., death, violence etc.), as well as by years. The responses have been partial and full of contradictions.

B'Tselem's most recent communication on this issue was in May 2015, when it filed an application under the Freedom of Information Act to the IDF Spokesperson. It too resulted in a partial response and was based only on information supplied by the MAG Corps, disregarding information from the MPIU and military courts. The IDF Spokesperson's main argument was that most of the figures are not available on the MAG Corps computer systems, and locating figures for the years 2000-2007 would involve "substantial difficulties". This statement was made despite the fact that the MAG Corps provided similar figures to the Turkel Commission and that similar figures have been provided to B'Tselem and other organizations over the years. With respect to 2008 figures, the IDF Spokesperson stated that the level of detail B'Tselem requested would involve an "unreasonable allocation of resources, given the painstaking examination it would entail". The IDF Spokesperson estimated that it would take "approximately 530 hours to locate the requested information", and therefore, it rejected this request as well.⁶⁹

68. Ibid., p. 18.

69. Letter from IDF Spokesperson to B'Tselem, dated 30 August 2015.

The IDF Spokesperson agreed to give B'Tselem partial information only, which does not allow for an examination of how the military law enforcement system operates. These incomplete figures make it impossible to study the decision-making progression, beginning with receipt of a complaint and ending with the conclusion of the file. It is impossible to know what happened to MPIU investigations, apart from the few cases in which indictments were served, and it is impossible to know what considerations guided the MAG Corps' decision to close a case or serve an indictment. In addition, it is impossible to know how long each case took to process, including the length of the investigation and the time that elapsed from the conclusion of the investigation and the decision of the MAG Corps.

The contention that the figures are not available on the computer system indicates the problematic view of transparency within the military law enforcement system, given that it chooses what information is entered into the computer system in the first place. The fact that the MAG Corps enters data in such an incomplete manner shows that this is the only information it believes it is obligated to provide the public. Moreover, it evinces a conscious choice not to analyze the data and draw conclusions that might improve its performance.

Getting information on a specific file is also fraught with difficulties: to get a copy of an MPIU file, the organization or the lawyer must provide a power-of-attorney signed by a lawyer. Even then, it could be months before the file is received. In May 2008, human rights NGOs HaMoked: Center for the Defence of the Individual and Yesh Din petitioned the HCJ regarding the long delays, which may amount

to years, in the transfer of investigation files and the MPIU's refusal to provide investigation files to individuals harmed who plan to or have filed a civil suit against the state.⁷⁰ In a hearing held in December 2009, the court ordered the state to draft a proper procedure for transferring investigation files, and dismissed the petition. The procedure, entitled "Processing External Requests to Review MPIU Investigation Materials", was provided about six months later, and stated that the MPIU would strive to complete the process within 75 days and inform the applicant if processing is not completed within 90 days. The procedure also stipulated that the MPIU would not provide investigation materials in cases where legal proceedings of any type were pending. Consequently, the organizations returned to the HCJ, demanding that a civil suit would not preclude receipt of investigation materials and that the MPIU set a more accelerated schedule for the process in order to allow complainants to exercise their rights effectively.⁷¹

The MPIU fails to meet even the timetables it stipulated in the procedure it set out. In addition, copies of MPIU files that are provided to organizations to photocopy are often incomplete, missing documents of various degrees of importance. Attempts to obtain missing documents often last many more months, so that in some cases, B'Tselem has forgone the attempt altogether.

Similarly, obtaining information from the MAG Corps also requires lengthy correspondence, which ultimately culminates with a very brief statement about the outcome in the file. It used to be easier to get information from the MAG Corps. During the first intifada, B'Tselem received a detailed letter stating

70. HCJ 4194/08 al-Wardian et al. v. MPIU Commander et al.

71. HCJ 6477/11 HaMoked: Center for the Defence of the Individual v. MPIU Commander et al.

the reasons for the decision every time a case was concluded. Shortly after the Military Advocacy for Operational Affairs was established in 2007, it began demanding that B'Tselem and other organizations provide a power-of-attorney signed by a lawyer in order to obtain information, citing protection of complainants and witness privacy.

Aside from the fact that this requirement has no legal basis, it is important to keep in mind that Palestinian complainants have no way of contacting the military law enforcement system independently. Nevertheless, the Military Advocacy for Operational Affairs has not withdrawn this demand and continues to provide B'Tselem with general responses only, unless we provide a power-of-attorney. Responses are often sent after repeated reminders, even when a power-of-attorney is provided. This means every complainant must have a lawyer, even if they only want to find out where the case stands, or just to find out if it has been closed.

In his testimony before the Turkel Commission, the MAG said that his office writes very detailed opinions when closing a file. According to the MAG, such an opinion "sometimes takes up a lot of pages. The matters are detailed, these are cases that are very important to us. It is important that there be a detailed explanation, first of all for ourselves. And also for the commanders".⁷² The MAG added that these documents are provided to the organizations. However, these opinions, if they do in fact exist, have never been provided to B'Tselem or other organizations.

Extreme delays

Complaints are processed over the course of months, and even years, from the time of the incident. The

delays are caused by the MPIU and the MAG Corps alike. First, the investigations themselves take a long time because of the difficulties reviewed above in making arrangements for collecting statements from Palestinians and soldiers. Second, the MAG Corps delays its own decision. In cases in which the MAG Corps does not immediately order an investigation, much time goes by before it makes a decision whether or not to launch an investigation. This is sometimes the result of the need to wait for the findings of the operational inquiry and sometimes due to other holdups. Even when an investigation is conducted and its work concluded, it could take months or years for the MAG Corps to make a decision on how to proceed with the case.

A review of investigations opened in cases of Palestinian fatalities from the beginning of the second intifada until the April 2011 policy change shows how lengthy processing times are. An MPIU investigation was opened in 44 of the incidents B'Tselem referred to the MAG Corps. In the 41 cases in which B'Tselem knows the date the investigation was begun, it took the MAG Corps an average of 525 days (almost a year and a half) to order an investigation. In 28 of these files B'Tselem knows the date the processing of the case ended. On average, it took 1,163 days (about three years and two months) to make that decision. The average time that elapsed from the time of the incident and the conclusion of processing in the 31 cases regarding which B'Tselem has this information, is four years.

The Turkel Commission recommended capping the time between the decision to launch an investigation and the decision on how to proceed with the file. The Ciechanover Committee, appointed to implement this recommendation, set a nine-month cap on

72. MAG Testimony, p. 13.

investigations, but it may be extended for three additional months. The MAG Corps attorney would have to make a decision within nine months from the conclusion of the investigation, and in more complex files, including fatalities, within a year. These timeframes may be extended by several months, subject to approval by the MAG.⁷³

Even if implemented, these recommendations still set out an unduly long processing time. This is not a theoretical issue. It is a practice that directly undermines the quality of the investigation and the ability to uncover the truth. Aside from the drawbacks involved in collecting relevant statements and evidence long after the fact, as reviewed above, the delays give rise to other issues. The Military Jurisdiction Law applies to soldiers during their mandatory military service, as well as reservists in active service. It continues to apply with respect to offenses committed while on duty, but not without limitation. Indictments may be served within 180 days (with the exception of certain offenses) from the time a soldier is discharged from mandatory service.⁷⁴ Reservists must be indicted within a year (again, with the exception of certain offenses).⁷⁵ Once the law no longer applies to the soldiers, the MAG Corps no longer has jurisdiction to review cases involving ex-soldiers and it must transfer them to the civilian prosecution. In practice, the MAG Corps does not do so, and now has hundreds of cases it has no jurisdiction over.

The Supreme Court addressed this issue in a petition filed by B'Tselem to compel the MAG to reach a decision in the killing of Samir 'Awad. During the hearing that took place two years after 'Awad's death, the justices expressed their dissatisfaction that the proceedings were still underway after the soldiers involved in the shooting had already been discharged from active service. The fact that the two main suspects had been discharged from mandatory service 12 and six months before the hearing, and that the MAG Corps had advance knowledge of the dates of their discharge, added to the court's criticism. The hearing also touched on the issue of the MAG's authority to make decisions in cases involving suspected offences committed by long-since discharged soldiers who are no longer subject to the Military Jurisdiction Law. Adv. Avinoam Segal-Elad of the State Attorney's Office, said that under current practice, if the MAG concludes that there is not enough evidence in the case to prosecute, the MAG Corps is the body that has to make the decision to close the case. The justices, however, rejected this claim. Justice Daphne Barak-Erez said: "Even the decision to close a case must be made by the competent official". Justice Uri Shoham added: "What relevance does the MAG's decision have? He is not the person who needs to make the decision... They are not under his jurisdiction and he is not the official competent to make the decision. This requires examination". The justices ordered the State Attorney's Office be added as a respondent in the case.⁷⁶

73. *Report of the Team for the Review and Implementation of the Second Report of the Public Commission for the Examination of the Maritime Incident of May 31st 2010 Regarding Israel's Mechanisms for Examining and Investigating Complaints and Claims of Violations of the Law of Armed Conflict According to International Law*, August 2015, pp. 35-36. [Available in English on the Prime Minister's Office website: <http://www.pmo.gov.il/Documents/ReportEng.pdf>].

74. Military Jurisdiction Law 5715-1955, Sec. 6.

75. *Ibid.*, Sec. 11.

76. HCJ 2302/14 Ahmad Muhammad 'Awad et al. v. MAG et al., hearing, 1 December 2014.

Such lengthy proceedings do not allow justice to be done. First, the protracted time the justice system takes to process a case, along with the difficulties in receiving pertinent, substantive answers as to the current status of the case, wears down the complainants and representatives on their behalf. Some will withdraw at some point during the lengthy proceedings. Others will forego further steps, such as appealing a decision. Others still will choose not to file a complaint in the first place. Second, if the soldiers are ultimately charged, this will happen

long after the incident, when the witnesses memory of events has grown dimmer and the evidence has disappeared. This impedes the possibility that the process would actually allow the defendants to get at the truth or give the defendants a fair trial.

A law enforcement system that operates so slowly and ineffectively cannot deter soldiers from committing offenses, as they clearly see that no harm will come to them if they break the law and harm others.

Conclusions

The current military law enforcement system does not allow for justice to be done, because in effect, it absolves those responsible for the commission of offenses – policy makers, MAG Corps officers, those who issue the commands and the soldiers themselves – of accountability for harm to Palestinians and unlawful acts. All this system can supply is a semblance of justice.

The role of the military law enforcement system has been narrowly defined to begin with: it investigates only specific incidents in which soldiers are suspected to have acted in breach of the orders or directives they were given. The system does not investigate the orders themselves nor the responsibility of those who issue them and make or determine the policy. As such, the system is oriented toward low ranking soldiers only, while senior military and government officials, including the MAG, are absolved in advance of any responsibility. In this state of affairs, even if the system had fulfilled its tasks, its contribution to law enforcement would still remain limited.

However, an examination of the operation of the military law enforcement system indicates that it makes no attempt to fulfill even this limited mandate. In roughly 70% of complaints, the investigation ends with no further action, or else no investigation was even opened. Only 3% of complaints resulted in charges brought against soldiers for harming Palestinians. This paper, which is based on the vast amount of information B'Tselem has amassed over 25 years of work, points to the structural failures that underpin the military law enforcement system's ability to process a sizeable caseload and yet close the vast majority of cases without any further action:

With MPIU investigations conducted negligently, investigators cannot get at the truth. Almost no effort is made during the investigation to collect

external evidence, the system citing as an excuse difficulties of which it has been aware for years and which it has made no attempt to resolve. Instead of evidence, investigations rely almost exclusively on statements collected from soldiers and Palestinians. Nevertheless, the investigation files show that MPIU investigators are hard put to collect these statements, which are often obtained only months after the incident. At witness statement interviews, investigators function more like stenographers taking dictation than staff tasked with uncovering the truth. This is the case even when soldiers' statements are found to contradict the accounts given by other soldiers or by the complainants.

The investigation file is transferred to the Military Advocacy for Operational Affairs, which is guided by considerations that almost inevitably dictate closing the file with no further action. Many cases are closed for "absence of guilt", since the MAG Corps simply assumes that the accounts given by soldiers suspected of committing an offense are reliable – usually with no supporting evidence. In addition, the decision of the MAG Corps – which accompanies the investigations from the very start and oversees them – has done nothing to improve or make them more rigorous, instead finding the lax MPIU investigations sufficient for making its decisions. Under these circumstances, the fact that many cases are closed for absence of evidence is no surprise. Since no serious effort is made to obtain evidence, it clearly could not support a criminal case.

In many other cases, the Military Advocacy for Operational Affairs elects not to launch a criminal investigation at all. Sometimes, it justifies its decision on the grounds of "absence of guilt". Here, too, it does so on the basis of soldiers' accounts of events. Sometimes, in cases in which there are Palestinian fatalities, the grounds are that the deaths were in "combat situations", an exclusion that grants

sweeping immunity to soldiers from criminal investigations, far above and beyond that granted by international humanitarian law. The military law enforcement system also draws legitimacy from the ostensible existence of oversight mechanisms within the civilian system in the form of the Attorney General and the Supreme Court, saying they are meant to oversee the work of the MAG, who wields extensive authorities, as well as the work of the MAG Corps as a whole. However, the Attorney General elects to delegate most of his powers to the MAG and refrains from intervening in his decisions. As for the Supreme Court, it is not meant to serve as an oversight mechanism, and in the few cases in which it was asked to deal with this issue, for the most part it preferred not to intervene.

The military law enforcement system is plagued by a host of issues in the basic way it is run: The system is inaccessible to Palestinian complainants, who cannot file complaints with the MPIU directly and must rely on human rights organizations or attorneys to file the complaints on their behalf. The processing of each complaint lasts months, and even years, so that often enough soldiers who are the subject of the complaint are no longer under military jurisdiction. Both the MPIU and the MAG Corps act without transparency, and getting information from them - both about a complaint filed, as well as with general information about their work - requires repeated requests. This is the system that officials bring as proof - to Israel and the world - of their claim that the military does everything in its power to investigate complaints against soldiers responsible for harming Palestinians and to prosecute the offenders. Top officials boast of the system's effectiveness and values, discounting any substantive criticism, despite the fact that the system's operation and the outcomes of its work are well known to senior officials both in and outside the military.

While changes have been made to the military law enforcement system over the years, they mostly served to reinforce the impression that efforts were being made to get at the truth, and did not resolve the system's substantive problems.

The deliberations and recommendations of the Turkel Commission ought to be considered against this backdrop. The Commission, which published its conclusions already three years ago (February 2013), recommended a number of improvements to the military law enforcement system. The following were among the Commission's recommendations: amendments to legislation that would include legislation against war crimes and address the criminal responsibility of commanding officers for the actions of their subordinates; improving MPIU and MAG Corps work methods - including setting shorter schedules for processing time; establishing an MPIU unit designated for handling complaints by Palestinians; greater transparency in the work of the MAG Corps; and a number of measures meant to enhance the MAG's independence. The implementation of these recommendations, which has already begun, may improve appearances of the current system, but it will not remedy the substantive flaws plaguing the military law enforcement system.

After the Turkel Commission published its recommendations, the government appointed another committee to implement them - the Ciechanover Committee, which submitted its own recommendations in August 2015. In its report, the Ciechanover Committee advocated the implementation of some of the Turkel Commission recommendations verbatim, stated that the implementation of others would require allocation of additional resources, and suggested some minor changes in yet other recommendations. The Ciechanover Committee concluded by stressing that its report is not the final word on the subject,

and that some issues still require more work. It recommended the establishment of another agency that would follow up on the implementation of its recommendations.

And so, report after report, committee after committee, the discourse in itself creates the illusion of movement toward changing and improving the system. This illusory movement allows officials both in and outside the system to make statements about the importance of the stated goal of enforcing the law on soldiers, while the substantive failures remain as they were and most cases continue to be closed with no measures taken.

Among other things, the semblance of a functioning justice system allows Israeli officials to deny claims made both in Israel and abroad that Israel does not enforce the law on soldiers who harm Palestinians. In so doing, the state ensures that the military law enforcement system will remain in the sole purview of the military. The military, in turn, will be able to continue its investigation policy in which only the junior ranks are (ostensibly) investigated, while senior commanders and civilian superiors are absolved of accountability for unlawful acts committed under their authority.

Appearances also help grant legitimacy – both in Israel and abroad – to the continuation of the occupation. It makes it easier to reject criticism about the injustices of the occupation, thanks to the military's outward pretense that even it considers some acts unacceptable, and backs up this claim by saying that it is already investigating these actions. In so doing, not only does the state manage to uphold the perception of a decent, moral law enforcement system, but also maintains the military's image as an ethical military that takes action against these acts (defined as “aberrations”) and even has an extensive, professional system for doing so.

Effective investigations that get at the truth are critically important. For the victims and their loved ones such a system would mean getting justice, in that action would be taken against those responsible for death and injury. An effective law enforcement system would also serve the public interest by deterring soldiers and officers from committing similar offenses and thereby preventing future harm. This is why establishing legal liability and accountability for human rights violations is the core of the activities of human rights organizations both in Israel and abroad.

And so, for 25 years, with a view to establishing accountability and preventing future harm, we contacted the military law enforcement system and demanded that soldiers suspected of harming Palestinians be investigated. Over the years, the military law enforcement system has grown to expect that human rights organizations, including B'Tselem, serve as subcontractors for the military investigative system: that they submit the complaints, coordinate collecting statements, obtain documents, and so forth.

Although this is not B'Tselem's job but the responsibility of the military system, we have elected to perform it for the last 25 years for a variety of reasons. One of the reasons we did so was that we hoped that in this way we were helping bring justice to the Palestinian victims and helping to establish deterrence that would prevent future such incidents. If that had been the outcome, this paper would not have been written. In reality, however, B'Tselem's cooperation with the military investigation and enforcement systems has not achieved justice, instead lending legitimacy to the occupation regime and aiding to whitewash it.

B'Tselem will no longer play a part in the pretense posed by the military law enforcement system and

will no longer refer complaints to it. The experience we have gained, on which we base the conclusions presented in this report, has brought us to the realization that there is no longer any point in pursuing justice and defending human rights by working with a system whose real function is measured by its ability to continue to successfully cover up unlawful acts and protect perpetrators.

We will continue to document and report on Israel's human rights abuses in the occupied territories, but we believe that the task of advancing human rights protection in the occupied territories will not be served by efforts to help shoddy investigations that would, in any case, end up being much watered down by MAG lawyers. The fight for human rights will be better served by denouncing this system and exposing it for what it is.

MAG Corps handling of incidents referred by B'Tselem – 2000-2015

	Fatalities		Injuries	Beating	Property damage	Human shield	Total
	Up to April 2011	Since April 2011 (subsequent to change in investigation policy)					
Decision whether to open investigation pending	3	4	1	10	3	3	24
No investigation opened	82	9	47	30	12	2	182
Under investigation	1	15	4	37	10	2	69
Case closed	32	13	38	199	46	15	343
In MAG processing	7	24	7	1			39
Indictment filed	6	2	4	11	2		25
Referred to disciplinary action	1		4	5	3		13
Communication not found	8	1	17	7	2	9	44
Total	140	68	122	300	78	31	739

Illustrative Cases

The Killing of Wadi' Samarah

15 years old, shot in Jenin on 6 September 2007, died four days later

The incident

Fifteen-year-old Wadi' Samarah was hit in the back of the neck by a rubber-coated metal bullet on 6 September 2007, in the northern West Bank town of Jenin. B'Tselem's inquiry found that, on that day, several military vehicles were stationed on the main road leading to Jenin. The vehicles were parked near the eastern entrance to the town, where several schools and small factories are located. Eyewitnesses told B'Tselem that schoolchildren were standing by the sides of the road, some throwing stones and empty bottles at the troops. Some of the soldiers pursued the pupils by jeep, while other soldiers hurled stun grenades, and fired tear gas and rubber-coated metal bullets.

Around 11:00 A.M., witnesses saw a jeep pursuing several teenage boys. One of them, Wadi' Samarah, ran towards the factory from which the witnesses were looking out. According to their account, when Samarah reached the factory's gate, one of the soldiers in the jeep shot him in the head from about 20 meters away, without any prior warning. Samarah fell to the ground. The military transported him by helicopter to Rambam Hospital in Haifa, Israel, where he succumbed to his wounds four days later, on 10 September 2007. According to his medical records, Samarah was hit from behind, in the back of the neck, by a rubber-coated metal bullet, a type of bullet used in crowd control that is not lethal when used in accordance with regulations.

The investigation

On 18 September 2007, eight days after Samarah died, B'Tselem wrote to the MAG Corps demanding that the incident be investigated. At that time, MAG Corps investigation policy stipulated an operational inquiry must be held before the MAG Corps decides whether to launch a criminal investigation. B'Tselem was therefore, informed that the request had been forwarded "to the relevant military officials". The MAG Corps did not inform B'Tselem that a decision had been made to investigate the incident. Only later, after many follow-up queries, did B'Tselem learn that an MPIU investigation had begun. Once concluded, the investigation file was sent to the MAG Corps, which sent it back to the MPIU for further investigation. At some point – B'Tselem does not know when – the MAG Corps forwarded the file to the State Attorney's Office, probably because the shooter had since completed his military service and was no longer subject to Military Jurisdiction Law.

In April 2014, almost seven years after Samarah was killed, B'Tselem received notice from the Tel Aviv District Attorney's Office that "after a thorough, comprehensive examination of the investigation material in the case at hand (including the results of the significant additional investigation carried out at our request), and with the

agreement of the Deputy Central District Attorney, we have decided to close the case against the suspect ... on grounds of lack of sufficient evidence.”

B'Tselem asked the MPIU for a copy of the investigation file. The copy sent was incomplete: Some of the statements mentioned in it were missing (including those of the shooter and the driver, who had been sitting beside him), and others were truncated and incomplete.

The portions of the investigation file sent to B'Tselem show discrepancies between the contents of the file and MAG Corps responses to inquiries by B'Tselem. On 16 March 2009 and 4 February 2010, the MAG Corps wrote to B'Tselem that the case was undergoing further investigation. However, the file indicates that from 5 March 2008 to 19 August 2010, no investigative action whatsoever was taken in the case. In May 2013, the MAG Corps replied to another inquiry by B'Tselem that the case was undergoing further investigation; yet the investigation log and the file itself indicate that the last investigative action in the case was taken more than two years earlier, on 15 February 2011.

The file indicates that the investigation was formally launched on 27 January 2008, almost five months after the incident, yet it then took another month to actually begin the investigation proper. In a departure from common practice, the MPIU investigator contacted the Jenin DCO without mediation. He asked that Wadi' Samarah's father, Khalil, be summoned to give a statement, although he had not witnessed the incident. In his letter, the investigator requested that Khalil Samarah obtain the personal details of eyewitnesses – including names, ID numbers, and phone numbers – and bring this information with him to the interview. The father's actual statement, given on 28 February 2008, is missing from the file. Nevertheless, the investigation log records that Khalil Samarah said that his son had been shot in the head from behind, had been taken to Rambam Hospital in a helicopter, and had died of his wounds several days later. He also gave the investigator the names of two eyewitnesses, but not their phone numbers.

Over the next few days, the investigator tried to track down the soldiers involved in the incident. Several days later, on 4 March 2008, the battalion's operations officer, Captain Amit, sent him an email stating that, “the incident was an incident that took place during an operation by the brigade in the town of Jenin, over the course of which the battalion was confronted with many disturbances of the peace by Palestinians, including: throwing many stones and rocks at our troops, throwing explosives at our troops, gunfire. The commander of the unit who hit the stone-thrower was me, as part of my duties as operations officer (I also carried out the shooting) – the teenager threw many stones at the vehicle and was shot by me with rubber.”

The investigation was stopped at that point and it was not until August 2010, almost two and a half years later, that it recommenced. There is nothing in the file to explain the lengthy break in proceedings. However, in a document submitted to the court after the investigation was resumed, in which the investigator requested Samarah's medical records from Rambam Hospital, he noted that the investigation had been put on hold in 2008 "in light of an operational inquiry in the unit" and that the Military Advocacy for Operational Affairs had recently requested that the investigation resume.

Upon resuming the investigation, the investigator tried to arrange for Captain Amit and the driver of the jeep, Evyatar – both of whom had already completed their military service – to give their statements. Eventually, he succeeded in taking a statement from Evyatar on 1 September 2010 and from Captain Amit the next day. Neither statement appears in the file. However, in other statements that B'Tselem did receive, the questioning MPIU investigator indicates that Captain Amit said in his statement that he fired a rubber-coated metal bullet from a distance of 40 to 50 meters. He said he observed that the teen had been hit and stated that no other weapons had been fired.

After the investigation resumed, the MPIU investigator sent a request to the police officer at the Jenin DCO "to summon and question Palestinians". He detailed four names of individuals living in the area of Jenin, but did not explain why he wanted their statements or how they were related to the incident. In any event, the investigator made many attempts to arrange to get their statements – always through the same DCO police officer – but to no avail. In some instances, the police officer did not respond, in others he responded that he did not yet have an answer, and at times he promised an answer the next day. Ultimately, by February 2011 – when the investigation ended, according to the investigation log – the statements had not been given.

Only in early October 2010, after many attempts, did the investigator manage to speak with Staff Sergeant Shahaf, who Captain Amit said was the signaler and was with him in the jeep. He too had already completed his military service. According to the investigation log, Staff Sergeant Shahaf told the investigator that he "remembers the incident in which Amit 'shot a kid in the head'" and that he "doesn't understand how Amit didn't get punished at the time and is happy he'll be able to screw over his previous company commander". The investigator noted in the investigation log that he told Shahaf that he "must take the matter seriously, show up for questioning, tell the whole truth and not lie or be flippant just to 'screw over' his previous commander". Staff Sergeant Shahaf gave his statement on 10 October 2010.

According to his statement, only part of which was sent to B'Tselem, "We drove the jeep into the alley, the children ran away. Amit fired several rubber bullets every time. At some point, we made a U-turn in the alley and drove out the way we came in. We did that about three times. That happened several times. The last time, I guess the kids ran away, I wasn't looking, and he fired a bullet. I didn't see how far it was, if the kid was running, standing, crawling, suddenly approaching or not. That's it, he fired a shot. I got out and saw what I saw." Staff Sergeant Shahaf added that when the vehicle stopped, "the kid was about 5-10 meters away from the vehicle." The investigator read him the statement made by Captain Amit, but Shahaf responded that a person cannot be killed by a rubber-coated metal bullet from 40-50 meters away.

On 7 October 2010, the investigator obtained the medical records from the hospital. He also interviewed the doctor who treated Samarah. In his statement, the doctor said that Samarah had been hit in the back of the neck by a rubber-coated metal bullet as he was fleeing. When the investigator asked if Samarah could have been shot from 40-50 meters away, the doctor replied that at that distance, the bullet would not have penetrated the body.

The investigation file indicates that the investigator went to great lengths to understand the use of rubber-coated metal bullets – which are meant to be a non-lethal means of crowd control. The investigator spoke with four weapons experts in the military and read related literature that is included in the file. All the experts said that 50 meters is the safety range for a round of three rubber-coated metal bullets – which is the type of ammunition Captain Amit fired and what hit Samarah – so that firing from closer range could have fatal consequences.

Three months later, the MPIU investigator sent the material he had compiled to the National Institute of Forensic Medicine, including the statements made by Captain Amit, the battalion commander, the doctor who treated Samarah and the weapons experts. The experts' statements gave technical information concerning rubber-coated metal bullets. The investigator asked the Institute about the type of bullet, whether a rubber-coated metal bullet could be fatal, and from what distance the bullet was fired. An opinion written by Dr. Yehuda Hiss, then director of the Institute, stated that "penetration of the skull by a rubber bullet can cause death". He wrote that the range from which the bullet was fired at Samarah could be up to about 30 meters but could also be greater, and that he cannot make a determination based on the available information. Dr. Hiss concluded by stating that he could not say anything about this particular case as, "in the absence of a

detailed description of the bullet's entry wound ... the possibility that the bullet was fired from a close range or even in contact with the person can be neither verified nor refuted”.

On 14 November 2013, six years after Samarah was killed, the MAG Corps informed B'Tselem that the investigation file had been transferred to the Tel Aviv District Attorney's Office. About six months later, Adv. Ro'i Reiss of the Central District Attorney's Office informed B'Tselem that the case had been closed on the grounds of lack of evidence.

As Adv. Reiss provided no explanation for his decision, B'Tselem cannot know what evidence the District Attorney's Office thought was missing nor why – after six years that included an investigation and later additional investigation – no attempt was made to obtain this missing information, instead making do with the information available in the file. Regardless, it is unclear what evidence was missing, when the material in the existing file indicates that Samarah was shot in the nape of the neck by a rubber-coated metal bullet, apparently from 30 meters away, a distance that all the experts agreed is not far enough under safety regulations. There was no dispute as to the identity of the shooter, who admitted to being at the scene and to shooting a minor in the back of the neck from less than 50 meters away. A soldier who was in the jeep with him confirmed this account. Nevertheless, despite all this material, the District Attorney's Office decided to close the case without any further legal proceedings.



The Killing of Ibrahim Sarhan

21 years old, of al-Far'ah Refugee Camp, Tubas District, 13 July 2011

The incident

Ibrahim Sarhan was shot and killed on the morning of 13 July 2011, during a military operation for apprehending wanted individuals in al-Far'ah Refugee Camp. Sarhan was not one of the wanted individuals. Statements collected by B'Tselem and the investigative materials in the file indicate that Sarhan was walking in the camp in the direction of an area the military had closed off when he came across three soldiers from the Duvdevan Unit. The troops' commander, Staff Sergeant Hagai, ordered him to stop and put his hands up. Sarhan did so, but then turned around and fled.

Staff Sergeant Hagai initiated a suspect-apprehension procedure: he called out to Sarhan to halt, fired one shot in the air, and then shot at Sarhan, hitting him in the thigh. The injured Sarhan managed to flee and hid in a nearby home, but was found by the soldiers. The soldiers gave Sarhan first aid. He was then evacuated in a Palestinian ambulance and died en route to the hospital.

The investigation

Ibrahim Sarhan was the first Palestinian to be killed by soldiers in the West Bank after April 2011, when the MAG announced a new investigation policy in cases of fatalities whereby, as a general rule, an MPIU investigation would be launched immediately. In keeping with the announced policy, an investigation was in fact opened the very day that Sarhan was shot. The last investigative action in the file was on 21 November 2011, about four months after the investigation began.

More than a year later, on 6 February 2013, the MAG Corps informed B'Tselem that the case had been closed on the grounds of lack of evidence. In July 2013, B'Tselem appealed to the MAG against the decision, after a review of the investigation file revealed solid evidence that the fatal shooting was carried out in violation of open-fire regulations and without any justification. Two years later, on 5 February 2015, the Chief Military Prosecutor, Colonel Ehud Ben Eliezer, informed B'Tselem that he had decided to reject the appeal after finding the conduct of the soldier who shot Sarhan to be "not unreasonable".

According to the investigation file, the MAG Corps ordered the MPIU to launch an investigation the day the incident took place. However, all that Deputy Military Advocate for Operational Affairs Dorit Tuval instructed the investigators was that they speedily obtain the daily reports of the brigade and battalion involved in the incident and forward them to the Military Prosecutor, who would decide if the case merits further investigation. These instructions mean that, at least in this case, the change in investigation policy

was largely declarative, and that launching a criminal investigation still depended on the decision of the MAG Corps.

The discrepancy between the incident as reported in the brigade's daily log and the description reached by the investigation illustrates just how meaningless the investigative instructions given to the MPIU were. The daily log noted that, "during the incident, an explosive device was thrown at the force and the force responded with fire. As a result of the gunfire, a Palestinian was hit in the legs". Over the course of the investigation, it transpired that the incident in question had in fact occurred altogether differently.

In any event, the day after the incident, the Chief Military Prosecutor received the daily logs and ordered that the investigation continue. However, the field officers – including the commander of the West Bank Division and OC Central Command – and senior MPIU officials prevented the investigators from questioning the soldiers for seven days, until after the operational inquiry within the unit was completed on 19 July 2011. They insisted on this even though the shooter, Staff Sergeant Hagai, said in his statement that he says he did not take part in the operational inquiry as he concluded his military service the day after the incident. Accordingly, the effectiveness of the operational inquiry and the ability to draw conclusions from it for future implementation were limited.

Even once the investigation resumed, the investigators gathered very little evidence, and barely used even that. For instance, at no time did they seize the soldiers' weapons, although they could have done so even before the operational inquiry was over. In retrospect, it is clear that the identity of the soldier who fired was not in doubt, but the investigators were not aware of that when they first began the investigation. They also made do with collecting statements about the plan for the arrest mission, instead of demanding to see the plan itself (except for the photographs of the wanted individuals who were caught). The investigators also obtained an aerial photograph of al-Far'ah Refugee Camp, but showed it only to the last soldier to give a statement.

Over the course of the investigation, seven statements were given: six by soldiers and one by the Palestinian pathologist, who presented the findings of the autopsy. Four of the soldiers – the team involved in the shooting and their company commander – were questioned under caution. The battalion commander and Central Command's operations officer were also questioned. The company commander was the only one asked, apparently at random, if he would agree to undergo a lie-detection test, although he had not even witnessed the incident. He agreed, yet the test was never carried out. When the soldiers gave their statements, the investigators checked their replies against open-fire regulations. According to the regulations, soldiers are allowed to open fire

in one of two cases only: immediate mortal danger, which permits shooting to kill; or in suspect-apprehension procedure of an individual suspected of having committed a dangerous crime, which permits, as a last resort only, shooting at the leg below the knee. The regulations stress that if a suspect does not comply with the call to halt or attempts to flee, that does not, in itself, indicate a risk of a dangerous offense and therefore does not permit firing the suspect. According to the investigation material, open-fire regulations also distinguish between two types of attempts to flee: "a runner" is a person escaping from an area that has been closed off so that the military can carry out an arrest, while "a flier" is a person entering the closed-off area. Suspect-apprehension procedure is permitted only against "a runner".

The two soldiers who were with Staff Sergeant Hagai during the incident explicitly stated in the statement they gave to the MPIU that, based on the direction in which Sarhan was walking, he could not possibly be considered "a runner" but only "a flier", as he was walking towards the area they had closed off, not running away from it. One of the soldiers noted that Sarhan was not the target of the arrest raid and was not a wanted individual. When asked whether the shooting complied with the requirements of open-fire regulations, one of the soldiers, Assaf, said it had not and explained that, "the local didn't come from the relevant areas, so according to the open-fire regulations, he [should] have been treated as a flier. I mean up until firing into the air. [But] that is also up to the combatant in the field to decide what to do".

In the statement he gave to the MPIU, Staff Sergeant Hagai justified his shooting of Sarhan on three counts. First, he argued, Sarhan fit the definition of "runner"; second, in Staff Sergeant Hagai's view, Sarhan matched the description of one of the wanted individuals – "young, thin, with short hair"; and third, Sarhan was suspected of having committed a dangerous offense because of his conduct, and especially because he started running away. None of these explanations can justify the decision to shoot Sarhan.

As for the first argument, that Sarhan constituted "a runner": the definitions laid out in the open-fire regulations are very clear, and the other members of his team had classified Sarhan as "a flier", based on the very-same regulations and definitions. Second, a great many people could match the general description noted by Staff Sergeant Hagai. Obviously, being young and thin with short hair is not enough to merit being treated as "suspected of committing a dangerous crime". Moreover, several soldiers said in their statement that they were shown photographs of the wanted individuals in preparation for the mission, whereas Hagai himself claimed he had not been shown these photographs. The investigators did not press him to explain why. His two team members, Assaf and Yochai, did not say that Sarhan was in any way similar to the

individuals in the photographs they were shown.

The third argument, that Sarhan's conduct rendered him suspicious, is also baseless and runs counter to open-fire regulations. Hagai stated that Sarhan "got really scared by the military presence" and that "when a local runs away like that, he's got something to lose", otherwise "he'd try to prove his innocence, he'd talk, heed the call to *wagef* [=stop, in Arabic], and answer our questions". Hagai's argument patently contradicts open-fire regulations, which explicitly state that running away does not, in itself, render an individual "suspected of committing a dangerous crime".

Only after the investigators questioned all the soldiers who took part in the arrest raid did they contact B'Tselem in an attempt to obtain medical information about Sarhan. The medical records that were obtained, which showed that Sarhan was shot in the thigh, against regulations, contradicted the accounts provided by several soldiers, who claimed he was shot below the knee. Yet the investigators did not bring any of these soldiers in for further questioning and did not try to resolve this point with them in any other way.

The MPIU did not interview a single Palestinian eyewitness to the incident. The investigators did try, through B'Tselem, to arrange for an eyewitness statement by a relative of Sarhan's who had apparently been with him at the time of the incident. The relative initially refused to give a statement to the MPIU. He later came around, and efforts began to arrange for a place where he could meet with the investigators. Although the DCO nearest to the refugee camp is situated in Nablus, the investigators suggested various other locations for the meeting, all of them far from the man's home, none of which he could reach without considerable trouble and effort. When the investigators finally tried to arrange for the meeting to be held at the Nablus DCO, it transpired that the only police officer serving there was just about to go on leave. The investigators once again suggested several locations that would significantly burden and inconvenience the witness, and he eventually changed his mind and retracted his agreement to give a statement.

The material gathered in the investigation file clearly shows that Staff Sergeant Hagai fired at Sarhan as the latter was running away after Hagai had called out to him to stop; it is clear that Sarhan was not suspected of committing a dangerous crime; that he was on his way towards the area closed off by the military and not away from it; and that the team headed by Hagai was not in danger at the time. Nonetheless, the MAG Corps twice accepted Staff Sergeant Hagai's arguments: both when the Military Advocate for Operational Affairs decided to close the case, and again

when the Chief Military Prosecutor denied B'Tselem's appeal.

In his reply to B'Tselem, the Chief Military Prosecutor selectively cited the MPIU's investigation material, relying almost exclusively on the statement by the shooter, Staff Sergeant Hagai, in establishing that the latter's actions were legitimate: despite the statements given by the other two team members to the contrary, the Prosecutor determined that the direction in which Sarhan was walking could not be definitively established. He also accepted at face value Staff Sergeant Hagai's account, that during an arrest mission, an individual – whom Hagai alone thought looked like one of the wanted individuals – reached an area that the military had closed off and suddenly began running away. The Prosecutor concluded that Hagai had acted legitimately: "The subjective understanding of the soldier who fired the shot – that this was a person who meets the conditions of a suspect in a dangerous crime, and action could be taken to apprehend him, including by shooting at his legs if he did not respond to a call to stop or to a warning shot in the air – was not unreasonable."

In reaching these conclusions, the Chief Military Prosecutor effectively rendered the open-fire regulations meaningless. Instead, he chose to place the burden on the "subjective" perception of the soldier who fired the shot, ignoring the question of whether this perception had any basis in the objective reality at hand. This omission is particularly glaring given the fact that the two soldiers who were on the scene with Staff Sergeant Hagai, operating under identical circumstances, provided a different account.

Open-fire regulations stipulate when gunfire is permissible. They are meant, by definition, to apply to cases when soldiers might feel they are in mortal danger. The regulations are supposed to function as safety measures for these very situations, with a view to reducing the risk inherent to any use of firearms and to minimize harm to civilians. In some scenarios, the regulations do leave considerable room for the individual discretion of the soldier in the field. However, in clear-cut cases such as the one at hand, there is no justification for broadening the discretion given the soldiers.

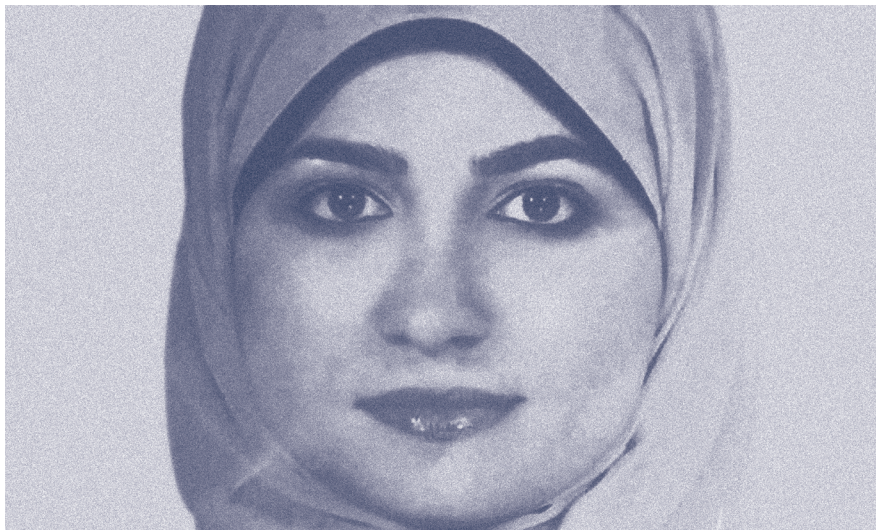
The Killing of Lubna al-Hanash

21 years old, near al-'Arrub Refugee Camp, Hebron District, 23 January 2013

The incident

On 23 January 2013, 21-year-old Lubna al-Hanash of Bethlehem went to visit a relative, Sou'ad Ja'rah, then 38, at al-'Arrub Refugee Camp. The two women went for a stroll along the garden paths in the nearby College of Technology. At approximately 2:30 P.M., they were walking towards an entrance gate to the college, located on Route 60, from where al-Hanash was supposed to travel back home. When they were about 130 meters away from the gate, shots were suddenly fired at them. Ja'rah later told B'Tselem that she saw the soldier who was shooting at them standing by the road, on the other side of the gate. Al-Hanash sustained a gunshot wound to the head and Ja'rah to a hand. The two women were taken to al-Ahli Hospital in Hebron, where Lubna al-Hanash succumbed to her wounds about an hour later.

The soldiers involved in the incident were Lieut. Col. Shahar Safda, Deputy Commander of the Yehuda Brigade, and Corporal Ram, who was his signaler. According to the investigation file, the two were driving along Route 60 in a civilian car owned by the military when they noticed stones and Molotov cocktails being thrown at the road, at which point they stopped and got out of the car. Lieut. Col. Safda pursued the individuals who had thrown stones and Molotov cocktails. He also fired several warning shots in the air. Then, Corporal Ram – who had remained by the car – shot and hit al-Hanash and Ja'rah. Molotov cocktails were found at the scene of the incident.



The investigation

In this case, unlike most, evidence was collected from the scene shortly after the incident. It was gathered not by the MPIU but by Israel Police investigators, who came there to investigate the throwing of Molotov cocktails. They collected forensic evidence, took initial statements from Israeli and Palestinian eyewitnesses, and took down the names and details of additional witnesses. That same night, a person was arrested on suspicion of throwing the Molotov cocktails. Two Palestinians eventually confessed to police interrogators that they had thrown the Molotov cocktails, and were subsequently indicted and convicted.

The MPIU also launched its own investigation on the day of the incident, several hours after the police began theirs. The MPIU initially learned of the incident from Israeli news website Ynet. Unlike the police, the MPIU investigators did not actually visit the scene of the incident. The forensic evidence gathered by the police was sent to various laboratories. The MPIU also sent the weapons of the soldiers involved – Lieut. Col. Safda and Corporal Ram – to a laboratory for examination. The results of all these tests are not in the investigation file and apparently played no part in the investigation.

Many documents are missing from the copy of the investigation file sent to B'Tselem. Nevertheless, there is an unusually large amount of evidence in the file, due to the police involvement. At least 27 soldiers and Palestinians gave statements in the investigation.

Eight statements were given by Lieut. Col. Safda and Corporal Ram. Statements were taken from other soldiers as well, including the first soldiers to arrive on the scene after the shooting, a military weapons expert, soldiers who served under Lieut. Col. Safda, the brigade operations officer, and the deputy commander of the Etzion Brigade who succeeded Lieut. Col. Safda.

Compared to other cases, the investigation file also contained an unusually large number of statements by Palestinian eyewitnesses: ten statements given by seven Palestinians. Six of the statements were given to the police. Of the four given to the MPIU, three were given by eyewitnesses whose details were recorded by the police immediately after the incident. The fourth statement was given by Sou'ad Ja'rah who, as mentioned, was also shot in the incident. B'Tselem and Ja'rah attorney made the arrangements for her to give her statement to the MPIU. The police took details from three other Palestinians, but their statements were not taken – two were never called upon to give a statement and attempts to arrange for the third to meet with the MPIU failed.

On 10 February 2014, more than a year after Lubna al-Hanash was killed, as the investigation was drawing to a close, MPIU investigators performed a filmed re-enactment of the incident with Sou'ad Ja'rah and Lieut. Col. Safda. Corporal Ram refused to take part.

On 10 April 2014, only after a petition to the HCJ by Lubna al-Hanash's father, Munir, and B'Tselem to have the MAG Corps reach a decision whether to serve indictments in the case, the MAG Corps posted a notice on its website stating that it had decided to close the case without taking any action against the soldiers involved in the incident. Later, then Military Advocate of Operational Affairs Lieut.-Col. Ronen Hirsch informed Adv. Gaby Lasky, counsel for the appellants, that the case had been closed following an order by the MAG, Major-General Danny Efroni. Lieut.-Col. Hirsch added that the MAG had not found that Lubna al-Hanash was killed as a result of negligence or other criminal offense on the part of either of the soldiers, and that open-fire regulations permit soldiers to fire at persons hurling Molotov cocktails, including immediately after the act. The notice by the MAG Corps stated that "in general, the firing carried out during the incident did not deviate from these regulations, but regrettably the deceased, who was standing near the escape route taken by the terrorists, was hit by the gunfire. It appeared that the soldier who fired did not notice the deceased when firing". The MAG Corps noted that it was indeed found that Lieut. Col. Safda had failed to properly brief the soldiers under his command about the open-fire regulations, but this was not directly tied to the killing of Lubna al-Hanash.

The investigation file indicates that the MPIU investigators made no effort to reconcile discrepancies between the statements they gathered and those taken down by the police. For example, Wael Jawabrah, who was passing by the college in a taxi on Route 60 when al-Hanash was shot, told the police that about two minutes after the shooting, he saw an officer approaching Route 60 from the college path, and that the officer's hands were covered in blood. This account contradicts the version given by Lieut. Col. Safda, who said al-Hanash had been hit, he ran over to her and started giving her first aid, returning to his vehicle only after the first soldiers and the Red Crescent arrived on the scene, and then helped them evacuate her. It also contradicts the account provided by Corporal Ram, whom Jawabrah mistakenly took to be an officer as well, whereby before the corporal reached the injured Lubna al-Hanash, Lieut. Col. Safda ordered him to turn back and call for an ambulance.

Another contradiction has to do with whether Lieut. Col. Safda and Corporal Ram could have seen al-Hanash from where they were standing. In his statement, Jawabrah said that from his position on Route 60, he easily spotted al-Hanash and Ja'rah, who were strolling along the college path prior to the shooting. One of the first soldiers to arrive on the scene after the shooting related in his statement that when he saw the injured

Lubna al-Hanash, she was wearing a hijab (headscarf) and a pink sweater. The soldiers who fired the shots, on the other hand, claimed that when they fired at the individuals who had thrown the Molotov cocktails, they either could not see al-Hanash or could not see that she was a woman. When Lieut. Col. Safda asked what “the [female] terrorist” was wearing, he answered that she was wearing a coat and black trousers.

The MPIU investigators even ignored a witness who contradicted himself. For instance, immediately after the incident, Corporal Ram told the police that he had shot at a person in a black shirt, although he could not explain why he had shot at this particular individual. He also noted that he could not identify the persons who had thrown the Molotov cocktails, but could say that there was no woman among them. Yet in his statement to the MPIU, Corporal Ram changed his account and claimed that he had shot at a person in a black shirt because he identified that individual as having thrown Molotov cocktails. He did not explain, nor was he pressed to explain, how despite his claim that he fired at a man in a black shirt who had thrown a Molotov cocktail, the people actually hit were Lubna al-Hanash and Sou’ad Ja’rah.

A major discrepancy between the accounts of the two soldiers who fired came up in terms of the extent to which Lieut. Col. Safda briefed Corporal Ram about the open-fire regulations. According to the statement by Lieut. Col. Amit, operations officer for the Etzion Brigade, a soldier who is not a trained marksman and does not have designated equipment is not permitted to fire from more than 50 meters away in suspect apprehension procedure. Corporal Ram shot al-Hanash from a distance of at least 145 meters.

Corporal Ram claimed that he had not been sufficiently briefed and had never been given a detailed and methodical explanation of regulations. He said that during joint car rides Lieut. Col. Safda did speak to him about the various regulations, but the conversations did not cover all procedures. In contrast, Lieut. Col. Safda claimed that in addition to occasional, chance conversations about the regulations, he fully briefed Corporal Ram on all procedures – although could not state the date on which he had done so. Later in the investigation Safda said that, in light of the incident, the military had identified a need to improve briefings of soldiers concerning open-fire regulations and various procedures.

That was the only question on which the investigators pressed Corporal Ram. They repeatedly asked him follow-up questions and refused to make do with his replies. Lieut. Col. Safda, the person who was supposed to brief Corporal Ram, was not similarly questioned. Apart from this one issue, the investigators appear to have been lenient in their questioning throughout the investigation. While they did ask the person

being questioned to explain contradictions between his account of events and those provided by other witnesses, they did no more than write down the response and did not press the issue any further.

As noted, the forensic evidence gathered by the police apparently played no part in the MPIU investigation. The file does not include the results of the various lab tests run on the evidence the police collected at the scene, and there is no mention of an attempt to obtain them. In addition, although the police measured distances at the scene and marked the precise location of the evidence gathered and the distance between the items, the MPIU did not use these measurements to gauge the distance between the shooter, Corporal Ram, and Lubna al-Hanash who was hit by the gunfire. According to the police measurements, the two were 145 meters apart. Instead, the investigators had an aerial photography analyst calculate the distance on the basis of the markings Corporal Ram made on an aerial photograph during his questioning. The resulting estimate was a distance of 170 meters. Later, when the MPIU consulted a weapons expert on various theoretical aspects of the incident, he was asked about shooting from a distance of 170 meters.

Likewise, MPIU investigators did not use the evidence to reconcile fundamental contradictions between the accounts provided by different soldiers. For example, Corporal Ram tried to justify his shooting by claiming that Lieut. Col. Safda's life was in danger. He claimed that after his commander ran towards the persons throwing the Molotov cocktails, he heard shots and only later learned that they had been fired by Safda. He said could not see Safda at the time and was worried that the officer had been the target of the gunfire. However, the police found bullet casings at the spot where Safda said he was at when he fired in the air after setting out in pursuit. According to their measurements, the casings were found about 30 meters from where Corporal Ram was standing. The police photograph of the spot the casings were found shows an unobstructed view between the two locations, so that Corporal Ram could easily have seen what transpired. The MPIU investigators chose not to challenge him with this information.

In late 2013 the MAG Corps ordered the MPIU to undertake further investigation in the file. The only meaningful investigative action taken after that was the re-enactment. As it was not followed up by any additional action, the results of the re-enactment were apparently not used to either confirm or refute claims made earlier in the investigation by the individuals involved.

Despite the evidence and statements compiled in the case, the contradictions between Corporal Ram's account and the forensic evidence, and the fatal outcome of the shooting, the MAG Corps decided to close the case without pursuing legal action against either of

the soldiers involved. This decision was not made on the basis of the findings gathered by the MPIU. In fact, the MAG Corps' decision chose to ignore the MPIU investigation almost entirely. Instead, the decision not to indict Corporal Ram was based on an argument the MAG Corps proposed, one that he did not even make himself, namely that the shooting was lawful as open-fire regulations permit the use of lethal gunfire after an assault, including an assault with Molotov cocktails.

Such a regulation is unlawful in that it permits lethal gunfire even when the person targeted no longer poses mortal danger. This contravenes the principles that lie at the heart of the open-fire regulations and the penal law on which they are founded, which permit the use of lethal gunfire only in cases of immediate and present danger, and when there is no less harmful way to eliminate the danger. Moreover, a regulation that permits using lethal gunfire against a person who has thrown a Molotov cocktail does not mean that other safety measures can be thrown to the wind, especially as regards prevention of harm to passersby. Even if Corporal Ram was acting under such a regulation, as the MAG Corps claimed, it is not a license for indiscriminate gunfire, every which way.



Yusef a-Shawamreh

The Killing of Yusef a-Shawamreh

14 years old, near village of 'Deir al-'Asal al-Foqa, Hebron District, 19 March 2014

The incident

On 19 March 2014, at around 7:00 A.M., soldiers from Reconnaissance Company 7 who had mounted an ambush shot and killed 14-year-old Yusef a-Shawamreh as he was crossing the Separation Barrier. The boy and two friends, Z. S., 13, and al-Muntaser Beallah a-Dardun, 18, residents of the village of Deir al-'Asal al-Foqa southwest of Hebron, were on their way to the a-Shawamreh family's farmland to pick gundelia [Arabic: 'akub], an edible plant annually harvested at that time of year which serves as an important source of income for local residents. The Separation Barrier was built in that area inside the West Bank, some 200 meters east of the Green Line, separating the a-Shawamreh family from their farmland.

The three teens reached a section of the barrier where they knew there were breaches, but discovered that they had been fastened shut with metal wire and plastic cable ties. The three set to work reopening one of the gaps. When they were done, they crossed the Separation Barrier and the "security path" that borders it. Not until then did two soldiers, who had been waiting concealed in bushes nearby, reveal themselves. They called out to the boys to stop, fired two warning shots in the air, and then shot a-Shawamreh in the waist. The soldiers gave a-Shawamreh first aid and arrested his two companions. The injured boy was evacuated in a military ambulance to Soroka Hospital, in Israel, where he was pronounced dead.

The investigation

The MPIU was apprised of the incident about four hours after it took place and immediately began investigative actions that lasted some two months, until 21 May 2014. About four months after the incident, on 10 July 2014, then Military Advocate for Operational Affairs Lieut. Col. Ronen Hirsch informed B'Tselem that the MAG had decided to close the case without pressing any charges as there was "no suspicion of a breach of open-fire regulations or of the involvement of any member of the military in a criminal act". Lieut. Col. Hirsch noted, among other things, that four soldiers had been lying in ambush at the scene of the incident. They identified three Palestinians who, having sabotaged the Separation Barrier, crossed it. The soldiers then carried out suspect-apprehension procedure, which culminated in one of the soldiers firing at the lower part of a-Shawamreh's leg but hitting him in the waist instead, killing the boy.

B'Tselem applied to get the investigation file. Many documents, included statements given, were missing from the copy of the file sent to B'Tselem. The material that was received clearly indicated that the investigation log did not reflect the full extent of the investigative actions undertaken. B'Tselem managed to obtain most of the file only after

making two more requests to the MPIU, each request followed by a two-month wait.

The investigation file indicates that at least 18 statements were given by 16 people. Two were given by the soldier who shot a-Shawamreh, who was questioned under caution; four by the commander of the ambush unit, including one given to the police; and the other 12 were given by 12 soldiers, including the company commander, the battalion commander, a military lookout, and the medical team called in to treat a-Shawamreh. Five soldiers were questioned as suspects: the four soldiers who took part in the ambush and the deputy company commander.

According to the material in the file, only three of the suspects were asked to re-enact the incident at the scene, and all three agreed. The day after the incident, MPIU investigators performed a re-enactment with the soldier who fired at a-Shawamreh, Sergeant Lior. It seems that another soldier – also a suspect – took part as well, despite not being asked to do so during his questioning. It is unclear why the other two suspects did not also carry out a re-enactment. Sergeant Lior gave two statements, one before the re-enactment. The file contains no mention of the investigators using the results of the re-enactment.

The MPIU investigators took statements only from Israeli security forces, although it stands to reason that they knew the identities of a-Shawamreh's friends who witnessed the incident, as the two had been arrested by the soldiers. The two boys were taken in for interrogation at the Kiryat Arba police station and, that afternoon, taken to the base of the Yehuda Regional Brigade from which they were later sent home. Their questioning began at the police station, but the MPIU investigators made no attempt to reach them at that point. Later on, MPIU investigators asked the police to help trace a-Shawamreh's friends, but were told that the police did not have their contact details. The file contains no record of attempts by the investigators to track down information at the regional brigade base about the two boys.

The investigators contacted a-Shawamreh's father only once in this regard, and also contacted B'Tselem only once. A record of the conversation kept in the file indicates that the investigator asked a-Shawamreh's father to bring the two boys who were with his son when he was killed to give statements to the MPIU. The father replied that as they are not his children nor is he connected to them, he cannot bring them in. The call to B'Tselem was made, according to the file, to a person who was not involved with the case. B'Tselem has no record of the call and, in any case, the investigators made no further attempt to get the details of the two Palestinian witnesses. Despite the negligible attempts made to locate the two boys, in his letter informing B'Tselem

that the case had been closed, Lieut. Col. Hirsch stated that “many” attempts had been made to contact the Palestinian eyewitnesses, including via B’Tselem, but all to no avail. Notwithstanding that the investigation began mere hours after a-Shawamreh was killed, investigators did not go to collect forensic evidence from the scene. Nor did they do so when they came there the next day to carry out the re-enactment, or at any later stage.

In the course of the investigation, the investigators did gather evidence, but this was done entirely arbitrarily. For example, one of the implicated soldiers related in his statement that while they lay in ambush, he texted the other soldiers on his mobile phone. He agreed to hand over a copy of the messages to the investigators, but they did not check the mobile phones of the other soldiers. Another example: on the day of the incident, the investigators came to Soroka Hospital, where they received the consent of a-Shawamreh’s family to photograph the body. However, there is no documentation of any request by the investigators – either at that time, or later – to receive the medical records of his treatment. Similarly, the investigators seized the ambush commander’s weapon but not that of Sergeant Lior, who fired the shot that killed a-Shawamreh.

In any case, the investigators barely used the evidence they gathered. For instance, they seized the weapon of the ambush commander and confiscated bullet casings from the battalion commander’s office, after being informed that the casings were from the bullets fired in the incident. However, the file contains no record indicating that these findings were examined. Likewise, one of the most substantial pieces of evidence was video footage of the incident captured by a military surveillance camera. The file contains a memo noting that the footage was confiscated, but no statement from the person who provided the footage to explain the technical problems with the footage. There is no mention of an explanation for the fact that the footage does not seem to be continuous, that at certain points the soundtrack does not match the visuals, and that the events seen in the video do not fully match the accounts provided in the statements. In any case, the investigators made almost no use of the footage in the investigation: it was shown to Ofir, the commander of the ambush, yet he was only asked to give his opinion on what is seen. It was also shown to Sergeant Lior while he was giving his statement, but his statement was not conveyed in full to B’Tselem. B’Tselem’s explicit request to receive the missing pages, documenting Sergeant Lior’s response to the footage, went unanswered.

Nearly everyone who gave a statement was asked to describe exactly what they were told regarding open-fire regulations at the briefing before they set out on the ambush. Three soldiers mentioned in their statement, in passing, that before they set out they

were briefed on the mission orders, but the investigators did not bother to ask whether the orders were given in writing and whether they possessed a written copy of the orders. If the orders were given in writing, the file contains no copy.

Regarding some of the open-fire regulations, there was apparently no difficulty in the investigation. For example, all the statements mentioned sabotage of the Separation Barrier as sufficient cause to consider a person as “suspected of committing a dangerous crime” and accordingly to carry out suspect-apprehension procedure, including shooting. However, the investigators made no attempt to reconcile basic contradictions between the statements concerning other portions of the regulations. One such contradiction related to the exact phrasing of regulations concerning minors who damage the Separation Barrier: all the persons giving statements made it clear that although they were explicitly told that shooting at children was prohibited, they disagreed over what constituted “a child”. Sergeant Lior, who shot a-Shawamreh, explained in his first statement that the orders were meant for arresting “serious” people over the age of 17. Yonatan – another soldier who was in the ambush, and Imri – the commander of the unit, said that a minor is anyone under the age of 12. Yair, the battalion commander, said that the question of who is a child is left to the discretion of the commander in the field. The investigators did not bother to check what the actual regulations stipulate.

Another issue was the factual question concerning the identification of the boys as minors or adults. Yair, the battalion commander, said in his statement that, “if there’s any doubt, if they [the soldiers in ambush] think it’s children, even if it’s a person causing damage to the barrier, you don’t use suspect-apprehension procedure against him”. However, WhatsApp text messages sent by the soldiers during the ambush, and which were handed over to the investigators, show that one of the soldiers, Sar Shalom, asked Sergeant Lior and Ofir if they thought the individuals were children. They replied that they were teens. In their statements, Lior said that he shot a-Shawamreh only after identifying him and his friends as 18 years old. Also Ofir stated that he had thought they were not minors.

Other soldiers, including the military lookout who was watching the incident in real-time and soldiers on the medical team that came to treat a-Shawamreh after he had been shot, told the investigators that they thought the three looked like children. The operations log includes a report stating that “two children are fiddling with the barrier ... the force fired at them and hit one in the waist”. The investigators did not explore these contradictions either.

Unlike the conflicting accounts on the above issues, there was wall-to-wall agreement that the fatal consequence was due to a mishap: Sergeant Lior had aimed at a-Shawamreh's calf, but as the boy was just going down a kind of step, he was hit in the waist and killed. The investigation did not enter into the source of this mishap, and the investigators addressed it as a force majeure rather than as the result of any failing on the part of the field commanders or the soldiers.

However, the investigation did mention in passing that the precise location of the ambush was determined after the commanders had first scouted out the area: Ofir, who headed the ambush, Imri, the company commander, and Adam, the company's operations officer. In his statement, Ofir stated that in their advance survey of the site, "We saw the breaches, we saw the positions, we selected a position, we saw escape routes, and we understood the terrain of the area". In addition, while the soldiers were mounting the ambush, Ofir ordered a soldier who was not part of the ambush team to go and stand by the sealed-up breaches in the Separation Barrier "so that I can make sure I have a clean line of fire for Lior at every one of the breaches". Ofir said the team had also practiced various procedures in the area, including suspect-apprehension procedure. Given this preparatory process, it is baffling how Sergeant Lior could have been taken by surprise by there being a step where a-Shawamreh was, but the investigators did not raise this question.

Moreover, the plan laid out for the ambush was approved by Yair, commander of the battalion, and it was he who decided on the orders given to the force and authorized the mounting of an ambush. During the investigation, the soldiers who took part in the ambush and others noted the stated purpose of the mission, namely to discover and arrest persons sabotaging the barrier. The most senior-ranking soldier to address this issue was Major Avishay, deputy battalion commander, who explained in his statement that the Separation Barrier in the sector designated to the battalion's responsibility is subject to many acts of sabotage and that many people cross the barrier. Ofir, who headed the ambush, explained that the exact location for the ambush was chosen as there are many acts of sabotage against the barrier in the area, and their purpose was to prevent them.

Given this information and the soldiers' conduct throughout the incident, it is clear that contrary to the soldiers' statements to the MPIU, preventing sabotage to the Separation Barrier was not the purpose of the ambush. After all, the soldiers remained concealed until after the boys finished re-opening a gap in the barrier and chose not to reveal themselves until the damage was done. Likewise, during the preparations for the ambush, the commanders ensured the soldiers would have a "clear line of fire" and

drilled them in suspect-apprehension procedure. All these details combined indicate that the goal of the ambush was not to prevent damage being done to the Separation Barrier. On contrary, it was meant to make Palestinians try and break through one of the breaches known to them, an action that would – according to the military – justify even lethal gunfire presumably, with a view to deterring other Palestinians from damaging the barrier. The appalling logic of this plan – inflicting harm on a person to serve as a deterrent to others – was not examined in the investigation.

Nevertheless, the MAG Corps made do with this investigation, despite its meager findings and closed the case without taking any measures against any of the individuals involved. It accepted at face value the soldiers' claims that Sergeant Lior had aimed at a-Shawamreh's calf but had inadvertently struck him in the waist, killing him. The MAG Corps chose to overlook the conspicuous fact that the soldiers were stationed near well-known breaches in the barrier and could have adopted other methods for apprehending a person trying to cross the barrier. Moreover, although there was general agreement that the orders given to the soldiers lying in ambush prohibited shooting at "children", and despite evidence that the soldiers identified the three boys as children, or at least thought they might be, the MAG Corps favored the explanations provided at a later stage by the shooter, that the team identified 14-year-old Yusef a-Shawamreh and 13-year-old Z.S. as being 17 to 18 years old. The MAG Corps made no attempt to establish the plausibility of the purported error. Lastly, the MAG Corps did not question the lawfulness of the ambush itself, and did not inquire into the open-fire regulations given to the soldiers or the problem inherent to considering any kind of damage to the Separation Barrier "a dangerous crime" justifying suspect-apprehension procedure.

The Beating of Sharif Abu Hayah

66 year old, a shepherd from Khirbet Abu Falah, Ramallah District, 28 January 2009

The incident

Sharif Abu Hayah is a shepherd. At around 9:30 A.M. on the morning of 28 January 2009, he took his flock to graze some two kilometers from his home in Khirbet Abu Falah. Suddenly, he noticed six uniformed soldiers, their faces painted black, who had been hiding behind some rocks. The soldiers called out to Abu Hayah in Hebrew but he could not understand them, and they approached him.

In the statement he gave to B'Tselem, Abu Hayah related that the soldiers assaulted him and knocked him down. He tried to resist but they beat and kicked him, tied his hands behind his back, and covered his face so he could not see. When he asked the soldiers to let him go, they beat him harder with their fists and kicked him. Then the soldiers dragged him some thirty meters – according to his estimate – and he was bruised by stones and pricked by thorns along the way. Abu Hayah related that the soldiers mocked him and took turns beating him. One reportedly tried to shove twigs into his mouth. Abu Hayah tried to push them out with his teeth but could not, and the twigs injured him.

A rumor that soldiers were holding Abu Hayah quickly spread through the village and residents began gathering nearby. Paramedics and a film crew for Palestinian TV also arrived at the scene. The residents called out to the soldiers from afar to let Abu Hayah go. The soldiers refused, and told the residents to stay back. At around noon, two military jeeps arrived and four soldiers got out, including an officer. The officer removed Abu Hayah's blindfold and apparently ordered the soldiers to release him.

In his statement, Abu Hayah described feeling faint and nauseous. Two soldiers picked him up and helped him walk several meters. Then the paramedics came up, laid him on a stretcher and carried him to the road, which was about 150 meters away. Abu Hayah was taken to hospital, where he was found to have a hairline fracture in his right arm, bruises, scratches, and swollen hands. He was discharged that evening. In the statement, which he gave to B'Tselem's field researcher about a week later, he reported that he was still aching all over.

The investigation

On 17 February 2009, B'Tselem wrote to the Military Advocacy for Operational Affairs demanding that the incident be investigated. The complaint was transferred to the MPIU the very same day, and an investigation was opened. On 13 May 2013, B'Tselem was informed that the investigation file had been closed on 21 January 2012, almost three years after the incident took place. B'Tselem was recently informed, in response

to another request for information, that the file had been closed on grounds of “lack of sufficient evidence meeting the standard of criminal law to prove that any of the IDF soldiers involved committed an offense”.

The investigation file conveyed to B'Tselem indicates that shortly after the investigation was opened, an MPIU investigator requested that operations headquarters at the Binyamin Regional Brigade send her the daily report from the date of the incident, and it was sent to her later that day. The daily report mentioned a complaint by the International Committee of the Red Cross (ICRC) that an ambulance sent to evacuate an injured person beaten by soldiers near Khirbet Abu Falah had been detained. The report also included the response by the unit whose soldiers detained Abu Hayah, whereby “a shepherd arrived at the lookout... He was bound but not beaten and his evacuation was not delayed. The man was released when [they] were rescued”. The investigator made no attempt to contact the ICRC or the ambulance driver to obtain more information about the incident, and only noted in the investigation log that “nothing more came up that could further the investigation”.

Two days later, the investigator talked on the phone with Second Lieut. Yonatan, the officer who was in charge of the troops during the incident. The officer told her that “the Palestinian involved [in the incident] is mentally unstable and the soldiers tried talking with him, but they couldn't”. Several days later, he came to the MPIU to give his statement.

In the statement, given on 1 March 2009, Second Lieut. Yonatan stated that soldiers had mounted an ambush at the spot in order to “identify suspicious movement in the area, following shooting attacks carried out in the area”. When the shepherd saw them, they acted according to protocol: “It's called a 'binding kit'. It consists of plastic cable ties and a flannel cloth. We laid him down on the ground, after we told him to stop, and a combatant took his 'binding kit' out of his vest.” According to the officer, one of the soldiers tried to cover Abu Hayah's mouth so he would not be heard and also tried to blindfold him, but he kept resisting and shouting. People from the village, who heard the shouting, started approaching the spot. Second Lieut. Yonatan claimed that the shepherd was not subjected to violence, except for the bit of force needed to handcuff him. He explained that “some of the cuts on his hands were because he kept resisting. He kept moving his hands inside the plastic cable ties, and that caused the cuts. His hands were dry, and together with the cable ties and the moving about, it caused him slight injuries, there were some minor cuts. And around his mouth, because he moved his mouth with the cloth, it injured his gums or something. I don't know exactly”. The officer said that he had a visual on the shepherd throughout most of the incident, so soldiers could not

have beaten him without his noticing and, in any case, it was impossible that soldiers had beaten the man as “they were briefed not to use violence, it’s something they know but I emphasized it in the field”.

When the investigator asked why Abu Hayah had not been released sooner, the officer cited concern that the shepherd would go back to the village and report the presence of soldiers nearby, thereby placing them at risk. He added that “those are the procedures you have to use in such a case, you bind anyone who exposes us and then you let him go. Such scenarios are covered before every operation. Before this operation, there was a briefing before we went out on the mission and various scenarios were addressed, and an instance in which the force could be exposed was discussed. In the briefing, my company commander, Uzi, said that when a shepherd comes and exposes the force, we bind him and keep him with us throughout the day, and release him in the evening”.

Abu Hayah’s statement was given several weeks later, on 10 March 2009, at the Beit El DCO after an MPIU investigator asked B’Tselem to arrange the matter with Abu Hayah. In his statement, Abu Hayah’s description of the incident was similar to the description he had given B’Tselem earlier. In response to questions by the investigator, he replied that he did not hear the soldiers before they grabbed him. He said he had, in fact, shouted and thrashed about, but that it was on account of the pain and because the soldiers had handcuffed him although he had done nothing wrong. The MPIU investigators made no attempt to gather the statement of any other Palestinians: eyewitnesses, the photographers who filmed the scene, or the paramedics who took Abu Hayah to hospital.

More than a week after Second Lieut. Yonatan gave his statement, an MPIU investigator contacted the soldiers’ company commander and asked to set a date for her to collect their statements. The commander replied that as the eleven soldiers “are constantly in extremely difficult operational activity, it will be very hard to free them up for giving statements” and asked that the investigators come to him. After many phone calls and negotiations, it was decided that the investigators would come to collect statements from all the soldiers on 22 March 2009.

On the afternoon of the day scheduled, four investigators arrived at the unit and collected statements from nine soldiers and the company commander. After many additional coordination efforts, two other soldiers gave their statements some three weeks later. All the soldiers except the company commander were questioned as suspects. The investigators posed identical questions to every soldier, even if they were irrelevant. For example, soldiers who had not even been near Abu Hayah were asked if they had beaten him or whether they had seen anyone else doing so.

The soldiers, for their part, provided almost identical accounts: the shepherd had exposed their ambush. Regulations for this type of eventuality require them to detain, handcuff, and blindfold him. As Abu Hayah resisted, they had to use force against him, but no more than the reasonable force necessary to handcuff and blindfold him and cover his mouth. Every one of the soldiers claimed that he had not beaten Abu Hayah, and that no one else had beaten him. They all claimed that the force used against Abu Hayah had been reasonable, and was only employed after Abu Hayah shouted and resisted and because they feared that his shouting would attract the attention of people from the village, exposing their ambush. They claimed that Abu Hayah caused all his own injuries himself and that all the signs of violence on his body, such as scratches and bleeding lips, were the result of his thrashing about and trying to remove the blindfold.

The claims that Abu Hayah was not subjected to violence and that he caused his own injuries were made even by soldiers who explicitly stated that they did not see him, as they were standing some distance away from where he was, or that they saw him only some of the time. For instance, seven soldiers told the investigators that they were asleep when the shepherd came upon them, and four of them awoke when he was already handcuffed. Sergeant Avraham, for example, was not near Abu Hayah for most of the incident, only when his turn came to watch the shepherd. Nevertheless, Avraham emphasized that, "we treated him as fairly as can be, with respect. He was acting wild and started yelling... There was no use of excessive force, everyone treated him as fairly as can be, without hitting him. Totally honorably. He's not some terrorist, he's just a person who exposed us. We acted accordingly". Corporal Daniel related hearing from the other soldiers that the shepherd had resisted and kept shouting, removing the cloth and trying to bite anyone attempting to cover his mouth. Corporal Daniel told the investigators that he did not beat Abu Hayah, nor did other soldiers, and that nothing happened "that does not benefit IDF soldiers in terms of the defined values of the military".

Two of the soldiers who initially handcuffed Abu Hayah gave the investigators a more detailed description. Sergeant Ron said that Abu Hayah kept thrashing about and shouting, while they tried to silence him verbally. According to Sergeant Ron, they tightened the cloth to "impose moderate physical pressure just so he'd shut up already. We tried using words to silence him, but nothing helped". When the investigator asked what "moderate physical pressure" meant, Sergeant Ron explained: "We moved him from a sitting to lying position, pinned him to the ground with a knee, and pulled at the cloth." He added that, "in the few minutes during which he was silent, we didn't use force against him". They did not beat or kick Abu Hayah and did "only what was necessary". Sergeant Ron noted that such incidents are unusual, "but we often come

into contact with the Palestinian population and we're always very courteous and humane. As long as there's cooperation, we don't use force".

Corporal Liran claimed that, "we grabbed him by the arms and laid him on the ground. He really resisted, started screaming... I raised his arms behind his back, Ron helped me, we handcuffed him. He kept talking and we asked him in Arabic to be quiet. He started screaming in Arabic, we couldn't understand... When he started screaming, we said to him 'Uskut' [=Be quiet' in Arabic] but he continued. We said it again, a bit more aggressively, but it didn't help. There's a directive that if the suspect doesn't shut up, you can 'rattle' your weapon... Commander Yonatan 'rattled' his weapon. He kept quiet for a few minutes and then started shouting again. When we handcuffed him, we let him sit and lean against a rock so he wouldn't be in the air, so that it wouldn't hurt him. He wouldn't keep quiet. We laid him face down, and he started screaming even louder". Corporal Liron added that when villagers began approaching, "I started raising his handcuffed arms a bit, just a bit, so he'd keep quiet. At first, he was quiet, and then we sat him up again so he'd be comfortable. He started screaming again, I raised his arms again". When Abu Hayah continued shouting, the soldiers laid him back down on the ground "because when he was comfortable, he simply wouldn't stop shouting". According to Corporal Liron, if Abu Hayah had not resisted, they would not have used any force. He also claimed that Abu Hayah caused his lip injuries himself by trying to bite down on the cloth.

In addition to the soldiers' statements, MPIU investigators also collected statements from the company commander and the battalion commander, who were not present at the incident. Both commanders sanctioned the soldiers' conduct, stating that they had acted reasonably and in accordance with regulations. The statement by the company commander indicates that this type of situation has been known to happen and therefore, at the briefing prior to the mission, "special emphasis was given concerning shepherds in the area, based on the understanding that if the team would be exposed it would be by a shepherd. The points of emphasis were described above and included an emphasis on being humane, human". He claimed that to the best of his knowledge, Abu Hayah was not subjected to violence and could not have behaved in a way that justified violence, as it was eight soldiers facing a single shepherd. According to the company commander, the incident was not investigated within the unit, but he stressed that such occurrences are not unusual and in fact take place every other day, although this was the first complaint filed on the matter.

The battalion commander stated that as exposure could put the soldiers at risk, he saw their conduct as reasonable: "I would have acted in exactly the same way, since I

would have understood that the team is positioned in a spot close to two villages... in broad daylight. The goal is to minimize risk to the team in such a situation, should someone come up and shout and act in a way that could expose the team... I expect the team to use reasonable force to minimize the risk, and the force that the soldiers used was perfectly reasonable, to the best of my understanding.”

The last investigative act noted in the file took place on 26 May 2009, and is recorded as “memo of viewing footage of the incident”. The investigator noted that the footage shows no use of violence; all it shows is the complainant handcuffed with several soldiers standing around him. Several other soldiers are seen standing further away, preventing villagers from coming any nearer. Near the end of the footage, soldiers are seen helping Abu Hayah get to the ambulance. The footage was taken from B’Tselem three months earlier, early on in the investigation, on 23 February 2009. The file contains no explanation as to why no one watched the footage until the very end of the investigation process. Even if it contained nothing that could assist the investigation, no one at the MPIU could have known that before actually watching the footage.

All the soldiers and officers who were investigated cited fear of exposure as justification for detaining Abu Hayah and for their conduct. The investigators accepted this argument at face value, although the soldiers were exposed shortly after detaining Abu Hayah, making the justification they cited moot. While Second Lieut. Yonatan was asked why Abu Hayah had not been released sooner, the investigator did not press him beyond his reply that the soldiers were following the regulations for preventing exposure. She did not attempt to challenge him with the fact that the force had already been exposed by then.

The investigators also accepted at face value the soldiers’ claims that Abu Hayah caused his own injuries by resisting detention. Abu Hayah was asked in his investigation if he had medical records and promised to pass them on to the investigator. He also signed a waiver of medical confidentiality. However, the only action taken by the MPIU on the matter was to contact B’Tselem – and not Abu Hayah – in mid-April, asking if the organization had any medical records relating to the case. The investigation was closed two weeks later, before B’Tselem could send the documents to the MPIU.

Had the investigators examined Abu Hayah’s medical report, they would have learned that he emerged from the incident with bruises, scratches, swollen hands, and a hairline fracture in his right arm. Even if some of the injuries might have been caused by his own actions in resisting detention, it is highly unlikely that this caused his fractured arm. As the investigators did not have this information at their disposal – since they did not question Abu Hayah about the aftermath of the incident and never saw the medical records – they could not confront the soldiers with these details and challenge their claim that Abu Hayah was responsible for all his injuries.

In his statement, the company commander noted that such incidents are routine, happening every other day, but that no complaints had been filed until that point. The investigators did not pursue the issue, as the investigation – like all MPIU investigations – did not address the procedures the soldiers were told to follow or the wisdom of mounting an ambush near a village in broad daylight, in an area that shepherds are known to graze their flocks.

According to the investigation file, the accepted facts of the case are that the incident did in fact take place and that, for more than two hours, soldiers handcuffed 66-year-old Abu Hayah and covered his eyes and mouth, although he had done nothing wrong and despite the fact that villagers who arrived at the scene quickly learned of the soldiers' whereabouts. The dispute was over the degree of physical force used against Abu Hayah – a point that the MPIU investigators did not bother to resolve, making do with the almost identical accounts provided by the soldiers.

This is the investigation file that was transferred to the MAG Corps. The MAG Corps disregarded questions as to the wisdom of placing the ambush at the chosen time and place, and the soldiers' discretion throughout the incident, who would not release Abu Hayah for over two hours, even after their location was discovered. Instead, the MAG Corps was satisfied with the flawed investigation, accepted the soldiers' claims and their explanations for Abu Hayah's injuries at face value, and almost three years after the incident took place, decided to close the case on the grounds of lack of evidence.



The Beating of Salman Zagharneh

42 years old, a laborer from the village of a-Ramadin, Hebron District, 23 September 2009

The incident

Salman Zaraghneh, a resident of the village of a-Ramadin in the Hebron District, is married and has six children. At approximately 4:00 P.M. on 23 September 2009, he was walking home after visiting friends who live in two shepherding farms near an unfinished section of the Separation Barrier, some two kilometers west of his village. The gap in the barrier was used daily by Palestinian laborers working in Israel without an entry permit. That day, Israeli security forces were deployed in larger numbers than usual in the area.

Zaraghneh saw a military jeep pursue a car that was probably transporting Palestinian laborers. The car got away, and the soldiers in the jeep then noticed Zaraghneh and pulled up next to him. Two soldiers got out. Zaraghneh said they asked him where he was going. After he replied that he was on his way home, the soldiers assaulted him, beating and kicking him. They then took his ID card and mobile phone and ordered him to wait there.

About half an hour later, the jeep returned with two more soldiers. Three soldiers got out, including the two who had beaten Zaraghneh earlier. One of the soldiers handed him back his ID card and phone. At that moment, another soldier slammed his rifle butt into Zaraghneh's face. The soldiers drove off in the jeep, leaving Zaraghneh wounded.

Zaraghneh was hospitalized in 'Aliyah Hospital in Hebron. Several days later, he was transferred to the hospital in Ramallah, where he was diagnosed with two fractures and a dislocation in his lower jaw. He underwent surgery to set the jaw bones. Two weeks later, the supports were removed and he was referred for physiotherapy. Two years later, Zaraghneh reported that he was still suffering from headaches and having difficulty chewing food.

The investigation

On 4 October 2009, B'Tselem wrote to the Military Advocacy for Operational Affairs demanding that the incident be investigated. An investigation was opened ten days later. Seven months later, B'Tselem was informed that the investigation had been concluded and the file transferred to the MAG Corps for review. Upwards of another year passed before B'Tselem was informed that the file was in the process of additional investigation. On 14 November 2013, four years after the incident, B'Tselem was informed that the case had been closed a month earlier. B'Tselem applied once more to the MAG Corps to receive an explanation for the decision, and was informed that the case had been closed "after the military force that was allegedly involved in the incident was not located".

The day after the investigation was opened, an MPIU investigator contacted B'Tselem to arrange for Zaragheh to give a statement, and it was given later the same day. As Zaragheh could barely talk due to his injuries, his brother came along to help him describe the incident and translate. Also present, apart from the MPIU investigator, was a DCO officer who was supposed to serve as an interpreter.

In his statement, which is part of the investigation file conveyed to B'Tselem, Zaragheh gave the account of the incident provided above. The investigator asked him to describe the soldiers, to which he responded: "Two soldiers stayed in the jeep and the other two soldiers who beat me, one looked small and black and the other was white, a kind of regular Ashkenazi [Caucasian Israeli]. The Ashkenazi was about 1.8 meters tall, the other was about 1.7 meters tall. Both wore regular fatigues. One had a helmet on. The soldier who gave me back my papers, he had a little beard." The investigator asked Zaragheh where he worked, whether he had a permit to enter Israel, and whether he may have been trying to enter Israel without a permit. Zaragheh denied the suggestion and said that he had been on his way home from visiting a friend.

When asked, "Why were you beaten?" Zaragheh replied: "The soldiers hit me for no reason, I didn't say a word." The investigator also asked who had financed his medical treatment, to which Zaragheh responded that the Palestinian Authority covered it and he only had to cover travel expenses and the X-ray. When the investigator asked whether anyone else had witnessed the incident, Zaragheh replied that there were no eyewitnesses.

Zaragheh gave the investigator his medical records, which were then shown to a doctor who was doing reserve duty at the DCO. In his statement, the doctor told the MPIU investigator that, "I was shown several X-rays of an individual I don't know, without hearing any of his medical history. As a doctor who does not specialize in X-rays, I can say that the prominent finding in the X-ray is a mandibular fracture with a shift in teeth position." He added that the individual had clearly undergone surgery. The investigator asked whether the individual had been beaten, to which the doctor replied: "He suffered a serious blow, he could have been beaten or he could have gotten a blow some other way."

MPIU investigators tried to track down the implicated soldiers. A month after the incident took place, and after various inquiries, on 25 October 2009 an investigator established which battalion had been stationed in the area. The next day, she spoke with a company commander from the battalion and explained that a complaint had been filed regarding an incident in the area. The commander, Lieut. Hemy, informed her that he was aware of the complaint and had already looked into it. According to the investigator's notes on the conversation, he told her that, "according to battalion procedure, whenever a local *shabach*

[Palestinian entering Israel without a permit] is arrested, his details are transferred to the battalion headquarters, which records the details of the arresting soldier, of the detainee, and the reason he was detained. From his inquiry, headquarters had no record of any local being detained, not even for inspection, on 23 September 2009”.

The investigator did not inform the company commander that Zaraghneh had not been suspected of illegally entering Israel, and was therefore not arrested or detained under said procedure. She made no attempt to explore the possibility that the soldiers had not reported the incident, and accepted the claim that if the incident was not reported, it had not taken place. On 26 October 2009, the investigator examined the morning report, and wrote in the investigation log that the report did not mention Zaraghneh’s arrest or detention either.

The investigation file also includes a document summarizing the operational inquiry of the incident by the unit involved. The document states that a complaint was received about an “ethics-related incident” that occurred on 23 September 2009, in which “harm to a Palestinian was described”, following which “an inquiry was carried out, examining the morning reports, headquarters logs, and the relevant commanders”. The document notes that the company was indeed deployed in the area on the date in question, but that after an examination of all documents, no evidence was found that such an incident took place. The document adds that “all commanders in the company were questioned about the incident, ranging from 24 hours before to 24 hours after, and said that they are not aware of any such incident. They insisted that they know the directives and the requirements and carefully maintain the norms and values of the IDF”. Therefore, “in light of the findings, it cannot be established that the incident indeed took place, there is no record in headquarters or in the morning report of such an incident, it was relatively recent (two weeks) and uncommonly severe, after questioning the commanders and checking headquarters’ logs, it appears that the incident did not take place.”

The investigator also tried to track down the implicated soldiers by checking the travel logs of the vehicles used by the battalion. However, the battalion’s transport officer who is responsible for the vehicles, told her that the soldier who signed the log could not possibly have been using the vehicle on an operational assignment. In a conversation with another company commander in the battalion, she was told that he did not have a roster of vehicle assignments.

When the investigator managed to trace four soldiers who may have been in the area at the time of the incident, it transpired that three had since been transferred to another base. The investigation log notes that a date had been scheduled for the statement of the fourth soldier, but the statement itself is not mentioned nor does it appear in the file, so it

may have never been given. On the other hand, two of the soldiers who were transferred to another based did give statements.

On 6 January 2010, some four months after the incident, Second Lieut. Ofer – one of two latter soldiers mentioned – gave his statement. He stated that he was not familiar with the case and could not even recall whether he had been stationed in that sector at the time. The investigator presented him with Zaragheh's statement, and he repeated that he had no knowledge of the case. In response to the investigator's questions, Ofer noted that he had returned ID cards to many Palestinians, and Zaragheh may well have been one of them. When the investigator asked whether Zaragheh's description of the soldier could be a valid description of him, Second Lieut. Ofer replied, "Yes, of the one who gave the ID card back, not the one who did the beating". When the investigator asked whether he was familiar with the other soldiers described in the complaint, he replied, "there are many Ashkenazi soldiers in the company" and that he knew a soldier who is "black and short", but that "there's absolutely no way that he had hit a Palestinian, based on the contact I've had with him. Also, I never went on patrol with him so I don't know of such an incident with him". The officer told the investigator the soldier's name was Alon. Ofer repeated that he did not remember where he had been four months earlier and that his unit arrested many people, so he could not know if Zaragheh had been one of them. In any case, he did not remember any report concerning a local being injured or any other irregular occurrence and had certainly not hit anyone, seen anyone being beaten, or heard of the incident.

Second Lieut. Aner – the other soldier who had already been reassigned to another base – gave his statement about two weeks later. He, too, claimed that he knew nothing and was not familiar with the case. His questioning ran along the same lines as that of Second Lieut. Ofer. The investigator presented him with Zaragheh's statement, and then Second Lieut. Aner said that he had heard of the incident but that no soldier had used violence, certainly not anyone connected to him in any way. Second Lieut. Aner said that, "there's no such person in the company, a black guy with a beard, and as for the other one, it's regular, it could be anyone". He said that he did not recall where he had been at the time of the incident, nor did he remember any report of a person being injured. He said he was not familiar with Zaragheh's name. According to Second Lieut. Aner, he may have detained someone or confiscated his mobile phone and ID card, but certainly did not beat anyone.

This concluded the investigation and the file was transferred to the MAG Corps, which at some later time sent it back to the MPIU for further investigation. The file indicates that the investigation was renewed two years later, on 15 January 2012. Several investigative actions were undertaken by the MPIU during 2012, primarily attempts to contact additional soldiers.

It appears that as part of the renewed investigation, the investigators were required to obtain Aner's and Ofer's signed consent to take a lie-detector test and hold a confrontation with other witnesses. In the file, the investigator noted that, "as Aner does not recall the incident, he will not undergo a lie-detector test or be asked to sign a consent form for a confrontation (which is irrelevant in cases where the suspect does not remember the event in question). In addition, Ofer is abroad, so no further statement will be taken from him and he will not be requested to sign the abovementioned forms".

From March to July 2012, no investigative action was taken. In mid-July, the investigators began making attempts to collect statement from other soldiers – all of whom had finished their military service by then. Most of these attempts, which involved dozens of phone calls, failed. Among other things, the investigators tried at that stage to trace Alon – the soldier who, according to Ofer's statement, matched the description provided by Zaragheh. Some of them said they were busy with work and had no time to give a statement, others did not answer the phone, some were abroad, and investigators could not even manage to locate one of them. After prolonged, largely failed attempts at coordination, the investigators managed to collect statements from two more soldiers, one of whom was Alon. Their statements do not appear in the case file. Regarding four other soldiers, the file includes a memo noting that the investigator spoke with them, asked if they knew of the incident, and was told that they did not.

The investigation lasted until January 2013. B'Tselem was told that – on the basis of the investigation file – the MAG Corps had ordered the case closed on 17 October 2013, as the soldiers involved in the incident had not been found. Nonetheless, on 20 October 2013, the log notes two additional investigative actions, but they were stricken by the military censorship.

The gravity of this negligent investigation is compounded by the fact that, at the time, B'Tselem received frequent reports of soldiers abusing Palestinians in the area in question. B'Tselem collected statements from Palestinians who were subjected to this abuse. B'Tselem sent the statements – which recounted severe violence, including humiliation of Palestinians for hours on end – to the Military Advocacy for Operational Affairs and to the commander of the Hebron Brigade. B'Tselem knows MPIU investigations were opened in at least some of the cases, which were also closed without pressing charges. The investigation file on the incident reported by Zaragheh included no mention of these cases. The investigators, followed by the MAG Corps, addressed Zaragheh's case as an atypical, isolated incident.

The Beating of Zidan a-Samamreh, 25 and Muhammad a-Samamreh, 23

In the area of a-Ramadin, Hebron District, 7 March 2010

The incident

On the morning of Sunday 7 March 2010, two soldiers arrested Zidan and Muhammad a-Samamreh not far from the Separation Barrier in the area of a-Ramadin in the Hebron District. The two, who were 25 and 23 years old, respectively, live in the town of a-Dhahiriyah and were about to cross the barrier into Israel without a permit, on their way to work there.

The soldiers aimed their weapons at the two men and ordered them to undress down to their underwear and sit on a nearby rock. Some ten minutes later, a military jeep arrived and two soldiers got out. B'Tselem's inquiry indicates that one of the soldiers approached the two men and began kicking them and hitting them with his rifle butt. The soldiers then handcuffed and blindfolded them. Although the two men were bound, the soldier continued beating Zidan and at some point, hit his handcuffed hand so hard with the rifle butt that he broke his arm. According to statements gathered by B'Tselem, the two soldiers who had originally detained the men asked the abusive soldier to stop, but he replied that he knew what he was doing. He beat them for several more minutes and then stopped.

Zidan and Muhammad a-Samamreh were led to a spot nearby where the four soldiers let them put their clothes back on. They were kept out in the hot sun for hours. Zidan begged the soldiers to let him go because of the pain in his arm, but they ordered him to be quiet. They also refused the two men's requests to give them water or to loosen the cable ties with which they were handcuffed and which were causing them pain. The soldier who had beaten them pulled the cable ties on Muhammad's even tighter.

About three hours later, Zidan a-Samamreh was released, after the soldier who beat him cautioned him not to report what had happened. Muhammad a-Samamreh was released shortly afterwards. Zidan managed to get a ride to a medical clinic in a-Dhahiriyah, where he apparently lost consciousness. He was taken to 'Aliyah Hospital in Hebron, where he was found to have a fracture in his right arm and bruises on his chest and back.

The investigation

On 31 May 2010, B'Tselem wrote to the Military Advocacy for Operational Affairs, demanding that the incident be investigated. A month later, on 28 June, the MAG Corps informed B'Tselem that it had ordered an MPIU investigation launched. However,

according to the investigation file which was conveyed to B'Tselem, the MPIU received the order only a week later, on 5 July 2010. The last investigative action noted in the file was carried out more than a year later, on 16 August 2011.

Almost two years later, the MAG Corps informed B'Tselem of its decision to close the case. Further correspondence uncovered that the investigation file had already been closed on 8 May 2012. The MAG Corps justified its decision on the grounds of "lack of sufficient evidence meeting the standard of criminal law to prove that any of the IDF soldiers involved committed an offense".

B'Tselem provided the MPIU with the medical records at the time of filing the complaint. At a later stage, in response to a request from the investigators, B'Tselem also provided the MPIU with X-rays of Zidan a-Samamreh's broken arm. The investigators obtained the opinion of a medical expert who stated that nothing could be concluded from the X-ray without further information. Although B'Tselem arranged for the investigators to speak with an employee at the Palestinian hospital where a-Samamreh was treated, and they did so before the expert opinion was given, they did not contact the hospital again to request further details or clarifications regarding the medical information at their disposal.

One of the first actions taken as part of the investigation was to ask the Yehuda Regional Brigade for the morning report from the day of the incident. They received the report on 7 July 2010. Towards the end of the investigation, the investigators again contacted the regional brigade, asking for the operations log for that day. The investigators received the log on 16 June 2011. The investigators made no use of either document other than noting that neither reported the incident. The investigators seem to have made this notation while ignoring the fact that the soldiers' actions in this incident were in breach of regulations so they would be unlikely to report or document it.

Moreover, both documents mention several Palestinians who crossed the Separation Barrier without a permit. The existence of this information indicates that the area was under surveillance – whether electronic or by soldiers on site. Had the investigators attempted to seek out sources of information, they might have uncovered documentation or eyewitnesses to the incident, which took place very close to the Separation Barrier near a-Ramadin.

The investigators failed to obtain documents concerning the soldiers' mission assignment schedule. This made it difficult to locate the soldiers who assaulted Muhammad and Zidan a-Samamreh. The investigators did try to locate a list of the soldiers who had remained on base on the weekend prior to the incident but never received it, despite repeated requests to the relevant authorities. The investigators did obtain a record of the weekly activity planned

for the Shekef Outpost, from which patrols leave for the gap in the barrier near a-Ramadin, but it was not in the investigation file sent to B'Tselem.

While investigators collected only meager evidence, they did gather many statements: one by Zidan a-Samamreh and the rest by 18 soldiers, 15 of whom were questioned under caution as suspects regarding the assault of Zidan and Muhammad a-Samamreh. The first statement was given only on 19 January 2011, about half a year after the investigation began and some ten months after the incident took place. The last statement was given about half a year later, on 28 July 2011. Every soldier was questioned once only, so the investigators did not confront them with disparities that came up, doing no more than recording each soldier's account of events.

All 15 suspects denied any connection with the incident or knowledge of it. As the statements were given many months after the incident, it is not unreasonable that some of the suspects could not remember their whereabouts on the day in question. None of them were confronted with documentation or evidence of any kind, possibly because the investigators had none.

The only statement apart from those of the soldiers was given by Zidan a-Samamreh, who was assaulted. The investigators asked B'Tselem to arrange for Muhammad a-Samamreh to provide a statement, but he asked to do so only on weekends, when he was not at work. His statement was never collected. Zidan a-Samamreh described several features of the soldier who attacked him, including height, hair color, and the color of his shoes. He also noted that the soldier said to the other soldiers, "I'm here to kill Arabs".

Most of the suspects were not made aware of a-Samamreh's statement, apart from the question whether they had ever said, "I'm here to kill Arabs". Two of the suspects were asked what kind of weapon they had and whether they had previously served with the Border Police, in keeping with additional details provide by a-Samamreh, but were not asked about other details that he mentioned. Only one suspect was presented with additional information from the statement but even then, the investigators merely noted his response. Only one suspect was asked whether he would be willing to undergo a lie-detector test; despite his affirmative answer, no such test took place.

In a few of the statements sent to B'Tselem, some or all of the text was illegible. However, the material that can be deciphered indicates that most of the questioning was very similar, consisting of a short, set series of questions: Where were you on the day of the incident? Did you take part in assaulting Muhammad and Zidan a-Samamreh? Do you know who assaulted them? Do you know them? In the course of your military service, did you ever use force against Palestinians? In the course of your military service, did you every say, "I'm here to kill Arabs"?

The fact that a uniform, pre-prepared list of questions was used to question the suspects was particularly conspicuous in the questioning of Staff Sergeant Ido, who claimed in the statement he gave that at the time of the incident he had not even been stationed at Shekef Outpost but was serving as a commander at a basic training base. The investigators did not try to verify his claim, but if true, he could not have taken part in the assault. Nonetheless, the investigator went on to ask the same list of questions: Did he take part in the assault, did he know who did, and so on.

The investigators contacted three other potential witnesses, one of whom was apparently a soldier who had meanwhile finished his military service, to arrange for them to give statements. It is unclear from the investigation file whether they were witnesses or suspects. After the investigators made several unsuccessful attempts to contact each of them, they stopped trying.

The investigation was concluded without the investigators managing to identify the soldiers who attacked Muhammad and Zidan a-Samamreh. The investigation file was sent to the MAG Corps, where the case was closed with no further proceedings.

The Abuse of Muhammad Maharmeh

22 years old, Hebron, 11 March 2012

The incident

On the morning of 11 March 2012, at around 11:00 A.M., a group of soldiers from the 13th Battalion of the Golani Brigade went up to the roof of the house of the Maharmeh family in Hebron. They got into an argument with Muhammad Maharmeh, who was 22 years old at the time, and his father, Ishaq, then 50 years old, accusing them of having thrown stones. B'Tselem's inquiry found that during the argument, the soldiers assaulted the two men. The soldiers arrested the father and son and took them to a military base nearby. Only at around 7:00 P.M. were the two taken to the Kiryat Arba police station.

According to B'Tselem's inquiry, while the two men were being held at the military base, soldiers severely assaulted Muhammad Maharmeh. Among other things, his finger was broken, a soldier urinated on him, dirt was put in his mouth, and another soldier threatened to rape him. In his statement, Maharmeh noted that one of the most active participants in the abuse spoke Arabic.

At the police station, Muhammad and Ishaq Maharmeh were questioned on suspicion of assaulting soldiers and obstructing them in the execution of their duty. They were released only after posting bail. After they were released, the two went to 'Aliyah Hospital in Hebron for medical attention. Muhammad sustained a broken finger and bruising to his abdomen, legs, arms, and face.

The investigation

B'Tselem called the MPIU to report the incident on 15 March 2012, and sent a letter on 19 March. About two weeks later, on 1 April, the MPIU unit in Beersheba received an order from the MAG Corps to investigate the incident. About a year and a half later, the Military Advocacy for Operational Affairs informed B'Tselem that it had decided to close the case.

In the time that elapsed before the MPIU investigation began, the Israel Police gathered statements from Muhammad and Ishaq Maharmeh, who were questioned as suspects, and from a soldier who had been part of the arresting force. Later on, the police took three more statements from Muhammad Maharmeh, in which he complained about the abuse he had undergone. The police also received the medical records of Muhammad and Ishaq Maharmeh and translated them into Hebrew. In addition, policemen spoke to Lieut. Adi, who commanded the force that carried out the arrest and took down the details of all the soldiers who were on the mission with him.

The MPIU carried out the last investigative act in the case on 9 December 2012. By that time they had interviewed under caution each of the five soldiers who participated in the arrest, and also took statements from Muhammad Maharmeh and his mother, Halimah Maharmeh. All the soldiers questioned and the Maharmehs – including Ishaq Maharmeh who had not given a statement to the MPIU – agreed to undergo a lie-detector test.

On 17 June 2012, B'Tselem provided the investigators with photographs of Muhammad Maharmeh's bruises, and later also sent them video footage of a part of his arrest. The investigators made no use of the material. Other than gathering statements and trying to arrange lie-detector tests, the only action they took was to search several of the soldiers' mobile phones. This was apparently motivated by Muhammad Maharmeh's statement to the police, in which he stated that while he was being beaten on the military base, he heard one soldier tell another to film him beating Muhammad. Muhammad Maharmeh said that at the same time he heard a sound that sounded like a picture being taken on one of the soldier's mobile phone. A police memo that was passed on to the MPIU documented a conversation between a police investigator and Lieut. Adi, in which the commander said that "there may have been images of the incident captured on one of the soldiers' mobile phone, but it's not documentation of the offense". The MPIU investigators did not question Lieut. Adi about the images – not about the identity of the soldier who took them or whether the commander had seen the images himself.

The investigators confiscated the mobile phones of three soldiers who were questioned as suspects. The investigation file includes a memo concerning one of the phones, in which the investigator noted that he had gone through its contents and found nothing. In the other two cases, the phones were apparently sent to a laboratory, but the file contains no mention of laboratory findings.

In his investigation, Lieut. Adi claimed that he had captured nothing on his own mobile phone, as it was not working. He showed the investigators his phone as proof that it was indeed not functioning. Despite the fact that the questioning took place some three months after the incident, on 5 June 2012, the investigators accepted at face value his claim that the phone had been inoperable on the day of the incident as well, and did not even send the phone to be examined in a laboratory.

The investigators went to considerable lengths to schedule lie-detector tests for the suspected soldiers and for Muhammad Maharmeh and his parents, but then an investigator spoke with Lieut. Col. Elyashiv, the commander of the 13th Battalion.

According to the conversation notes, the battalion commander stated that none of the soldiers questioned spoke Arabic. Further to this conversation, and as Muhammad Maharmeh had said that one of the key assailants spoke Arabic, the investigators consulted with the commander of the Beersheba MPIU and consequently decided not to go through with the lie-detector tests.

The major discrepancies between the versions given by Muhammad and Ishaq Maharmeh and those provided by the soldiers who took part in the arrest had to do with the extent of force used. The soldiers claimed that the force used was reasonable and necessary under the circumstances, yet the father and son described use of excessive force. The investigators made no attempt to find out what actually happened, and made do with recording the different versions.



In any case, the greater and more vicious violence employed against Muhammad Maharmeh was not during the arrest, but rather while he and his father were held on the military base. Nonetheless, the only soldiers questioned were those who took part in the arrest. Even then, they were questioned almost only about the actual arrest. Once every soldier finished giving his version of the arrest, the investigators presented him with the description given to the police by Muhammad Maharmeh, which related primarily to the abuse he underwent at the military base. All the soldiers then denied any involvement or even knowledge of what was described in the statement.

The investigators made no attempt to find out at which base Muhammad and Ishaq Maharmeh were held for eight hours, who had access to them, and other pertinent questions. Nor did the investigators query why they were held there so long.

As Maharmeh was subjected to most of the abuse while being inexplicably held on a military base for hours, and as the investigators did not make the slightest effort to discover what happened in that time span, focusing only on the arrest itself, the result was that the abuse was not investigated at all. Nevertheless, the MAG Corps informed B'Tselem on 14 November 2013 that based on the investigation, it had decided to close the file. No explanation for the decision was given.