

**UNWILLING  
AND UNABLE:**

**ISRAEL'S  
WHITEWASHED**



**INVESTIGATIONS  
OF THE GREAT  
MARCH OF RETURN  
PROTESTS**



**בִּיטְלֵם**  
**BTSELEM**  
بتسيلم

## Unwilling and Unable

### Israel's Whitewashed Investigations of the Great March of Return Protests



## Introduction

On 30 March 2018 – Land Day – Palestinians in the Gaza Strip began to hold regular protests along the perimeter fence, demanding an end to the blockade Israel has imposed on the Strip since 2007 and fulfillment of the right of return. The protests, held mostly on Fridays with tens of thousands participating, continued until the end of 2019.<sup>1</sup>

Most of the demonstrators – including women, children and seniors – gathered in the tent encampments set up for the protests about 400 to 600 meters from the perimeter fence. These areas also had stalls with various activities for children and adults, such as clown shows, poetry readings, musical performances and soccer games. Many of the families congregated in the tents, eating and chatting. Some of the protestors were by the fence and some of them threw stones at soldiers stationed on or next to dirt mounds on the other side of the fence.

Israel was quick to frame the protests as illegitimate even before they began, among other things arguing they were a Hamas government initiative. It made various attempts to prevent the demonstrations and declared in advance it would violently disperse the protesters. To that end, the military deployed dozens of snipers along the fence and various officials clarified that the open-fire regulations would permit lethal fire against anyone attempting to approach the fence or damage it.<sup>2</sup>

Ordering the use of live fire against unarmed civilians is unlawful. As Justice Benjamin Halevy ruled in the Kafr Qasem case in 1958, the illegality of such an order “is not a question of form, nor is it imperceptible, or partially imperceptible.” On the contrary, it is a case of “unmistakable illegality patently evident in the order itself, a command that bears a clearly criminal nature or that the actions it orders are of a clearly criminal nature. It is an illegality that pains the eye and outrages the heart, if the eye be not blind and the heart be not callous or corrupt.”<sup>3</sup>

Nevertheless, over the course of the protests along the fence, the military implemented a policy of using live fire against unarmed protestors. This was mostly carried out by snipers deployed along the fence to that end. As a result, 223 Palestinians, 46 of them under the age of 18, were killed and some 8,000 injured. The vast majority of the persons killed or injured were unarmed and posed no threat to the well-armored soldiers on the other side of the fence.

The open-fire policy and its horrific outcome drew harsh criticism against Israel. United Nations Secretary-General António Guterres expressed concern over the large number of casualties, asked the parties responsible to refrain from any acts that would lead to further casualties, and called for an investigation of the events.<sup>4</sup> The EU’s chief diplomat at the time, HR/VP Federica Mogherini, issued a statement declaring the EU mourned the loss of life and stating that the “use of live ammunition should, in particular, be part of an independent and transparent investigation.”<sup>5</sup>

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<sup>1</sup> For more, see: PCHR, [Question and Answer: 1<sup>st</sup> Year Anniversary of the March of Return Demonstrations](#), 28 March 2019.

<sup>2</sup> See, e.g.: Yaniv Kubovich, “‘[Shoot Anyone Breaching the Fence](#)’: Israeli Army Gears Up for Gaza Mass Protest”, [Haaretz English website](#), 29 March 2018.

<sup>3</sup> MC (Central) 3/57 Chief Military Prosecutor v. Lance Corporal Ofer.

<sup>4</sup> UN News, [UN chief calls for probe into deadly clashes along Israel-Gaza border](#), 30 March 2018.

<sup>5</sup> [Statement by HR/VP Federica Mogherini following yesterday’s events in Gaza](#), 31 March 2018.

On 8 April 2018, several days after the protests began, then-Chief Prosecutor of the International Criminal Court (ICC) Fatou Bensouda released a statement expressing concern over the large number of deaths and injuries as a result of live fire and noting the possibility that crimes that fall under the jurisdiction of the ICC were being committed. The Prosecutor noted in her statement that her office was conducting a preliminary examination of the situation in the Occupied Territories and that these events might be included in it. The Prosecutor further clarified that anyone involved in the violence, whether by giving orders to commit crimes, by encouraging their commission or by contributing to such crimes in any other manner, could be prosecuted before the ICC.<sup>6</sup>

Yet even after these responses, Israel refused to reform its open-fire policy. Instead, it quickly promised, as it has done many times in the past, to “investigate” the incidents. As Israel anticipated, the announcement that its investigation mechanism had begun looking into fatalities during the protests was warmly received by the international community and allayed censure against the open-fire policy it was continuing to implement against the protestors. For example, at a UN Security Council meeting held on 26 April 2018, UN Special Coordinator for the Middle East Peace Process Nikolay Mladenov commended Israel for having established a team to examine the use of force in the protests. Later in the same meeting, other countries – including France, Poland, the Netherlands and the European Union – also spoke favorably of Israel’s willingness to investigate and of the fact that it had begun to do so.<sup>7</sup>

Almost a year after the protests began, an independent international commission of inquiry established by the UN Human Rights Council found reasonable grounds to believe that, apart from isolated cases, gunfire by Israeli security forces was carried out in grave violation of international human rights law or international humanitarian law (IHL), and that some of these instances could constitute war crimes and possibly even crimes against humanity. The commission noted that the Israeli government “has consistently failed to meaningfully investigate and prosecute commanders and soldiers for crimes and violations committed against Palestinians,” casting doubt on Israel’s “willingness to scrutinize the actions of the military and civilian leadership who drafted, approved and supervised the implementation of the rules of engagement governing the actions of Israeli forces at the demonstrations.” Nevertheless, the commission demanded that Israel investigate the deaths and injuries that occurred during the protests. Commission Chair Santiago Canton stated, at a press conference on the report: “The onus is now on Israel to investigate every protest-related killing and injury, promptly, impartially and independently in accordance with international standards, to determine whether war crimes or crimes against humanity were committed, with a view to holding accountable those found responsible.”<sup>8</sup>

More than three years after Israel pledged to investigate, this report examines how – if at all – it has made good on its promise.

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<sup>6</sup> [Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, regarding the worsening situation in Gaza](#), 8 April 2018.

<sup>7</sup> Security Council, [The situation in the Middle East, including the Palestinian question](#), 8244<sup>th</sup> meeting, 26 April 2018.

<sup>8</sup> Human Rights Council, [Report of the Independent International Commission of Inquiry on the Protests in the Occupied Palestinian Territory](#), February 2019.

## A. The open-fire regulations

Over the course of the protests, the Israeli military implemented an open-fire policy of using live fire against unarmed protestors who posed no threat to the well-armored soldiers on the other side of the fence or to anyone else. Most of the shots were fired by snipers deployed in advance along the fence. As snipers shoot at a defined target – the body of a particular person – using precise equipment, in at least some of these cases, the injury was intentional. Indeed, after the first protest, the IDF Spokesperson declared – in a quickly-deleted tweet – that “[n]othing was carried out uncontrolled; everything was accurate and measured, and we know where every bullet landed.”

The horrifying outcome of this policy soon became clear, when the number of casualties – the vast majority of whom were unarmed and posed no threat to any one – began to rise:

In the very first protest, held on 30 March 2018, 12 protestors were killed and more than 750 injured, five of whom later died of their wounds.<sup>9</sup> By the end of May that year, another 95 Palestinians had been killed and some 2,900 injured. In total, Israeli security forces killed 223 Palestinians, including 46 minors under the age of 18, and injured some 8,000 during the protests along the fence. Of the fatalities, 73 were killed on 14 May 2018 while protesting the relocation of the US Embassy to Jerusalem.<sup>10</sup>

Israeli officials have declined to disclose the details of the open-fire regulations, keeping to general, vague statements about their content. For instance, in response to a petition against the regulations filed in April 2018 with Israel’s High Court of Justice, the state asserted:

The open-fire regulations permit use of **live fire** solely for countering **violent** riots that pose a **clear and immediate danger to IDF troops or to Israeli civilians**. According to the regulations, the danger should be countered primarily by use of verbal warnings and non-lethal crowd control measures. Should use of these measures fail to avert the danger posed by the violent riot, the rules permit **accurate firing at the legs of a major rioter or instigator** with the object of **eliminating the danger** posed by the violent riot... Firing at the legs of a major rioter or instigator **must be employed strictly as a last resort and subject to the stringent requirements derived from the principles of imperative necessity and proportionality**.<sup>11</sup>

The claim that the security forces were pursuing a cautious policy that permitted live fire only in cases of “clear and present danger” was already divorced from reality at the time it was put to paper. The policy was described more accurately three years after the fact, when Israeli military snipers first spoke about the orders they had received on Hamakor, an investigative news show on Israeli television that aired on 25 May 2021.<sup>12</sup>

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<sup>9</sup> For more data on injuries, see Office for the Coordination of Humanitarian Affairs (OCHA), [Protection of Civilians Database](#).

<sup>10</sup> These figures do not include four protestors who were injured in the protests and died later on, but a direct link could not be established between their injury in the protest and their death.

<sup>11</sup> H CJ 3003/18, **Yesh Din – Volunteers for Human Rights v. IDF Chief of Staff** (hereinafter: **Yesh Din**), Response on behalf of the State, para. 44. Emphases in the original. See section E for the judgment in this petition.

<sup>12</sup> **Hamakor**, [Snipers Speak](#), 25 May 2021 (Hebrew).

Speaking on the show, the snipers confirmed that the open-fire regulations permitted firing at individuals considered “major instigators”. They also revealed what that phrase stands for and just how broad the circumstances were in which they were allowed to use live fire against protestors. One explained: “A major instigator is someone who fans the flames during the protest.” Another described a major instigator as “the one who eggs everybody on. If you hit him, you deescalate the situation there. And we target that person.” The snipers made it clear that they alone decided who was considered a major instigator, and no one could challenge their decision.

Eldar: You’re essentially ‘the eye of God.’ That’s what they call it. You decide who’s going to walk in the morning and who isn’t. You decide who’s going to have a knee afterwards and who isn’t.

Shalem: If I, as a sniper, decided someone was a major instigator, asked for authorization to shoot him, shot him and hit him, no one can later look at the footage and say, listen, he wasn’t a major instigator. It’s a very broad range.

The snipers explained that the label of “major instigator” stayed with individuals until the demonstration was over, regardless of what they did after being targeted. That was their explanation for video footage posted at the time that showed Palestinians shot and killed while doing nothing.

Eldar: I’m basically standing at the post and can see everything. As I said, ‘the eye of God’, all-seeing. I basically get on the radio with the company commander and tell him: “Yes, that’s our instigator. I recognize the guy.” And when he gives you authorization, then it doesn’t matter if the guy has left and come back. You still have authorization for him, the same guy... It took me quite a lot of time because he kept moving. It took about an hour until I had him in my sights. The guy was standing on this little bit of ground, alone, with no one around him, with his arms folded and just waiting, and I said to myself, this is the right moment. It’s like he’s waiting for my bullet. You get it? And basically, that’s when I release the bullet.

Shalem: I identify a major instigator, I see a guy throwing stones, I aim my sights at him, wait for a knee. The guy’s standing behind a bump on the ground so I don’t shoot yet, I wait for him to show himself. Then he stops throwing stones, takes twenty steps to one side, I don’t know, looking for stones, and that’s when I shoot him. When you film those ten seconds, the exact ten seconds when he shows himself, after I’ve been waiting to shoot him.

These descriptions reveal that being defined a “major instigator” has nothing to do with being dangerous. As the term is broad enough to cover a wide range of behaviors, and the label stays in effect even after the person has moved on to another activity – the regulations clearly allow snipers to target protestors who pose no danger, and certainly no immediate danger.

Moreover, the snipers said that officers had pressured them into firing even at protestors who did not meet the broad criteria for “major instigator”:

Eldar: People with ranks will always come and badger you, constantly look over your shoulder, talking, saying to you, come on, what’s going on? Are you firing? When are you going to fire? What, why aren’t you firing? When are you going to fire? Are you

aiming? Aren't you aiming? What's going on with you? Why aren't you shooting already? Come on, what's going on? What's going on? So it affects you, starts pressuring you. What's going on? Why aren't you shooting already? Well? We have a riot in the sector, why aren't you shooting? It's very stressful, you're all, what is this? You're a rookie, and these people with fancy ranks on their shoulders are coming at you. Dude, leave me alone. Let me get a grip on myself.

Maayan: When someone comes and tells me, "I need somebody now," then I'll stop looking for the right person and start looking for the right person for the situation because I have to shoot somebody, but it could be that he didn't really do anything. It could be that he was standing looking at the view, saying, wow, what a pretty sky.

To make matters worse, the snipers' statements indicate that the regulations are not only problematic in themselves, but entirely impracticable. Senior officials seem to be aware of this fact, too. Former IDF Spokesperson Ronen Manelis, who was interviewed by the Israeli media outlet that aired the investigative report after the show, said he had been on-site during the protests almost every week, along with then-Military Advocate General Sharon Afek and OC Southern Command Herzi Levy. Manelis said the entire area had been engulfed in smoke and teargas, which made it difficult to implement the regulations verbatim. Manelis said:

It's not sterile. Now, would I want a battalion commander to say: Guys, I'm asking you to identify the major instigator according to the open-fire regulations and engage in accurate shooting... I'd be very happy for that to happen.

The official justification provided for the open-fire policy was based on doomsday scenarios: thousands of Palestinians breaching the fence and attacking security forces and Israeli civilians who live nearby; armed Palestinians hiding among the protestors and firing at soldiers; or Palestinians entering Israel to carry out terror attacks. For example, in June 2018, well after the lethal outcomes of the policy had become clear, then-Prime Minister Binyamin Netanyahu explained: "They're organising a violent assault into Israel with the view of destroying us which they openly proclaim in order to break the fence, the border fence, and kidnap and murder Israelis that are 100 metres away and communities that align the fence and so on."<sup>13</sup> In this television interview, former IDF Spokesperson Manelis also said the regulations were based on worst-case scenarios: "The lens was always terrorism. How do I manage to prevent terrorist activity, prevent terrorist activity from coming closer..."

Doomsday scenarios about a hypothetical future danger cannot justify the use of lethal fire against protestors who were not even near the fence. In reality, not a single Israeli soldier or civilian was killed in the Great March of Return protests. These scenarios were not even close to materializing, as the snipers themselves explained on Hamakor:

Daniel: At first, it looked like it was going in that direction because I simply saw huge masses of people approaching. But in the end they didn't cross some line, which only a few of them crossed. The absolute majority stood there, behind some line, and didn't go any further.

Artimi: They obviously know they won't be able to breach the fence en masse. It's just a show of presence, a show of force.

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<sup>13</sup> Policy Exchange, [In Conversation with Benjamin Netanyahu](#), 7 June 2018.

R: They have no way of getting through there. You have a ton of ramparts, a ton of covers, a ton of... There's no single person who can, especially during a riot, get through. They could get over to the Israeli side and advance – and I'm exaggerating here – 50, 100 meters?

The snipers clarified that many of the deaths and injuries had been “mistakes” and that these results were unintended.

Maayan: Look how many positions there are here... Every position has at least two snipers. Every rifle fires at least 10-15 bullets during a riot. At least one of those bullets will probably be a mistake. When you hear on the two-way-radio, on the news, that a sniper accidentally killed, wounded [someone], then you don't ask if it will happen, because it does happen. That's the situation. It happened to him, it will happen to him. The question isn't “if” but “when is it going to happen to me.”

A: We'd finish an average Friday with 25 legs that snipers took down. And almost every Friday, you could say someone was killed by mistake... A child or a teen or an adult we didn't mean to kill, but was killed.

Treating these incidents as “mistakes” is incompatible with the reality the snipers described: regulations that give snipers incontestable, nearly limitless discretion and are, in any case, virtually impossible to implement due to pressure from commanders and physical conditions such as teargas, smoke and heat; “mistakes” that are not followed up by inquiries or any other measures taken; and the persons responsible refusing to change the regulations and persisting in implementing them despite the number of deaths and injuries. Such a state of affairs is no mistake. It is a policy.



## B. Israeli investigations

Investigations of the incidents were exclusively entrusted to the Military Advocate General's Corps (the MAG Corps). Another body involved in the investigations is the General Staff Mechanism for Fact-Finding Assessments (FFA Mechanism), established in 2014 after Operation Protective Edge. Information about the FFA Mechanism's operations is not made public, and the military does not disclose the names and qualifications of its members or their work methods. Israeli human rights organization Yesh Din asked the IDF Spokesperson for information about the mechanism's members and methods of operation. The response, which arrived more than a year later, stated vaguely: "The Mechanism has inquiry teams made up of officers in both regular and reserve military service, who have expertise in various military occupations and who receive assistance from legal experts with experience in investigations." The IDF Spokesperson also said members of the Mechanism "occasionally convene for training and meetings, as needed."<sup>14</sup>

The FFA Mechanism began looking into incidents that took place during the protests as early as 4 April 2018 – mere days after the first protest. It was tasked with examining only what the military calls "exceptional incidents." The Mechanism is not expected to decide whether a criminal investigation should be launched, but only to "perform a comprehensive factual assessment of the incidents and collect relevant information and materials" in order to provide the MAG with "as much information as can be obtained, in order to determine whether there are reasonable grounds to suspect that a criminal offense warranting an investigation has been committed."<sup>15</sup>

The FFA Mechanism was charged with performing "an individual examination of the incidents referred to it," as well as "a broader examination of the conduct of IDF forces with respect to the foci of activities under their purview in which Palestinians have been harmed," in order to "establish a factual infrastructure with respect to conduct in riot-prone areas, even when there is limited information about an individual incident that took place in the area, and for the purpose of reviewing future complaints regarding a certain area." The Mechanism also serves as "an additional channel for operational evaluations."<sup>16</sup> According to the military, the Mechanism has been given broad powers that allow it to collect information and materials from any source it requests and to summon witnesses from inside or outside the military, including Palestinian sources.<sup>17</sup>

Cases of persons killed over the period in which protests took place were referred to the Mechanism, with priority given to cases in which the alleged victims were minors, members of medical crews or journalists. The IDF Spokesperson stated that cases in which "the information indicated that gunfire had been aimed at terrorists involved in terrorist activities" were not referred to the Mechanism.<sup>18</sup> The spokesperson did not explain who was considered

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<sup>14</sup> Letter from Major Gal Tourjeman, IDF Spokesperson Assistant to Miryam Wijler, Yesh Din, 4 August 2019. See also, [Gaza Border Events: Questions & Answers](#) (hereinafter: **IDF Spokesperson's FAQ**).

<sup>15</sup> HCJ 3003/18, **Yesh Din – Volunteers for Human Rights v. IDF Chief of Staff**, Response on behalf of the State, para. 47.

<sup>16</sup> Letter from Major Gal Tourjeman, IDF Spokesperson Assistant to Miryam Wijler, Yesh Din, 4 August 2019.

<sup>17</sup> *Ibid.* See also, **IDF Spokesperson's FAQ**, *supra* note 14.

<sup>18</sup> Letter from Major Gal Tourjeman, IDF Spokesperson Assistant to Miryam Wijler, Yesh Din, 4 August 2019. See also, letter from Lieutenant Colonel Tzofia Moskovich, Head of Strategy and Communications Operations Branch, IDF Spokesperson, to Miryam Wijler, Yesh Din 9 March 2020.

a “terrorist” by the military and what type of cases were not referred, but indicated there were at least 40 such cases, and that not all the victims had been killed during protests.

The information collected by the FFA Mechanism is handed over to the MAG, who then decides whether to order a criminal investigation, ask the Mechanism for further information or close the case. The MAG’s decision can be appealed to the Attorney General, and his decision can be challenged in the High Court.<sup>19</sup>

According to figures supplied by the IDF Spokesperson to B’Tselem, as of 25 April 2021, the FFA Mechanism had received 234 cases in which Palestinians were killed. This figure includes Palestinians who were killed during the period in which the protests were held, but with no connection to them. The Mechanism completed its review in 143 of these cases and transferred them to the MAG Corps. The MAG ordered the Military Police Investigation Unit (MPIU) to investigate 33 of the cases, as well as three other cases not handled by the FFA Mechanism. In four cases the investigation was closed with no action taken. In one more MPIU investigation – into the killing of 14-year-old ‘Othman Hiles<sup>20</sup> – that was completed, a soldier was charged with abuse of authority to the point of endangering life or health, and sentenced to one month’s military community service.<sup>21</sup> The MAG opted not to criminally investigate 95 cases in which the FFA Mechanism had completed its review, and closed the files with no further action. All other cases transferred to the MAG are under review.<sup>22</sup>

The Palestinian Centre for Human Rights (PCHR) referred 184 cases to the FFA Mechanism, 63 of them relating to Palestinians killed in the protests and the remaining pertaining to Palestinians wounded in them. Fifteen of the complaints related to female victims, 51 to minors and 118 to men. The responses provided to PCHR addressed fatalities only. In some cases, PCHR was told to supply further information – translated into Hebrew – such as medical records and eyewitness testimonies and to answer questions about the incident. In others, the organization was only informed that the case had been referred to the FFA Mechanism. PCHR was told that an MPIU investigation was opened in 15 cases. In 15 cases, a decision was made not to investigate, and PCHR appealed all 15 to the Attorney General. No response has been received to date.

On 23 January 2019, PCHR met at Erez Crossing with DCO representatives, whose role in the investigations is unclear, and with a legal advisor on behalf of the FFA Mechanism. PCHR was asked during the meeting to stop referring cases as “enough have been received.” It is not clear why the demand was made and whether it had to do with limited resources or with another reason. In any case, PCHR continued to refer cases to the MAG Corps after the meeting.

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<sup>19</sup> See **IDF Spokesperson’s FAQ**, supra note 14.

<sup>20</sup> See investigation file analysis below.

<sup>21</sup> Another soldier was indicted for a killing that was not related to the protests. The soldier was convicted of negligent injury and abuse of authority to the point of endangering life or health, and sentenced to community service.

<sup>22</sup> Letter from Lieutenant Colonel Mika Lifschitz, Head of Strategy and Communications Operations Branch, IDF Spokesperson, to Eyal Sagiv, B’Tselem, 10 May 2021. IDF Spokesperson figures included two more investigations into the killing of Palestinians during the same period as the demonstrations, but without connection to them.

## C. The main flaw: Not investigating the open-fire policy

Even before the protests began, Israeli officials warned that the open-fire regulations would allow the use of lethal fire against anyone who tried to damage the fence or even approach it. The open-fire regulations handed down to soldiers did allow the use of such lethal fire, and were not substantially changed even after their horrific outcome became evident. Despite the soaring number of casualties, Israeli officials continued to defend the regulations, claiming they were both legal and appropriate. Well-armed security forces continued to use lethal fire against protestors on the other side of the fence who posed no real danger, over the course of the protests.<sup>23</sup>

The responsibility for determining the open-fire policy, for giving soldiers illegal orders and for the resulting lethal outcomes lies with the policymakers. However, the persons primarily responsible for the events and for determining the policy – the government-level officials who shaped, backed and encouraged it, and the Attorney General who confirmed its legality – are not being interrogated.

Additionally, the MAG, who was put in charge of the investigations, has a conflict of interests with respect to investigating the open-fire policy during the protests. On one hand, he is responsible for providing the military with legal counsel before and during the events that took place. In that capacity, he works closely with the military personnel in charge of operations throughout the fighting and approves policy implementation in real time. On the other hand, the MAG is tasked with deciding which cases to investigate and what action to take once the investigation is concluded. Where the allegations concern directives that the MAG drafted and actions that he approved, he would be ordering his own and his subordinates' investigation. Therefore, putting the MAG in charge of the investigation means the policy itself is never investigated.

Instead, the military law enforcement system looks into “exceptional incidents” only. The FFA Mechanism has reviewed a number of cases in which individual, low-ranking members of the security forces were suspected of breaching the open-fire regulations – which, as stated, are unlawful in the first place and must be disobeyed by soldiers.<sup>24</sup> The top military brass – who issued these orders to the soldiers and, down the entire command chain, instructed soldiers to follow them – has not been investigated in any way.

Focusing on “exceptional cases” is a structural feature of the military law enforcement system.<sup>25</sup> A striking example of this *modus operandi* emerged in the aftermath of Operation Protective Edge, which took place through July-August 2014. Over the course of the fighting, Israel killed 2,203 Palestinians, including at least 1,371 (62%) who did not take part in the fighting – 527 of them under the age of 18. Some 18,000 homes were destroyed or severely damaged, leaving more than 100,000 Palestinians homeless, and Israel wreaked havoc on Gaza's infrastructure.

On the very first day of the fighting, the military assaulted the home of the Kaware' family in Khan Yunis. The house collapsed and nine people, including five children between the ages

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<sup>23</sup> See B'Tselem, [If the heart not be callous: On the unlawful shooting of unarmed demonstrators in Gaza](#), April 2018.

<sup>24</sup> See B'Tselem, [Why Israeli soldiers must refuse to fire at unarmed Palestinian protesters](#), 3 April 2018.

<sup>25</sup> For more on this subject, see B'Tselem, [The Occupation's Fig Leaf: Israel's Military Law Enforcement System as a Whitewash Mechanism](#), May 2016.

of seven and 14, were killed. This was the first of dozens of air- and ground-strikes that targeted residential buildings with the occupants still inside, which became one of the horrifying hallmarks of Operation Protective Edge. Clearly, these attacks were not the personal initiative of soldiers, pilots or commanders in the field, but the result of a policy formed by senior government and military officials. These officials backed the policy of targeting homes, claiming time and again that it was in line with international humanitarian law and eschewing any responsibility for harm to civilians.<sup>26</sup>

As soon as the fighting was over, the whitewashing machine went into action. The government members and senior military commanders who had steered the policy – including assaults on inhabited buildings – drafted the orders and made operational decisions during the fighting were not investigated in any way. The FFA Mechanism, established after the fighting, looked into cases defined as “exceptional” and forwarded its recommendations to the MAG – who, in turn, assessed the cases entirely out of context, as though they were aberrations and not the norm. In these circumstances, small wonder that the MAG ultimately found the military’s conduct flawless and the regulations properly implemented, with the exception of a single incident in which three soldiers were convicted of stealing 2,420 NIS (~USD 750).<sup>27</sup>

The same was true of the investigations Israel conducted following Operation Cast Lead, which ended in January 2009. During the fighting, Israel killed 1,391 Palestinians, at least 759 (55%) of whom did not take part in the fighting, including 318 under the age of 18. Israel destroyed more than 3,500 houses during the fighting, leaving tens of thousands of people homeless, and caused massive damage to other structures and to infrastructure facilities. After the fighting, the MAG Corps looked into more than 400 incidents and ordered at least 52 investigations. Here, too, the MAG ultimately found that all the IDF actions had been legal, with the exception of three cases in which four soldiers were found guilty of theft, of using a child as a human shield and of unlawful use of firearms.

The fact that Israel does not examine policy or those responsible for drafting and implementing it renders its investigations meaningless. Worse still, the claim that Israel is “investigating” creates the illusion that the policy employed during the protests was legal and that the only problem was in deviation from the orders. This allows those chiefly responsible to get away with impunity, and produces a dangerous false pretense that enables the military to carry on with the same deadly policy.

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<sup>26</sup> On the implementation of this policy, see B’Tselem, [Black Flag: The legal and moral implications of the policy of attacking residential buildings in the Gaza Strip, summer 2014](#), January 2015.

<sup>27</sup> See B’Tselem, [Whitewash Protocol: The So-Called Investigation of Operation Protective Edge](#), September 2016.

## D. Can the ICC intervene?

In January 2015, Palestine – recognized by the UN as a non-member observer state in November 2012 – signed the Rome Statute and accepted the jurisdiction of the International Criminal Court in The Hague. About two weeks later, then-ICC Prosecutor Fatou Bensouda launched a preliminary examination of the situation in the Palestinian territories. Some five years later, in December 2019, the Prosecutor announced her conclusion that the conditions required for an investigation had been satisfied and that there is reasonable basis to believe war crimes have been committed or are being committed in the West Bank (including East Jerusalem) and the Gaza Strip by Israel, Hamas and other Palestinian armed groups.

In the report summarizing the preliminary stage, the Prosecutor noted the investigation would also address the military's use of lethal and non-lethal means against demonstrators. The Prosecutor did not launch an investigation immediately, referring first to the panel's justices for confirmation of her position that the ICC has jurisdiction with respect to Palestine.<sup>28</sup> The panel released its decision on 5 February 2021, affirming the ICC's jurisdiction in the Gaza Strip and the West Bank (including East Jerusalem). About a month later, on 3 March 2021, the Prosecutor announced she was launching an investigation.

These developments are one reason for Israel's relatively quick announcement that it would investigate incidents that occurred during the Gaza protests. One of the guiding principles for the ICC's work is complementarity, meaning the ICC will assert jurisdiction only when the state in question is "unwilling or unable" to carry out its own investigation. Once a state has investigated the incidents, the ICC will not intervene.<sup>29</sup> Israeli officials made no attempt to hide the fact that the key motivation for the military's investigations into incidents that occurred during the protests was to avert intervention by the ICC. For instance, at the very beginning of the protests, Major General (res.) Noam Tibon, who headed the FFA Mechanism after its establishment post Operation Protective Edge, explained that even if the military had clearly obeyed the law, investigations were needed in order to "protect our commanders":

Tomorrow, God forbid, the name of an officer or a soldier can end up at the International Court in The Hague and they decide to prosecute him. That person would hardly be able to leave Israel, and the State of Israel would have a difficult time helping him. So this team comes and says: The IDF was professional. If there was a flaw – we'll handle it. We don't wait for anyone to come and check on us. [It] gives tremendous protection to IDF soldiers and IDF commanders, and also, our ability to come and say in the end, look, we checked, we conducted a professional examination carried out by a very experienced commander who was in no way involved in the fighting on that front. The examination proved we acted properly.<sup>30</sup>

However, declaring an investigation is underway is not enough to stave off intervention by the ICC. The Rome Statute, which articulates the complementarity principle, stipulates that a

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<sup>28</sup> Office of the Prosecutor, [Prosecution request pursuant to article 19\(3\) for a ruling on the Court's territorial jurisdiction in Palestine](#), para. 96. The request was filed on 20 December 2019 and again on 22 January 2020, at the ICC's request.

<sup>29</sup> Rome Statute, Art. 17.

<sup>30</sup> Good Morning Israel radio show, [Allegations of disproportionate firing in Gaza Strip: "General Staff Committee offers tremendous protection"](#), Galei Zahal (IDF Radio), 9 April 2018 (Hebrew).

state would be considered “unwilling” to investigate suspicions if the actions it took were designed to shield a person from criminal responsibility for crimes listed in the Statute.<sup>31</sup>

In a policy paper addressing the preliminary examinations, the ICC Prosecutor elaborated on the complementarity requirement, clarifying that the first question examined is empirical: Have any relevant investigations been conducted at all and any persons connected to the crimes prosecuted? A negative answer is enough to establish the ICC’s authority to intervene. The Prosecutor postulates numerous reasons why a state might not investigate. Some states have laws preventing investigation, such as laws awarding amnesty or immunity to persons responsible for crimes. Sometimes, investigations deliberately focus on low-level or marginal perpetrators, despite evidence regarding individuals with greater responsibility. In other cases, the reasons could be more general, such as lack of political will or judicial capacity.

Where states have investigated, the Prosecutor assesses whether the investigations focused on those who bear the greatest degree of responsibility for the most serious crimes committed, and whether the investigation was effectively designed to shield a person from criminal responsibility for crimes listed in the Statute. The Prosecutor examines whether the investigation was satisfactory, and specifically whether any of the following are detectable: disregard for evidence, intimidation of witnesses and victims, incongruity between findings and evidence, concealment of information, failure to devote sufficient resources to the proceedings, or refusal to cooperate with the ICC and provide it with information. The Prosecutor also assesses whether any unwarranted delays occurred and whether the investigation was independent and impartial. This includes inspecting the involvement of state institutions in the commission of the offenses, political interference in the investigations, ties between the suspects and the investigating authorities, and official statements concerning the investigations and indictments.<sup>32</sup>

According to the criteria listed above, Israel cannot be said to have investigated the incidents that took place during the protests. The only body investigating these incidents is the military itself. Its focus is only on low-level soldiers, with a narrow mandate to determine only whether the open-fire regulations were breached – rather than examine the open-fire regulations and policy themselves. The military has no power to investigate those responsible for determining the policy, for legally approving it and for handing it down to the troops. At present, it is clear that Israel has not investigated, is not investigating, and has no intention of investigating the persons who bear the most responsibility for the policy that led to the killing of more than 200 Palestinians and the wounding of thousands.

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<sup>31</sup> Rome Statute, Art. 17(2).

<sup>32</sup> International Criminal Court – The Office of the Prosecutor, [Policy Paper on Preliminary Examinations](#), November 2013, paras. 47-54.

## **E. Israel’s High Court of Justice approved continued implementation of the open-fire policy**

In April 2018, at the height of the protests, six human rights organizations filed two petitions asking the High Court to disqualify the open-fire policy permitting live fire against demonstrators where there is no clear and immediate danger to human life. The court took a month to issue the ruling, while the military continued operating according to the orders impugned in the petitions. The petitions were ultimately dismissed.

In the judgement, the High Court panel fully adopted the state’s contentions with respect to the protests. Supreme Court Vice President Hanan Melcer, who essentially copied the state’s response verbatim, held the protests were “violent mass events” directed by the Hamas regime that had “inflamed the crowd.” Justice Melcer contended these events “occasionally created real and present danger to the lives and bodily integrity of security forces and residents of Israel – a danger that intensified due to the terrorist acts committed from within them and under their cover.” Supreme Court President Esther Hayut went even further, holding that “this is one of the most significant challenges” facing Israel’s security forces.<sup>33</sup>

The justices were not shown the open-fire regulations. The official argument was that the petitioners had not consented to the state presenting the regulations to the court *ex parte*. However, the petitioners made it clear during the hearing that this applied only to the intelligence briefing the state sought to provide the justices along with the regulations, while they had no objection to the justices reviewing the regulations themselves.

As such, the justices discussed the open-fire regulations without having read them, relying exclusively on the state’s explanations about their content, and asked no questions about the connection between the regulations and events on the ground. On that basis, the court ruled that the regulations were lawful. Vice President Melcer held that the regulations permitted use of live fire “solely for countering violent riots which pose a clear and immediate danger to IDF troops or Israeli civilians or within which such a danger is posed;” and that only if the danger persists, as a last resort, the regulations permit “accurate shooting at the legs of a major rioter or major instigator, with the object of eliminating the clear and present danger,” and only “subject to the stringent requirements emanating from the principles of imperative necessity and proportionality.”<sup>34</sup>

Although President Hayut did note that the category of “major rioter or major instigator” cited by the state in its response “is not anchored in international law according to the authorities cited by the Respondents,” she nevertheless emphasized that the statements were made “with due caution” since the justices had not examined “the relevant intelligence information” or received “explanations and clarifications regarding its characteristics.” This, the President noted, “may be found justifiable” in hindsight.<sup>35</sup>

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<sup>33</sup> **Yesh Din**, *supra* note 11, paras. 6-7 of President Hayut’s judgment.

<sup>34</sup> *Ibid.*, para. 50 of the judgment of Vice President Melcer.

<sup>35</sup> For criticism of the “major instigator” category, see Eliav Lieblich, [Between Paradigms: The legality of the open-fire regulations on the Gaza border under international law and in light of the HCJ ruling](#), *Iyunei Mishpat*, 43, 2020 (Hebrew).

Having upheld the orders presented to him, the Vice President went on to find that “it appears the fire was used in pursuit of a lawful purpose – protecting the citizens of the State of Israel and IDF soldiers.” Vice President Melcer then noted that the state had explained that, firearms are discharged against rioters only after other measures to disperse the masses have been found to be impracticable, and use of more moderate measures has been proven ineffective... Only in this state of affairs, and as a last resort, has targeted, measured fire been carried out, in keeping with the open-fire regulations, against the terrorists and at the legs of major rioters who had damaged the security barrier.<sup>36</sup>

Justice Melcer’s unequivocal assertions contradict remarks he made later in the judgment, to the effect that he had no real way of evaluating the implementation of the regulations as, we have no concrete information with respect to the identity of the main activists and instigators, to the nature of their actions, to their organizational affiliation or involvement in terrorism or in other prohibited hostile activities, or to whether and how they posed a clear and immediate danger which necessitated firing – as a last resort.<sup>37</sup>

The issue of implementation, Melcer clarified, should be examined only as part of the inquiries the state said the military was already undertaking, while the justices’ role is “confined to judicial scrutiny over compliance with Israel law and the norms of international law applicable to Israel, which the Respondents have told us are being followed by the State.”<sup>38</sup> This begs the question – what was the basis for Justice Melcer’s finding that live fire was used “in pursuit of a lawful purpose”?

The Vice President was well aware of what was happening on the ground. Yet he appears unperturbed, simply expressing the hope that the large number of deaths and injuries thus far, and the fact that according to the Petitioners, many have been hit in the upper body and several in the back – will, on one hand, lead to conclusions regarding the possible use of alternative non-lethal measures to the extent possible, and on the other, to an in-depth review, using the mechanisms listed here, of past incidents.<sup>39</sup>

After the judgment was handed down, officials argued that the High Court had upheld the open-fire policy employed in the protests and viewed this as legal license for the military to continue applying the regulations unchanged. For example, then-Minister of Defense Avigdor Lieberman wrote: “The High Court of Justice has unanimously rejected the petitions submitted by insignificant left-wing organizations against the IDF’s strong and steadfast stance in facing the enemy in Gaza.”<sup>40</sup> In a post about the protests, the IDF Spokesperson explained that the regulations had been approved by military advisors and the Attorney General, adding that they had been the subject of petitions to the High Court and that three justices had ruled in favor of the state, with respect both to the regulations and to the factual circumstances.<sup>41</sup>

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<sup>36</sup> **Yesh Din**, supra note 11, para. 57 of the judgment of Vice President Melcer.

<sup>37</sup> Ibid., para. 62 of the judgment of Vice President Melcer.

<sup>38</sup> Ibid., para. 61 of the judgment of Vice President Melcer.

<sup>39</sup> Ibid., para. 63 of the judgment of Vice President Melcer. For a similar position taken by President Hayut, see paras. 13-14 of her opinion.

<sup>40</sup> Daniel Dolev and Tal Shalev, [HCJ unanimously dismisses petitions against IDF open-fire regulations in Gaza Walla](#), 25 May 2018 (Hebrew).

<sup>41</sup> See **IDF Spokesperson’s FAQ**, supra note 14, [Have the Standard Operating Procedures undergone legal review?](#)



Yet the court did not uphold the regulations implemented on the ground – as they were never presented to the justices. The court did approve the regulations that the state said the military was following, but did so while ignoring the glaring disparity between the information presented to the justices and reality on the ground – a gap that was apparent in real time as the court was hearing the petition. The petition was heard on 30 April 2018, about a month after the protests began. By then, Israeli security forces had killed 38 Palestinians, including five minors, and injured more than 1,900 with live fire by implementing the regulations. The judgment was delivered about three weeks later, on 24 May 2018. By that point, 69 more Palestinians had been killed, nine of them minors, and more than 1,700 wounded by live fire. Since the judgment was handed down, to date, another 116 Palestinians have been killed, 32 of them minors, and more than 4,400 wounded by live fire. In total, the implementation of the regulations resulted in the killing of 223 Palestinians, 46 of them under the age of 18, and the wounding of some 8,000 by live fire.

The ruling clarifies that the High Court is willing to provide the state with a legal stamp of approval for unlawful acts, so long as the state withholds the truth from the court. While the court did not devise the policy or draft the regulations, the justices bear vital responsibility for their continued implementation. In choosing to ignore reality on the ground, the justices allowed the state to continue implementing the lethal, unlawful open-fire policy and lent it a legal seal of approval. Not only did they refrain from setting proper standards for protecting human life, and from pronouncing what is permissible and what is not, they preferred to uphold a policy that allowed the killing of protestors who posed no danger to anyone. In choosing to do so, the justices not only betrayed their role and duty, but played a key part in the continued implementation of the unlawful policy.

## **F. Flaws in the investigation of “exceptional incidents”**

The military law enforcement system was charged with a limited mission: investigating isolated incidents in which soldiers were suspected of breaching their orders. Accordingly, its inquiries focused on low-ranking soldiers on the ground. In these circumstances, even if the system had excelled in its investigative work and performed its mission successfully – the contribution to law enforcement would have been limited. Yet a review of the system’s operations shows that it does not strive to meet even this limited goal.

International human rights law requires investigations to be effective, i.e., independent, impartial, expedient and transparent. International humanitarian law, which Israel holds is the body of law relevant to the protests, also stipulates certain conditions investigations must meet.<sup>42</sup> As detailed below, Israel’s investigations do not meet these requirements.

### **1. Inherent flaws**

#### **A. Lack of independence**

The investigations are conducted entirely by the military, without civilian involvement. Neither the FFA Mechanism nor the MAG Corps can be considered independent agencies that are detached from the military. While their teams are not directly involved in decisions relating to the military’s response to the protests, they serve in the same military that operates on the premise it is fighting a terrorist assault against the entire State of Israel.

While the military claims the Attorney General and the Supreme Court provide oversight over the MAG in particular, and the law enforcement system in general, this oversight is a mere formality for three reasons. First, as a rule, the Attorney General delegates most of his powers to the MAG and refrains from intervening in his decisions. Second, the Attorney General personally approved the open-fire regulations employed during the protests, making him an interested party and precluding him from functioning as an instance of independent oversight. Third, the High Court is not meant to serve as an oversight mechanism but is an institution that persons who believe they have suffered injury may turn to – on their own initiative and at their own expense. Moreover, even in the few cases in which High Court justices were called upon to review decisions made by the MAG, they almost always opted not to intervene.<sup>43</sup>

#### **B. Cases of wounded persons not investigated**

The military only investigated cases in which Palestinians were killed by security forces. The thousands of incidents in which Palestinians were injured, sometimes so severely they were left paralyzed or needed amputation, were not investigated at all. PCHR representatives were informed of this in a meeting held on 1 October 2018 with representatives of the Gaza DCO. In the meeting, PCHR was told the military would investigate exceptional cases of serious wounds – yet B’Tselem and PCHR are not aware of any such investigations. PCHR

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<sup>42</sup> Noam Lubell, Jelena Pejic, Claire Simmons, [Guidelines on Investigating Violations of International Humanitarian Law: Law, Policy, and Good Practice](#), The Geneva Academy of International Humanitarian Law and Human Rights and the ICRC, September 2019.

<sup>43</sup> For more, see: B’Tselem, [The Occupation’s Fig Leaf](#), supra note 25, pp. 28-29.

continued to refer cases of wounding to the military and demand an investigation after the meeting, but was asked for further information only regarding fatalities.

The fact that the military only investigated deaths also emerges from B'Tselem's and Yesh Din's correspondence with the IDF Spokesperson, who provided them with data on the investigation of deaths only, despite being asked the same questions about the investigation of incidents that resulted in injury to protesters.<sup>44</sup>

The number of people wounded in these protests is almost unfathomable: a total of more than 13,000 Palestinians, some 8,000 of them injured by live fire, about 2,400 by rubber-coated metal bullets and almost 3,000 by tear gas canisters that hit them directly.<sup>45</sup> Of the persons wounded, 156 lost limbs.<sup>46</sup>

Choosing which cases to investigate based on the final outcome of the shooting rather than on the soldiers' conduct is based on an arbitrary distinction, as the difference between injury and death is often matter of pure chance.

A chief function of any investigation is to effect deterrence and ensure that soldiers refrain from unjustified actions. Focusing on the outcomes of such actions eliminates prevention, as it ignores what the soldiers actually did and offers them no guidance on what to do in future.

## **2. Dysfunction in practice**

The military law enforcement system fails even in its rare investigation of cases it defines "exceptional." Hundreds of complaints made by B'Tselem and PCHR, scores of MPIU investigations, dozens of meetings with officials within the military law enforcement system and years of research have all led to the conclusion that the nature of MPIU investigations precludes almost any chance of uncovering the truth.<sup>47</sup>

This is also evident in the MPIU's work on cases forwarded by PCHR. PCHR was informed that an MPIU investigation had been opened in 15 cases and asked to send materials pertaining to all of them, translated into Hebrew – including medical reports, death certificates, aerial photographs and coordinates, a sketch of the scene, a photo of the victim during or after they were hit, relevant videos and more. In only four of the cases, MPIU investigators contacted PCHR to ask for assistance in collecting statements from eyewitnesses and family members. PCHR made arrangements for five witnesses. Two arrived at Erez Crossing with a lawyer from PCHR, who was prohibited from sitting in on the interrogation, and three provided their statements on video. The statements were taken more than a year ago, but PCHR has not been informed where the investigations stand. Other than demanding assistance with witness statements, the MPIU has not provided PCHR with any updates on progress nor asked for further materials.

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<sup>44</sup> See Yesh Din, [Killing Time: The slow processing of complaints regarding Gaza Great March of Return casualties and the use of the Fact-Finding Assessment Mechanism to thwart prosecution of soldiers](#), September 2020, pp. 13-18.

<sup>45</sup>Office for the Coordination of Humanitarian Affairs (OCHA), [Protection of Civilians Database](#).

<sup>46</sup> Health Cluster, [Health Cluster Bulletin](#), November-December 2019.

<sup>47</sup> For more, see: B'Tselem, [The Occupation's Fig Leaf](#), supra note 25, pp. 17-20.

## A. Foreseeable difficulties

The IDF Spokesperson released a FAQ sheet explaining that the FFA Mechanism's examination process is lengthy and complicated, and has encountered several challenges. For one, as the incidents occurred in an area not under Israeli control, staff were unable to access the scene and collect evidence. Another challenge cited was lack of cooperation on the part of victims, eyewitnesses and family members who were not prepared to give testimony or provide medical records. This includes Palestinians who claim they were injured in the protests. Finally, the IDF Spokesperson cited a heavy workload and the need for additional resources.<sup>48</sup>

The military law enforcement system is well aware of these challenges, which its representatives have been citing for years. Back in July 2004, in a response to a High Court petition filed by the Association for Civil Rights in Israel and B'Tselem regarding MPIU investigations, the state said:

In addition to the theoretical level – which is key – there are practical obstacles that make it extremely difficult to conduct criminal investigations during fighting. There are complicated aspects to investigating while fighting is underway: It is difficult to reconstruct the scene, collect testimonies from civilians, gather evidence, verify the identity of casualties on the other side, and more. These practical impediments compound the theoretical challenges and do not stand alone.<sup>49</sup>

The MAG Corps made similar claims before the Turkel Commission in 2010. According to the MAG, investigations into suspected breaches of international humanitarian law while fighting is underway “present the MPIU with many, various challenges that are not simple”:

[T]he scene in which the crime was (ostensibly) committed, is located – generally – outside the territory of the State of Israel, and in many cases even in an area controlled by an enemy state (South Lebanon) or by hostile parties (the Gaza Strip). This fact significantly limits and sometimes totally thwarts the capability of the investigators to visit the sites and gather physical evidence located at the site. Furthermore, apprehension also exists that parties wishing to accuse the IDF of committing war crimes will “plant” fictitious evidence at the scene. An additional difficulty derives from the fact that in many cases, the fighting itself leads to the destruction of the evidence... A third difficulty is connected with finding eyewitnesses to the incidents (aside from the soldiers themselves)... Likewise, difficulty frequently arises already at the preliminary stage of identifying the location where the incident took place and the force that was involved in it... Finally, even when the location and the force involved were identified, difficulty exists in getting a uniform and clear version... because the operational circumstances and the “fog of war” [have an] influence.<sup>50</sup>

The military cannot continue citing the same difficulties, year in and year out, as an excuse for its failure to investigate incidents in which soldiers harmed Palestinians. Inasmuch as

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<sup>48</sup> IDF Spokesperson's FAQ, supra note 14.

<sup>49</sup> HCJ 9594/03, B'Tselem v. Military Advocate General, [Supplementary Notice on behalf of the State Attorney's Office](#), para. 11 (Hebrew).

<sup>50</sup> The Public Committee to Examine the Maritime Incident of 31 May 2010, [Second Report: Israel's Mechanisms for Examining and Investigating Complaints and Claims of Violations of the Laws of Armed Conflict According to International Law](#), February 2013, [hereafter: **Second Turkel Report**], p. 343.

these difficulties do exist, and inasmuch as they preclude a genuine, serious investigation – the military would do well to state it cannot investigate, instead of claiming it does and repeatedly blaming these known, entirely predictable difficulties for the inevitable failure of the investigation.

## **B. Foot-dragging**

Both the MAG and the FFA Mechanism work extremely slowly. PCHR filed 184 complaints and has so far received a final answer only in 28. This is corroborated by figures provided to B'Tselem by the IDF Spokesperson, indicating that by the end of April 2021, the FFA Mechanism had concluded its assessment in no more than half of the 234 cases under review.

This pace is particularly troubling given that the FFA Mechanism's work is only the first step in the investigative process. The Mechanism's mandate does not include an actual investigation of the incidents, but is confined to a quick initial assessment of the circumstances in order to help the MAG decide whether an MPIU investigation is warranted. The sluggishness means that any investigation the MAG does ultimately order will begin long after the incidents took place. This significantly lowers the chances of success, as witnesses' memory grows foggier, soldiers are discharged and findings are difficult to obtain. Such circumstances preclude exhaustive, serious investigations that can uncover the truth.

The impact of this foot-dragging was blatantly obvious in the way the law enforcement system – both military and civilian – dealt with complaints forwarded by PCHR regarding the killing and injury of Palestinians in Operation Pillar of Defense in November 2012. In the first six months of 2013, PCHR filed complaints concerning 32 Palestinians who had been killed in the fighting and 36 who had been injured. After eight years of pressing the MAG Corps, the Attorney General and the High Court, PCHR was informed in December 2020 that the files had been lost. As they could no longer be processed, the investigations were closed with no further action.<sup>51</sup>

## **C. MPIU case: The killing of 'Othman Hiles**

At the time of writing, only one indictment has been filed for the killing of a Palestinian demonstrator: in the case of 14-year-old 'Othman Hiles, who was shot and killed by a soldier on 13 July 2018.

B'Tselem's examination found that on that day, at around 2:00 P.M., three 14-year-olds from Gaza City – 'Othman Hiles, 'Abdallah al-'Arej and Muaiad Jundiye – went to the protest area east of the city and sat down some 200 to 300 meters from the fence. At around 6:00 P.M., the three decided to advance towards the fence, where several young people were gathered. In video footage posted on social media, Hiles is seen approaching the fence and starting to climb it – at which point he is shot. In a testimony he gave B'Tselem, 'Abdallah al-'Arej described what happened:

'Othman told us to get closer to the fence so he could touch it. We got up to about twenty meters from it, where we found a few guys and some girls holding Palestinian flags. 'Othman told me he wanted to go over to the two girls because he was stronger and braver than them, and that he would touch the fence. I told him that the military would

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<sup>51</sup> For more, see PCHR, Press Release: [The Files Are Lost!?!?](#), 7 December 2020.

shoot us because we're boys, but wouldn't shoot the girls. I said: "Othman, no, let's go back, the army will snipe at us." He didn't listen.

A minute later, Othman walked towards the fence, with me and Muaiad next to him. We got so close to the electronic fence that we could touch it. Othman said to me: "I'll touch the fence and go back, leave me be, I don't want to go back." I was about a meter away from him. He just managed to touch the fence and climb on to it, when the Israeli military shot live gunfire at him. He fell down. Tear gas canisters were fired and I choked up and couldn't help him. Scared, I moved a back a little and I started shouting that Othman had fallen as a martyr and that we needed a stretcher there to get him medical care. I couldn't lift him. He was all bloody. The bullet went into his chest and out of his back.<sup>52</sup>

The MPIU investigation was launched on 21 August 2018 and concluded about five months later, in late January 2019. It focused only on the killing of Hiles, treating the incident as an isolated occurrence divorced of context while ignoring hundreds of almost identical incidents in which soldiers had followed the same orders.

The investigation file includes summaries of the operation logs from the day of the incident and medical records sent to the investigators by the lawyer representing the family on behalf of the Al Mezan center. It mostly, however, consists of testimonies MPIU investigators collected from soldiers and officers involved in the incident – including the soldier who shot and killed Hiles. Three of the soldiers were interrogated under caution: the company commander, the team commander and the soldier who fired the shot.

The interrogation of the soldiers and officers focused on three issues: the open-fire regulations and the briefings given to the soldiers before the protest, their understanding of the circumstances of the shooting, and the reasons they did not report the incident until the following day.

The higher-ranking officers questioned by the MPIU – the battalion commander and the company commander – said the soldiers had been briefed on the open-fire regulations before the protests. They listed the instances in which live fire was permitted, including sniper fire at the knees of an individual considered a "major instigator." They clarified there were restrictions on firing at women and children and emphasized that soldiers were not allowed to open fire without authorization from the sector commander. According to these officers, shooting to kill was permitted only in cases of immediate and present threat to life.

Yet the team commander and the other soldiers questioned, including the perpetrator, were less unequivocal when it came to the orders and the instances in which live fire was permitted. Some did not remember what they had been told in briefings. They were unaware, for example, of restrictions on firing at women and children and did not know what they were required to do if the fence was damaged or if one of the protestors climbed it. However, all the soldiers noted that firing without authorization was absolutely prohibited, unless lives were at risk.

The soldier who shot Hiles was questioned by the MPIU three times. He was first interrogated on 31 October 2018, about two months after the investigation began and more than three months after the incident itself. From the outset, he did not deny shooting and

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<sup>52</sup> Testimony given to B'Tselem field researcher Olfat al-Kurd on 15 July 2018.

killing Hiles. He explained that in the briefings, the soldiers had been told not to let Palestinians near the fence. When he saw Hiles approaching the fence and shaking it, he had asked for the team commander's authorization to open fire, but the commander did not hear him. He saw Hiles climbing the fence and then, despite not receiving authorization, he shot and hit him. The soldier stressed that he did not feel his life was in danger and had no intention of killing Hiles – instead aiming at his ankle – but that as he understood the orders, he had to prevent Palestinians from climbing the fence.

Other than the soldier who fired the shot, all the individuals questioned – some of whom had been on the ground at the time of the incident (including the team commander) and others who watched the video after the fact – agreed the shooting had been unjustified in the circumstances and had breached regulations.

The MAG Corps accepted this description of the incident, as included in its annual report:

The accused was part of a troop that was posted near the perimeter fence in the Gaza Strip and was responding to a violent riot on 13 July 2018. That morning, the company commander briefed the soldiers on the open-fire regulations and clarified that no firing was permitted without authorization from the commanders in the sector, and specifically his own authorization. During the riot, a group of rioters approached the fence and two of them shook it. The troop commander instructed one of the soldiers to fire in the air, and did so himself, without authorization from the company commander. One of the rioters approached the fence again and began climbing it. At that point, the accused fired at him without receiving authorization, in breach of the open-fire regulations and the instructions given to the troop prior to deployment.<sup>53</sup>

Nevertheless, in late October 2019, the perpetrator was convicted of the almost negligible offense of abuse of authority to the point of endangering life or health, as part of a plea bargain. He was sentenced to a token punishment of 30 days' military community service, a suspended prison sentence and demotion to the rank of private. According to the MAG Corps' annual report:

After a hearing before the MAG in which the military defense lawyers made various arguments, and given the difficulties proving guilt, the parties entered a plea bargain whereby the combatant would be convicted of the offense of abuse of authority to the point of endangering life or health and sentenced to incarceration served by way of military work for one month.<sup>54</sup>

A review of the investigation file and of the indictment begs the question how the MAG Corps arrived at this result. The testimonies in the file attest to serious flaws in the soldiers' understanding of the regulations, with some of them clearly unaware of what they were and were not permitted to do – despite the senior officers' claims they had been given clear, detailed briefings. With no explanation provided for this disparity, it is unclear why action was taken only against the soldier who fired the shot.

Second, it is not clear why the MAG Corps chose to prosecute the soldier for an almost negligible disciplinary offense while entirely ignoring the outcome of his act: the killing of a 14-year-old boy who posed no danger to anyone. The decision is particularly perplexing

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<sup>53</sup> Military Advocate General's Corps Report, 2019, p. 15 (Hebrew).

<sup>54</sup> Military Advocate General's Corps Report, 2019, p. 23 (Hebrew).

given the MAG Corps' own choice to focus on outcomes rather than on the actions of soldiers, by investigating fatalities and not the thousands of cases that resulted in injury. If the deciding factor is the outcome, why did the MAG Corps focus on the soldier's conduct in this case?

Responding to B'Tselem's inquiry, the MAG Corps said: "The offense was attributed [to the soldier] after we found that a causal connection between the shooting and the harm to 'Othman Hiles could not be substantiated to a degree meeting the standards of criminal law."<sup>55</sup> Yet this statement is nothing more than a feeble excuse designed to justify the outcome of the investigation.

The MAG Corps says that without the bullet that hit and killed Hiles, a causal connection between the shooting and the death cannot be proven. It is, therefore, only prepared to indict the person who opened fire for a minor disciplinary offense – even though the soldier who fired the shot admitted to shooting and killing the victim, and other soldiers who were with him corroborated his account. The MAG Corps has made similar arguments in other cases. But, as noted in the IDF Spokesperson's FAQ sheet, MPIU investigators cannot obtain bullets that hit Palestinian protestors anyway.<sup>56</sup> In such circumstances, what use can an investigation be?

The question is why the MAG Corps bothers to uphold an intricate investigation mechanism, conduct lengthy investigations, question soldiers and officers, and take up the time of the Military Prosecution, the Military Defense and the military courts – when the system is structured to produce such inconsequential results. The obvious conclusion is that there was never any genuine intention to take action against the soldiers. The state's goal is to create a façade, in order to silence criticism and avert an investigation of the incidents by the ICC Prosecutor.

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<sup>55</sup> Letter from Captain Amit Greenhoiz of the Chief Military Prosecutor's Office, MAG Corps, to B'Tselem, 10 February 2021.

<sup>56</sup> See **IDF Spokesperson's FAQ**, supra note 14.



## G. Examples

### **The wounding of Muhammad al-'Ajuri, 16, east of Jabalya Refugee Camp, 30 March 18**

On Friday, 30 March 2018, Muhammad al-'Ajuri arrived with several of his friends at a protest being held east of Jabalya R.C. Fifteen-year-old Al-'Ajuri, who lived in the camp, was a runner with the Palestine Athletics Federation. He and his friends went up to a distance of several dozen meters from the fence to hand out onions to protestors, in order to help ease the effects of tear gas inhalation.

Israeli security forces fired copious amounts of tear gas at the area, and al-'Ajuri withdrew to a spot about 300 meters from the fence. A member of the Israeli security forces then fired a live bullet at his right leg. The teen was taken to hospital, where it was found his leg had suffered a fracture and a damaged artery. After he underwent surgery, the physicians determined his leg was still in danger and recommended further surgery in Ramallah. Israel refused to let him exit the Gaza Strip, and he petitioned the High Court with the help of human rights organizations Adalah and Al Mezan. The justices dismissed the motion for an urgent hearing and the physicians had no choice but to amputate the leg.

In a testimony he gave B'Tselem, Muhammad al-'Ajuri described how he was shot:

I went up to a distance of about 50 meters from the fence to hand out onions to the protestors. I saw a few people who'd been injured, including an older man who'd been hit in the left leg. The bone in his leg was showing and he was bleeding badly. Most of the injuries I saw were to the legs. The soldiers were firing a barrage of tear gas canisters and I nearly choked, so I turned around and started moving away. When I was about 300 meters away from the fence, I was shot from behind and hit in the right leg. I didn't fall down. I stayed standing where I was, and my leg was bleeding. My father came to help me, and then a few young guys came and gave me first aid. They tied a strip of cloth around my leg to stop the bleeding and took me by motorcycle to an ambulance, which was about 250 meters away.<sup>57</sup>

On 19 July 2018, PCHR filed a complaint on al-'Ajuri's behalf with the MAG Corps. On 20 December 2018, the center provided documents and medical records to the DCO at Erez Crossing. On 13 January 2019, the Military Advocacy for Operational Affairs confirmed receipt of the complaint, adding that al-'Ajuri's injury might have been caused by the military. For a decision to be made, PCHR was asked to provide further information: additional medical records and witness affidavits translated into Hebrew, as well as descriptions of IDF forces present at the scene, including their location, numbers, unique features and the weapons the soldiers used. On 7 February 2019, PCHR replied regarding the details of the incident and the transfer of medical records to Israel. Regarding the position and number of troops, PCHR replied that "these are IDF troops and their numbers are unknown," adding that since the victim "is not a military expert," he could not answer the questions. In an additional testimony he recently gave B'Tselem, al-'Ajuri said:

When I was injured, I was 16 and a half years old, a tenth grader. I was a runner on the Palestine Athletics Federation team. After the injury, I dropped out of school and stopped doing sports. I went through unimaginable suffering and was in a bad way mentally. I felt depressed, sad and hopeless because of my leg amputation. It was a

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<sup>57</sup> Testimony given to B'Tselem field researcher Olfat al-Kurd on 17 April 2018.

very difficult time for me. On 25 November 2018, I went to the United States to have a prosthesis fitted. I stayed there until February 2019 and then I went back to Gaza with the prosthesis, which helped me get back to a normal life. I don't feel like an invalid. I can move easily and have gone back to riding a motorcycle.

On 19 July 2018, I filed a complaint against the army via PCHR. I've been waiting for an answer for two and a half years. I keep in touch with PCHR to get updates on my case, but haven't received any. When I was injured I was a teen and wasn't dangerous to the soldiers. I feel frustrated and hopeless that they haven't decided to investigate my case, but I also have no faith that they will and don't trust the Israeli justice system.<sup>58</sup>

### **The killing of Suhayb Abu Kashef, 16, north of the town of Khuza'ah, 3 August 2018**

On Friday, 3 August 2018, at around 5:00 P.M., Suhayb Abu Kashef, a 16-year-old from Khan Yunis, arrived at a demonstration north of the town of Khuza'ah. Abu Kashef, who had a behavioral problem, threw stones at Israeli security forces on the other side of the fence using a slingshot. He and other youths crossed the concertina wire the military had placed on the ground a short way away from the fence, at which point Israeli security forces opened heavy fire at them. Abu Kashef was hit in the neck and taken to the European Hospital in Khan Yunis on a ventilator. At the hospital, he was found to be paralyzed in all four limbs as a result of the injury. After about six weeks, in which he was also treated at a hospital in Hebron, he succumbed to his wounds on 15 September 2018. In a testimony he gave B'Tselem, Abu Kashef's neighbor, Yasser Abu Sablah (27) related what he had seen:

At around 6:30 P.M., I saw our neighbors' son, Suhayb Abu Kashef, move ahead and cross the concertina wire. He threw stones at the soldiers, but they didn't reach them. When Suhayb and another group of guys got close to the fence, the soldiers opened fire at them and Suhayb was hit in the neck. I was standing about twenty meters behind him. I saw him put his hand to his neck, take a few steps back and collapse. He was carried to an ambulance and I ran there with the other guys. I was shocked and didn't know what to do, because I knew him really well. He took part in all the demonstrations, every Friday, and got hurt inhaling tear gas more than once.<sup>59</sup>

On 28 October 2018, PCHR filed a complaint with the MAG Corps regarding the killing of Abu Kashef. On 23 January 2019, the center provided Israel with materials regarding the incident. On 24 February 2020, nearly 18 months after Abu Kashef's death, PCHR was told that following an FFA Mechanism assessment, the decision was not to open an MPIU investigation. While "Abu Kashef might have been hurt as a result of gunfire by IDF troops as part of their response to the violent riot," the letter said, "no evidence has been found to raise reasonable suspicion that Abu Kashef was hit as a result of **deliberate** lethal fire or as a result of **non-deliberate fire that deviated from the open-fire regulations.**" The MAG concluded that therefore, there were no "reasonable grounds to suspect the commission of a criminal offense" and ordered the case closed.<sup>60</sup> On 29 March 2020, PCHR filed an appeal with the Attorney General over the MAG's decision not to investigate. Several days later, on

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<sup>58</sup> Testimony given to B'Tselem field researcher Olfat al-Kurd on 26 October 2020.

<sup>59</sup> Testimony given to B'Tselem field researcher Khaled al-'Azayzeh on 18 September 2018.

<sup>60</sup> Letter from Captain Maya Fisher-Barzilai, Office of the Military Advocate for Operational Matters, 24 February 2020 (emphases in the original).

2 April 2020, the Attorney General's bureau chief replied that the appeal had been received and forwarded to the relevant officials for a response.

In a testimony she gave B'Tselem, Suhayb's mother, Nisreen Abu Kashef, described what happened after his death:

My son Suhayb had a cognitive disability and his behavior was very childish. He would take a soccer ball with him to the Great March of Return protests. His death devastated me. On 30 September 2018, I contacted PCHR in Khan Yunis and filed a complaint against Israel for killing my son although he had done nothing wrong. I hoped my complaint, the testimonies I handed over and PCHR's intervention would make Israel open an investigation into the killing of my son and put the soldier who shot him on trial. It's the least that should have been done.

Yesterday, I found out that Israel is refusing to investigate Suhayb's killing. It made me sad and very frustrated. It was all in vain. The occupation authorities continue to violate our human rights. Even after committing crimes against us, they completely ignore the feelings of their victims' families. But I will continue to fight with the help of human rights organizations, to demand justice and an Israeli investigation into my son's killing.<sup>61</sup>

### **The killing of Ahmad Abu Habel, 15, at Erez Crossing, 3 October 2018**

On Wednesday, 3 October 2018, at around 5:00 P.M., two friends from Beit Lahiya – Ahmad Abu Habel and Muhammad Dawas, both 15 – arrived at a demonstration taking place opposite Erez Crossing, north of their hometown. During the protest, while they were sitting by the roadside at least 200 meters from the fence, soldiers fired a tear gas canister that lodged in Abu Habel's head, killing him. In a testimony he gave B'Tselem, Dawas, said:

Ever since the protests started on Mondays and Wednesdays at Erez Crossing, my friend Ahmad Abu Habel and I have been going there. We throw stones at the soldiers and take part in the "night-time confusion" demonstrations. On Wednesday, 3 October 2018, at around 4:00 P.M., Ahmad and I got on a bus that takes demonstrators to Erez Crossing. When we got there, at around 5:00, there were already some demonstrators by the crossing. The soldiers threw tear gas canisters and some of the protesters threw stones at the soldiers. The air was full of tear gas. We breathed in a lot of it and couldn't stand or walk any further. Ahmad and I went to sit by the roadside, far from the crossing, to get away from the gas.

Suddenly, after about ten minutes, while I was sitting next to Ahmad, he keeled over and I saw smoke rising from his head. He'd been hit in the head by a tear gas canister. I ran away so I wouldn't get hit, too. I immediately called the medics to come help him. They took the canister out of his head, which was bleeding. The medics picked him up and carried him to an ambulance, which took him to the Indonesian Hospital. I went with him. A few minutes after we got to the hospital, he was pronounced dead.<sup>62</sup>

On 10 October 2018, Ahmad's father, Samir Abu Habel, 61, filed a complaint with the MAG Corps via PCHR. On 26 December 2018, the Military Advocacy for Operational Affairs

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<sup>61</sup> Testimony given to B'Tselem field researcher Khaled al-'Azayzeh on 14 October 2020.

<sup>62</sup> Testimony given to B'Tselem field researcher Muhammad Sabah on 4 October 2018.

responded that the incident was under review. In a testimony he gave B'Tselem, Samir Abu Habel spoke about what has happened since:

A few months ago, PCHR invited me and the relatives of other victims to meet with their lawyers and receive updates on the center's work and on the status of our cases. Ever since the complaint was filed, I've been hoping the soldiers who killed my son will be tried and punished and that they get what they deserve.

I'm still waiting for an answer from Israel. Once in a while I get an update from PCHR about the file, but there hasn't been any new information for several months. I'm anxiously awaiting an update, expecting to hear that the soldier who opened fire has been sentenced and to receive compensation for losing Ahmad. Of course, no amount of money in the world can make up for losing my son, but compensation and acknowledgement of the crime by punishing the perpetrators and the officer who ordered the shooting are essential.

I expect this case to end with a conviction, because it's clear-cut. There's no way to deny what happened. The military has to admit to it and wrap the case up as soon as possible. I lost my son, who did not pose any danger to the soldiers and was hundreds of meters away from them.<sup>63</sup>

### **The killing of Amal a-Taramsi, 44, east of Gaza City, 11 January 2019**

On Friday, 11 January 2019, at around 2:00 P.M., Amal a-Taramsi, a 44-year-old from Gaza City, arrived at a protest that was taking place east of the city. As she had done in previous demonstrations, a-Taramsi helped protestors who had inhaled tear gas by spraying their faces with a saline solution. Some protestors began throwing stones, burning tires and hurling explosive devices at Israeli security forces on the other side of the fence.

At around 4:00 P.M., when she was standing about 200 meters away from the fence, a-Taramsi was struck in the neck by a live bullet. She was taken to the medical tents and from there to a-Shifaa Hospital, where the doctors pronounced her dead. 'Alaa al-Halabi, a 30-year-old from Jabalya R.C. who is a senior paramedic and ambulance driver with the Red Crescent, related in a testimony he gave B'Tselem:

On Friday, 11 January 2019, at around 2:00 PM, I arrived with Paramedic Majed Abu Lebdeh at the eastern side of Malaka Square, east of Gaza City. Half an hour after we arrived, people started throwing stones at soldiers, who fired tear gas canisters and live rounds. We took three people who'd been wounded by live fire to the medical tents and returned to our position, around 200 meters away from the fence. We were standing there, watching the protestors throw stones and the soldiers respond with tear gas canisters and live fire in their direction.

At around 4:00 PM, as I was watching the protestors who were close to the fence throwing stones at soldiers who were behind dirt mounds, I saw a woman standing about ten meters north of me. Suddenly I heard live gunfire and youths screaming. I went over to a woman who was lying on the ground and recognized her as the woman I'd seen standing there before. She was bleeding and her head was covered in blood. I

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<sup>63</sup> Testimony given to B'Tselem field researcher Muhammad Sabah on 14 October 2020.

took her over to a Red Crescent Land Rover and drove her to the medical tents. They examined her and gave her first aid, and then she was taken to a-Shifaa Hospital.<sup>64</sup>

On 11 February 2019, PCHR filed a complaint with the MAG Corps regarding the killing of a-Taramsi. The next day, the MAG Corps acknowledged receipt of the complaint and asked PCHR to provide witness affidavits, medical records and documentation from the incident – all translated into Hebrew. On 25 February 2019, PCHR sent the MAG Corps medical records and an aerial photograph of the site of the incident, and clarified it was prepared to make arrangements for witnesses to provide statements to the MPIU. On 26 June 2019, PCHR provided the FFA Mechanism with an affidavit collected from an eyewitness to the shooting. On 17 September 2019, PCHR sent a reminder, and was told on 26 September 2019 that the case was still under review by the FFA Mechanism. On 23 June 2020, PCHR sent another reminder to the MAG Corps, which replied on 17 August 2020 that the incident was still under review by the FFA Mechanism.

In a testimony he gave to B'Tselem, Amal's father, Mustafa a-Taramsi, 70, said:

After Amal was killed, I gave power of attorney to PCHR to file a complaint with the Israeli military. Since then, I haven't received any information about the investigation or about whether they found the soldier who shot and killed my daughter for no reason while she was near the fence. I'm waiting for the case to be concluded and for compensation.

All Amal did was participate in the march. She didn't put any soldiers in any danger. She was standing about 200 meters away from the fence. I refuse to accept the fact that the case will be closed without giving me compensation and without prosecuting whoever killed my daughter and the person who ordered him to shoot. That order resulted in the killing of my daughter for no apparent reason. I thought the case would be wrapped up within months after the complaint was filed. I didn't expect it to take so long. I won't stop. If the case is closed, I'll keep on fighting and will appeal the decision. I'll demand the case reopened and that the people responsible for killing my daughter be prosecuted. I intend to continue following the case until it ends with a conviction and with compensation for the killing of my daughter, Amal, in cold blood.<sup>65</sup>

### **The wounding of Mai Abu Rawida, 20, east of al-Bureij Refugee Camp, 6 December 2019**

On Friday, 6 December 2019, at around 2:30 P.M., Mai Abu Rawida, a 20-year-old from al-Maghazi R.C., arrived with her two sisters at a Return March protest being held east of al-Bureij R.C. in the central Gaza Strip. After attending prayers at the protest tents, she went with several friends up to a distance of a few dozen meters from the fence, waving a Palestinian flag. At around 3:30 P.M., Abu Rawida went closer to the fence, and then a member of the Israeli security forces fired a rubber-coated metal bullet (“rubber bullet”) that hit her in the eye. She was transferred from one hospital to another and finally underwent surgery at a-Nasr Hospital. Two days later, she was transferred to a-Shifaa Hospital, where she was treated for a skull fracture. Mai Abu Rawida continued receiving treatment for her

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<sup>64</sup> Testimony given to B'Tselem field researcher Muhammad Sabah on 13 January 2019.

<sup>65</sup> Testimony given to B'Tselem field researcher Muhammad Sabah on 28 January 2021.

eye and was fitted with a prosthetic eye on 14 March 2020. In a testimony she gave B'Tselem, she recounted:<sup>66</sup>

On Friday, 6 December 2019, at around 3:30 P.M., after I walked away from my friends and stood several dozen meters away from the fence, one of the soldiers fired a “rubber” bullet that hit me in the left eye. I fell to the ground and put my hand over my eye, which was full of blood. Blood was coming out of my mouth. I was sure I’d lost my eye. I screamed and my friends rushed over with some guy. They lifted me up and carried me to the paramedics. The paramedics took me to an ambulance that drove me to the field infirmary and there, the doctors cleaned the wound and sent me to Shuhada al-Aqsa hospital right away. I’m very sad. I lost my eye just like that, for no reason. I wasn’t a threat to the Israeli army in any way. Sometimes I feel that my face is disfigured. I look in the mirror and don’t like it. The army ruined my life and my future. As a woman, my life is ruined.

Several days after the injury, on 12 December 2019, Abu Rawida contacted PCHR and filed a complaint. She gave testimony to PCHR along with two of her friends, who were with her during the incident. The four were told they might be required to go to Erez Crossing to give testimony to MPIU investigators. On 18 December 2019, PCHR filed a complaint regarding Abu Rawida’s injury with the Military Advocacy for Operational Matters, which acknowledged receipt on 1 January 2020. PCHR inquired about the status of the case on 12 April 2020, and on 6 May 2020 was notified by the Military Advocacy for Operational Affairs that the complaint was still under review. On 28 January 2021, PCHR asked for another update. As of the time of publication, the military has not responded. In a testimony she gave B’Tselem, Abu Rawida said:

After I was injured, I contacted PCHR in the Gaza Strip and gave testimony together with two of my friends, who were eyewitnesses. I was told we might be required to go to Erez Crossing to give testimony, but no one has called me since. I haven’t made any inquiries, because I know that even though there were many violations by the Israeli military, which caused many deaths and injuries, no one has been prosecuted.

I don’t think anyone will compensate me some day for the harm I suffered. The soldiers who shot me haven’t even been tried, although I’m sure they know exactly who shot me. It’s been ten months since my injury and no investigation has been opened.

Since I lost my eye, I’ve felt crippled and damaged. Sometimes I feel tired and exhausted, because when I walk along the street, I’m always on guard against reactions from people and drivers. I hear them scold me, “Can’t you see?! Look where you’re going when you cross the street!” These things have a really negative effect on me.<sup>67</sup>

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<sup>66</sup> Testimony given to B’Tselem field researcher Olfat al-Kurd on 10 December 2019.

<sup>67</sup> Testimony given to B’Tselem field researcher Olfat al-Kurd on 14 October 2020.

## Conclusions

“Where harm to innocents was suspected, we investigated ourselves thoroughly, and where needed, those responsible were held to account.”<sup>68</sup> That is what Israeli Chief of Staff Aviv Kochavi said recently in a meeting with the president of Germany, in which the two discussed the ICC’s pronouncement that it had jurisdiction to investigate Israel’s actions in the Occupied Territories. As this report shows – these statements have no basis in reality.

Israel labeled the Gaza protests as illegitimate before they even began. This reflects the view employed by the apartheid regime throughout the Occupied Territories, whereby Palestinians are not entitled to political rights, including freedom of protest. Furthermore, Israel tried to prevent the demonstrations from taking place, despite the fact that they were held inside the Gaza Strip – an area for which Israel claims to bear no responsibility. Finally, when Gaza residents went ahead with the demonstrations, Israel devised and implemented an unlawful policy that permitted live fire against protestors who posed no threat. Over the course of the protests, Israeli security forces killed 223 Palestinians and injured more than 8,000. The vast majority of casualties were unarmed and posed no threat to any one.

Israel responded to international criticism by saying it would investigate the incidents. The investigations were entrusted to the Military Advocate General (MAG), who used the special Fact-Finding Assessments (FFA) Mechanism set up after Operation Protective Edge. Yet these investigations are a form of whitewashing, designed primarily to create the appearance that Israel is seeking the truth – when in fact, the opposite is the case.

The government put the military in charge of the investigations. By doing so, the politicians who shaped and backed the policy, and encouraged its implementation, ensured their involvement would not be probed – as the MAG has no authority to order an investigation of such kind. This guaranteed that the persons truly responsible for the policy would not be investigated or held to account. Although he was the one who approved the orders, placing the MAG in charge of the investigations freed him from examination, too, as he would not order his own investigation.

The investigations that were ultimately launched focused on a handful of cases defined in advance as “exceptional”, and on low-ranking soldiers who were suspected of breaching the open-fire regulations – while ignoring the illegality of the policy itself. In keeping with its longstanding practice, the military law enforcement system did not attempt to get at the truth in these cases. Only one soldier was indicted, and he was quickly convicted as part of a plea bargain and given a token penalty of military community work, a suspended sentence and a demotion. The case was then touted as an example allegedly proving that Israel had investigated incidents related to the protests. Yet without investigating those responsible for the open-fire policy employed during the protests, this case is merely as an exception that proves the rule.

Israel’s conduct regarding the investigation of the Gaza protests is hardly surprising, given that it followed the exact same pattern after operations Cast Lead and Protective Edge. Then, too, Israel flouted international law, refused to reform its policy despite the lethal outcomes and deflected criticism by promising to investigate its conduct. Then, too – nothing came of

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<sup>68</sup> Itamar Eichner, “[Chief of Staff warns European leaders against ICC decision: “It can happen to your soldiers too.”](#) *ynet*, 16 March 2021 (Hebrew).

this promise. Barring a handful of non-representative cases, no one was held accountable for the horrifying results of an unlawful and immoral open-fire policy.

Contrary to the pervasive sentiment among Israeli military and government officials, investigating suspected human rights violations is not a favor to the international community or a concession on Israel's part. All states are duty-bound to investigate suspected breaches of international law, be it human rights law or the laws of war. The investigations must be conducted according to accepted, written protocols, and must be effective – i.e., independent, impartial, expedient and transparent.<sup>69</sup> Investigations that fail to meet these requirements, like the ones carried out by Israel with respect to the protests, lead to the conclusion that the state has failed to discharge its duty to investigate. This time, the conclusion has real repercussions: The ICC is already investigating, and the former Prosecutor has announced she will look into Israel's policies with respect to protests.

The investigations that the military conducted in relation to the Gaza protests were never intended to ensure justice for the victims or to deter troops from similar action. Their sole purpose was to silence international criticism so that Israel could continue to implement its policy unchanged, and to avert the ICC's intervention by producing a paper trail ostensibly showing Israel is investigating. However, as Prof. Mordechai Kremnitzer noted: "Despite what some people assume, the world may be clueless at times, but not always and not all the time. The assumption that the world will 'buy into' the idea that the military's internal process in the current context is a genuine inquiry underestimates the world's intelligence."<sup>70</sup>

True policy change will come about only when Israel is forced to pay a price for its conduct, actions and policies. When the smokescreen of investigations is lifted and Israel is forced to reckon with its human rights abuses and breaches of international law, it will have to decide: openly admit that it does not recognize Palestinians as having political rights and as deserving of protection, and therefore has no interest in accountability for violating Palestinians' human rights – or change policy.

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<sup>69</sup> See, e.g., Amichai Cohen & Yuval Shany, [The IDF and Alleged International Law Violations: Reforming Policies for Self-Investigation](#), Policy Paper 93, The Israel Democracy Institute, December 2011 (Hebrew; see English abstract [here](#)). See, also, Lubell, Pejic and Simmons, *supra* note 42.

<sup>70</sup> Mordechai Kremnitzer, [The IDF investigating itself will be a cover-up](#), *Haaretz*, 8 April 2018 (Hebrew).