

## **After a year of protests in Gaza: 11 Military Police investigations, 1 charade**

*B'Tselem position paper, March 2019*

For the past year protests have been taking place regularly near the Gaza perimeter fence, with thousands of Palestinians in attendance. The protests are being held to demand that the Israeli-imposed blockade over the Gaza Strip be lifted and seeking the realization of the right of return. Up to the end of February, 200 Palestinians have been killed, including at least 39 minors, and over 6,300 have been hit by live gunfire, a direct result of the manifestly unlawful open-fire orders given to the troops in the field, which permit firing at protesters who are posing no danger to anyone. These results have elicited harsh criticism against Israel, mostly from the international community. Despite the criticism, Israel has refused – and continues to refuse – to alter its open-fire order. The gunfire continues, and the casualty toll – of both dead and injured – keeps rising.

Instead of overhauling its mode of operation, Israel announced – as is its wont – that it would investigate “exceptional incidents” that took place during the protests. This is the standard statement Israel issues whenever it finds itself facing intensified criticism, usually after a significant rise in the number of Palestinians killed by Israeli troops. This was the case, for example, after Operation Cast Lead in January 2009 and after Operation Protective Edge, in the summer of 2014.

The purpose of making an announcement regarding “investigation of exceptional incidents” is to dispel criticism at key junctures, just until matters blow over and international attention moves on to other issues. And so it goes, over and over again. However, apart from the role they play in the Israeli effort at silencing international criticism, the investigations carried out by the military law enforcement system, under the leadership of the Military Advocate General (MAG), are pointless. The “investigations” do not lead to adopting any measures against any of the people responsible for harm to Palestinians, as from the very outset the investigations do not probe the responsibility at the level of officials

who set out and approved the policy or the unlawful orders. The investigations do not deter the troops serving on the ground, as they are so few and far between, and even in cases in which an investigation was actually launched, it was then almost invariably closed without any further measures. Nor do the investigations achieve justice for the victims or their families.

None of this is a random fluke: the military law enforcement system is not designed to guarantee accountability. Instead, it is a well-oiled whitewashing system whose objective is the very reverse. Nevertheless, the propaganda ploy of making a statement regarding the launching of an investigation – a measure Israel reuses over and over again, in exactly the same form – has always been successful, at least to date. This is no theoretical matter. When propaganda diversion tactics succeed in preventing accountability, there is a price to pay, and it is measured in human lives. It cannot be allowed to succeed again now.

**The official version: We're investigating, all is well.**

The first stage in whitewashing is an examination by the General Staff Fact-Finding Assessment Mechanism (the FFA Mechanism). As detailed in the state's response to High Court petitions, the FFA Mechanism is charged with investigating exceptional incidents. In its response to the petitions – which were filed in April 2018 to contest the lawfulness of the open-fire orders implemented at the protests – the state explained that “the task of the mechanism is to carry out a comprehensive examination of the facts and collect data and relevant information in order to provide Respondent No. 2 [the MAG] with as full as possible a factual basis for reaching a decision as to whether there is reasonable suspicion as to the commission of the criminal offense, which would warrant an investigation.”<sup>1</sup>

In February 2019, the IDF Spokesperson issued a lengthy document regarding the protests in the Gaza Strip and the Israeli military's response to the protests. The document, published only in English, and released shortly before the scheduled publication of the conclusions by the UN Human Rights Council

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<sup>1</sup> Paragraph 47 in the state's response, HCJ 3003/18 *Yesh Din v. IDF Chief of Staff* [Translation by B'Tselem].

international commission of inquiry on the matter, includes a chapter devoted to the investigation of incidents.<sup>2</sup> In this chapter, the IDF Spokesperson explains the role of the FFA mechanism far more comprehensively than it was described in the state's response. According to the IDF Spokesperson, the information that the FFA mechanism collects serves the MAG in deciding "whether or not to open a criminal investigation, as well as for the purpose of a lessons-learned process and the issuance of operational recommendations that will help mitigate the risk of exceptional incidents occurring in the future."

The FFA mechanism was granted sweeping powers which allow it to collect "information and materials from any relevant IDF sources, as well as the capacity to request information and materials from external sources, including from civilian witnesses and international organizations." It uses the authority it was given to collect, among other materials, information as to the use of force and its results, the deployment of the forces and the equipment used, and information regarding the forces' preparations for the events and intelligence. In addition, the FFA mechanism gathers "open source information" found on social media. The IDF Spokesperson argues that these materials help obtain a full picture as to the military's actions for every site in which there were protests, and the way the orders and decisions made by officers in the field were carried out.

According to this document, as early as 4 April 2018, mere days after the first demonstration, the chief of staff ordered the FFA mechanism to begin its examinations and to convey its findings to the MAG for review. To that end, a special team was established. It is made up of senior ranking officers – on active duty and in the reserves – with applicable professional military expertise. The team has legal advisers, and no members of the team are part of the chain of command in the incidents at hand.

All cases in which Palestinian fatalities were recorded in operational reports or whose deaths were reported in the media were referred to this mechanism.

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<sup>2</sup> [Gaza Border Events: Questions & Answers](#), published on the IDF Spokesperson Unit's website.

Allegations regarding the death of minors, medical personnel or first aid volunteers and journalists were given priority. The number of incidents handled by the FFA mechanism is unknown, although the IDF Spokesperson does note that over 60 incidents have been referred to the FFA mechanism by various organizations and on behalf of the families of the victims. According to the IDF Spokesperson document, on the basis of material conveyed to him by the FFA mechanism, the MAG has ordered five criminal investigations with regard to eleven Palestinians killed at the protests. All the investigations are still underway. In the document, the IDF Spokesperson did not explain in which cases an investigation was launched, why the choice to open an investigation was made in these particular cases, or what investigative steps have been taken thus far. A list of the incidents being investigated was only made public about a month later.<sup>3</sup>

### **The international response: We welcome the investigations**

As Israel anticipated, the announcement that the FFA mechanism would begin addressing the fatalities at the protests was warmly received by the international community and successfully allayed the censure against the open-fire policy it has been implementing at the protests.

For example, the British Foreign Office stated that the UK is deeply concerned by the high number of deaths and injuries suffered by Palestinians during the protests, and that it welcomes Israel's commitment to investigate the incidents. The Foreign Office added: "We urge that the findings of this investigation be made public, and that, if wrongdoing is found, those responsible be held to account."<sup>4</sup>

Similarly, at meeting of the UN Security Council held on 26 April 2018 due to the high number of dead and injured at the protests in the less than a month they were underway, the UN Special Coordinator for the Peace Process Nikolay

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<sup>3</sup> Yaniv Kubovitz, "[IDF Military Police Investigating Deaths of Eight More Palestinians in the Protests at the Gaza Border.](#)" *Haaretz*, 13 March 2019 [in Hebrew].

<sup>4</sup> [Israel: Palestinians: Written question135976](#) (UK Parliament website).

Mladenov commended Israel for having established a team to examine the use of force at the protests. Later at the same meeting, other countries – including France, Poland, Holland and the European Union – also spoke favorably of Israel’s announcement that it is prepared to investigate and that the FFA mechanism has begun operations.<sup>5</sup>

In contrast, eleven months after the protests began, with the death toll and number of injured still on the rise, the report by the independent international commission of inquiry on the protests in Gaza – appointed further to a resolution 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 or 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” thereby casting doubt on its “willingness to scrutinize the actions of 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.”<sup>6</sup>

Nevertheless, despite these unequivocal statements in the body of the report, and in contradiction to the commission’s conclusions as to Israel’s consistent refusal to carry out valid investigations, the commission demanded that Israel investigate additional instances of death and injury, in cases similar to those in which investigations have already been launched.<sup>7</sup> In addition, Chair of the Commission Santiago Canton stated at a press conference on the report: “The onus is now on Israel to investigate every protest-related killing and injury,

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<sup>5</sup> Security Council, 8244th meeting, [“The situation in the Middle East, including the Palestinian question,”](#) 26 April 2018.

<sup>6</sup> Human Rights Council, [Report of the independent international commission of inquiry on the protests in the Occupied Palestinian Territory](#), Article 111.

<sup>7</sup> Ibid, Article 108.

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>

### **Justices of the High Court: We are satisfied, we have faith in the investigations**

Earlier in twelve months since the protests began, the setting in motion of the FFA mechanism and Israel’s assurance that it would investigate “exceptional incidents” was found satisfactory by the justices of the High Court. Deputy Chief Supreme Court Justice Hanan Melcer, who wrote the main ruling in a petition in the matter, accepted in full the version that the state put to him. He, therefore, determined that the protests were “violent and large-scale events,” most of which took place “at the direction of the *Hamas* terror organization and have included, *inter alia*: organized, intentional and significant clashes with Israel’s security forces, as well as attempts to damage Israel’s security infrastructures. Terrorist attacks have also been committed during these events and under their cover.” As for the open-fire regulations, Justice Melcer found that they only permit live gunfire in cases of “clear and present danger to the lives and bodily integrity of Israeli civilians and Israeli security forces,” and that the use of live gunfire will only be a measure of last resort, when other methods did not avail to defuse the danger. In such a case, “and only in such [a] case – do the rules permit, according to what we have been told, precise shooting towards the legs of a central rioter or central inciter, in order to eliminate the close and foreseeable danger.”

As for the stark contrast between the dispassionate description of the open-fire regulations described in the ruling and the reality on the ground, where as a result of the implementation of these very orders the number of dead and wounded continues to rise, week by week, Justice Melcer leaves dealing with the

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<sup>8</sup> See press release, [“No Justification for Israel to Shoot Protesters with Live Ammunition,”](#) 28 February 2019.

disparity for a later date, putting the responsibility to do so squarely and exclusively on the military's investigative mechanisms:

We assume that the multitude of fatalities and wounded until now, and allegations by the Petitioners that many of the demonstrators were injured in upper body parts, and some of them in the back – will lead, on the one hand, to the extraction of operational lessons regarding implementation of alternative non-lethal means to the extent possible, and on the other hand, to a thorough examination, by means of the mechanisms mentioned here, as to what happened in the past.<sup>9</sup>

**In practice: A whitewashing mechanism, pure and simple**

Decades of investigations – with or without the relatively recently formed General Staff Fact-Finding Assessment Mechanism – prove time and time again that the investigations are no more than a whitewash mechanism. After implementing a policy of using military force which has resulted in thousands of fatalities, tens of thousands injured and over one hundred thousand people who were left homeless after the bombing of their homes, the Israeli military has nothing it can boast of apart from the very act of conducting an investigation, and only in the event of exceptional incidents. Apart from donning one fig leaf or another – which the state misses no opportunity to exploit for propaganda – after enough time has gone by, all investigations have been closed without any further measures adopted, after it was determined that anyone involved had acted in accordance with the law, and without probing the policy itself in any way.

Ten years ago, during Operation Cast Lead in the Gaza Strip, Israel killed 1,391 Palestinians. At least 759 (55%) had been uninvolved in the hostilities, including 318 children under 18. Israel also destroyed over 3,500 homes, leaving tens of thousands without a roof over their heads, and caused immense damage to

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<sup>9</sup> [HCJ 3003/18 Yesh Din v. IDF Chief of Staff](#) [English translation from Supreme Court website].

structures and infrastructure facilities. Injured people bled to death while the military denied them passage to hospital. Palestinians were shot while waving a white flag. To grant legitimacy to all these actions, the well-oiled whitewash apparatus moved into high gear: the MAG Corps “examined” over 400 incidents, and ordered the launching of at least 52 “investigations.” The MAG always ultimately found that everything had been done in accordance with the law, with the exception of three cases. In those three instances, soldiers were convicted on charges of theft, using a child as a human shield, and unlawful use of a weapon.

The same scenario was repeated four and a half years ago, in Operation Protective Edge; Israel killed 2,203 Palestinians, including 1,392 (63%) who were uninvolved in the hostilities; 528 were under 18. Some 18,000 homes were destroyed or badly damaged, and over 100,000 Palestinian were rendered homeless. Entire families were killed when their homes were hit in an air strike. The wheels of whitewashing kicked in at once, rolling right along. This time the MAG Corps established a “special examination mechanism,” to examine and investigate instances defined as “exceptional” and then conveyed its recommendations to the MAG. As before, it was found that all had been lawful and above board, apart from one case in which three soldiers were convicted of stealing NIS 2,420. This episode of whitewashing is not yet complete. Some of the “investigations” are still underway.

After Operation Protective Edge, as after Operation Cast Lead, the whitewash mechanism sanctioned and legalized everything after the fact, by relying on an absurd, legally invalid interpretation that is based on a morally repugnant worldview. The people who bear the real responsibility were never even investigated: neither the political officials – who set out the policy, supported and encouraged it – nor the top military brass which implemented the policy, nor the MAG – who, to begin with, authorized the unlawful orders and the lethal policy, and who naturally would not order an investigation against himself.

There is no rational basis to expect a different outcome this time around. After all, once again the FFA mechanism examines only those instances defined as “exceptions,” whereas the policy itself – including the open-fire regulations



which enable using live gunfire at protesters who pose no danger to anyone – goes entirely unexamined. Israel announced this policy publicly, and stated it is lawful and valid even before the protests began, protests which Israel was quick to describe as having no legitimacy, claimed that they are taking place “under the directorship of the Hamas terrorist organization,” and classified anyone taking part as “a terrorist.” Accordingly, officials made it clear that the open-fire orders would permit lethal gunfire at anyone trying to damage the fence or even approach it.<sup>10</sup> Even after the demonstrations began, and the results of the implementation of these regulations became evident, officials continued to defend them and claim them to be lawful and valid. However, unlike previous statements, the official now took care to note that the orders permit lethal gunfire only as a measure of last resort, and only in cases of near and immediate danger to Israeli security forces or Israeli civilians.<sup>11</sup> The problem is that these careful turns of phrase are a far cry from reality. In the field, shooting live rounds from a distance at protesters who posed no real danger persisted.

Admittedly, in the document the IDF Spokesperson recently released, it was hinted that the FFA mechanism is also examining the policy itself. However, it is clear that the information the FFA mechanism collects is not being used by the FFA mechanism or the MAG to assess the lawfulness of either the order or the policy. The inescapable conclusion is that these statements by the IDF Spokesperson were also designed merely to silence criticism and for propaganda purposes. Nowhere in the 100 plus page document is even the slightest doubt raised as to the lawfulness of the orders given to the troops on the ground, nor is any criticism leveled at the policy set out for dealing with the protests.

It is therefore clear that once again the policy implemented by the military has not been, nor will it be, investigated. Likewise, the open-fire regulations which have had the full backing of all officials from the very start will also go unexamined. The senior political officials and the top military officers vehemently defended the orders (including some who called that they be made

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<sup>10</sup> See B’Tselem, “[Gaza not ‘combat zone,’ shooting at demonstrators a crime,](#)” 29 March 2018.

<sup>11</sup> See [IDF Spokesperson's document](#), above note 2.

harsher). The MAG, who tasked with making the decisions regarding the launching of investigations and legal proceedings is also the person who phrased the orders to begin with and approved them as lawful, and he would naturally not order an investigation against himself. The State Attorney's Office defended the orders to the justices of the High Court, who in turn ruled that there is nothing amiss with them, and the problem – if one exists – is in implementation in particular, individual cases, a matter that ought to be investigated, in the future, by the military itself.

At the end of the day, after another pointless examination and investigation, we will find ourselves in the same place. This time too, only cases defined as “exceptional” will be investigated, and a handful of individual members of the security forces, all low level, will be suspected at most of deviating from the open-fire regulations in a few isolated instances. Again, the regulations themselves will go unexamined. No one will explore the manifestly unlawful orders that the senior civil officials and generals should not have issued and which the soldiers are obliged to refuse to follow.

### **An end to the whitewash mechanism?**

For the past year, in accordance with the open-fire policy, soldiers have been firing live rounds from a distance at unarmed protesters, who pose no real risk, and are in the Gaza Strip, on the other side of the perimeter fence. The command to fire live ammunition at unarmed civilians is manifestly unlawful. The illegality of such order is not, as described by Supreme Court Justice Benjamin Halevy in 1958 in his ruling on the Kafr Qasem massacre, “formalistic, obscured, or partially obscured.” On the contrary, it is a case of “absolute and definite unlawfulness which is to be seen on the face of the order itself, a clearly criminal character of the order or the actions the order commands, an unlawfulness that stabs the eye and pricks the heart, if the eye be not blind and the heart be not callous or corrupted.”

From the outset, Israel should not have adopted these manifestly unlawful open-fire regulations. At the very least, it should have altered the orders at once, as soon as their horrific outcome became apparent. In practice, Israel did act

swiftly, but not to change the open-fire regulations. It was quick to flaunt the unvarying illusion it reuses from time to time. Mere days after the protests began it announced it would “investigate” the incidents. A year has since gone by: 200 dead, thousands of wounded, and eleven Military Police investigations regarding “specific incidents,” all still pending. The regulations remain unchanged and are still being implemented in the field. People are still being killed or wounded and no one is being held to account.

To Israel, the eleven investigations launched are the fig leaf it can flaunt to prove that it is investigating, to create the necessary façade and to silence criticism until the uproar subsides. However, investigations and accountability are no merely theoretical issue or one of image. They are a matter of life and death. Investigations are necessary so that senior officials realize that they cannot give unlawful orders, and to demonstrate to the troops in the field the parameters of the use of force. At the end of the day, the goal is deterrence, to keep unlawful actions from recurring. It is an essential message that must be conveyed to prevent additional deaths or injuries. The fact that Israel avoids conveying this message evinces how little value it places on the lives and physical wellbeing of the Palestinians taking part in the protests.

Even the fact that Israel’s promise of “investigating” is taken seriously – even though the facts presented in this and other papers by B’Tselem are well known – has real repercussions. The promise is used over and over again in order to ease international pressure to compel Israel to cease implementing its lethal policy. It leaves Israel free to carry on in its actions, and even step them up.

Israel does not want to investigate. All it wants to do is to create the appearance of wanting to. That is why the investigative bodies Israel has established cannot truly investigate. There is no reason to continue buying into the tall tales Israel promotes. There is no point in going on counting how many “investigations” were launched, dedicating headlines to them, or getting upset over the simulated anger of politicians at the MAG for “daring to investigate our soldiers.” Rest easy, he is not actually investigating, he is whitewashing.

A real change in Israeli policy will only take place if the international community demands it clearly and unequivocally, and if it stops allowing Israel to do no more than offer hollow promises of “investigation.” The international community must make the most of its power and influence to compel Israel to cease the gunfire and change its policy. Then, and only then, when the smokescreen of investigations will no longer serve it, will Israel be forced to make a choice: whether to openly admit that it has no interest in accountability for the violation of Palestinians’ human rights, including cases of security forces killing or injuring Palestinians, or else to make a profound and fundamental change in the way it operates. Until that time, there is nothing to be done but stop cooperating with this tapestry of lies.