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26 February 2015

Re: **Appeal against the Decision to Close MPIU (Jerusalem) File 339/11 regarding the Killing of Mustafa Tamimi**

Ref: Letter from Lieut. Col. Ronen Hirsch dated 5 Dec. 2013 HK 20114100550

I am contacting you on behalf of B'Tselem and Ms. Ikhlas Tamimi, the late Mustafa Tamimi's mother, as follows:

A. Background to the Appeal

1. On 9 December 2011, in the village of a-Nabi Saleh, Mustafa Tamimi sustained a critical head wound when he was hit by a tear-gas canister fired directly at him from close range by Staff. Sgt. A. Tamimi was struck while throwing stones at a military jeep in which A. was riding. Tamimi was rushed to Beilinson Hospital in an induced coma and on life support. He succumbed to his injuries the following day. The shooting and the events leading up to it were well documented in a series of still photographs taken by photographer Haim Swarczenberg, and on video recorded by David Reeb and Sarit Michaeli.¹
2. The objective documentation and the investigative material indicate that there is no major dispute regarding the main particulars of the incident, including the identity of the soldier

¹ All still photographs referenced in this appeal were shot by Swarczenberg, unless otherwise stated. David Reeb's footage referenced in this appeal is in the file titled "Nabi Saleh – 9.12.2011 for metzah.mov". Sarit Michaeli's video footage is in the files with the .mts filename extension.

who fired, the angle of the shot and the cause of Tamimi's death. The main disputes that arise from the response of the Military Advocacy for Operational Affairs involve only whether A. saw Tamimi before he fired, whether A. could have seen him and, on the assumption that A. did not see Tamimi, whether this is sufficient to absolve him of criminal liability. Without providing any satisfactory explanation, the Military Advocate General (MAG) Corps refrained from addressing other issues essential to reaching a decision in this case. These include A.'s potential awareness of the presence of protesters in the vicinity of the jeep, his duty to refrain from unnecessary and dangerous shooting and his ability to foresee the fatal outcome of such shooting. The MAG Corps also refrained from addressing the question of the responsibility of A.'s commanders for the fatal outcome.

3. As will be explained below, the case file contains evidence showing that, contrary to the conclusion reached by the Military Advocate for Operational Affairs, A. could have seen Tamimi before the fatal shooting.
4. As will be explained below, the decision by the Military Advocate for Operational Affairs is riddled with factual and legal errors and is therefore unreasonable. An examination of the investigation file clearly indicates there is evidence to prove beyond a reasonable doubt the criminal culpability of the soldier who shot Tamimi and that of his commanders in Tamimi's death. Based on objective evidence and the opinions of two experts from the Military Police Investigation Unit (MPIU), there is no doubt that the lethal firing was carried out in a direct trajectory, in breach of open-fire regulations. The evidence also indicates that the shooting was unnecessary, unjustified, and the result of flawed discretion while the soldiers were withdrawing from the area. It also emerges that A. was aware, or at least should have been aware, of the presence of protesters near the jeep.
5. Given the lengthy duration of the proceedings and the fact that at the Military Jurisdiction Law had long ceased to apply to at least some of the suspects or those involved in the incident, the decision regarding this appeal should, by rights, be delivered only after being studied by the State Attorney, since he is the official authorized to make the decision and to initiate criminal proceedings or close the case. (See Supreme Court decision dated 1 December 2014 in HCJ 2303/14 **Ahmad 'Awad and B'Tselem v. The Military Advocate General**).

B. The MPIU Investigation and B'Tselem's Complaint

6. According to the investigative material in the file, investigative measures regarding the killing of Tamimi began immediately after the incident.
7. On 12 December 2011, the MPIU took a statement from Deputy Battalion Commander Maj. Sagi. He was not interviewed as a suspect, despite his responsibility as commander.
8. The next day, 13 December 2011, the MPIU questioned under caution A. and the other soldiers who were with him in the jeep at the time of the shooting: his immediate superior, Deputy Company Commander, Lieut. Nitai; the driver of the jeep, Staff Sgt. I.; and Sgt. K., who had also been trained as a commander.
9. Soon after, the MPIU took statements from the medical personnel who provided first aid to Tamimi and from Binyamin Brigade Commander, Col. Saar Tzur. On 4 January 2012 and 13 February 2012, respectively, statements were taken from Swarczenberg - the stills photographer, and David Reeb - the video photographer, and the images they took were seized. On 14 February 2012, a statement was taken from the person in charge of the battalion armory.
10. On 27 March 2012, Lieut.-Col. Yoav, a ballistics expert from the IDF Testing and QA Unit and Lieut.-Col. N., a senior decoding officer in the Intelligence Corps,² gave their statements to the MPIU, having both analyzed the angle of A.'s shot. Following the findings in their statements, A. was questioned under caution for a second time on 2 April 2012.
11. On 16 May 2012 and 21 June 2012, the MPIU conducted reenactments of the incident in the village of a-Nabi Saleh. It subsequently took additional statements from Lieut. Col. N. regarding these reenactments.
12. During the investigation, the MPIU seized medical documents regarding Tamimi's injuries and death, visual documentation of the incident from several sources, including material provided by B'Tselem as well as the tear-gas canister that allegedly struck the deceased.
13. B'Tselem contacted the MPIU on the very day of the incident, and shortly thereafter also Lieut. Col. Ronen Hirsch, then-Military Advocate General for Operational Affairs, demanding an MPIU investigation into the circumstances of the incident. In its

² The investigation file contains three statements given by a senior decoding officer named Lieut.-Col. N. and an expert opinion he provided to the MPIU. Taken as a whole, the material handed over, which was partly censored, seems to indicate that this is the same person, which is assumed in this appeal.

communication, B'Tselem stressed the importance of conducting a timely and effective investigation that would include an examination of the criminal liability for Tamami's death of the commanders involved in the incident.

14. B'Tselem contacted the MAG Corps several times throughout the various phases of the investigation to inquire about the progress of the file and to speed up the pace of the investigation. On 4 July 2012, the office of the Military Advocacy for Operational Affairs informed B'Tselem that they had received the file for review a while back and had returned it to the MPIU for supplementary investigation. Several more replies were subsequently received, most recently on 3 October 2013, all stating that the supplementary investigation was still underway. Nevertheless, based on the material contained in the file, it is not clear what, if any, additional substantive investigative actions were carried out during approximately eight months, from July 2012 to March 2013, when the MPIU took another brief statement from Lieut. Col. N. On 29 October 2013, no less than a further eight months later, during which no further progress was made in the investigation, the MPIU received the written opinion of Lieut. Col. N. regarding the manner in which the shooting was carried out and A.'s estimated angle of vision.
15. On 5 December 2013, some two years after the incident occurred, Lieut. Col. Hirsch informed B'Tselem that according to an expert opinion, the soldier who fired did not see Tamimi – nor could he have seen him – when he fired. In view of this opinion and the other material in the file, Lieut. Col. Hirsch determined that “the shooting was carried out in accordance with the relevant rules and regulations and did not involve any offense whatsoever”. The file was, therefore, closed without any legal steps taken against anyone.
16. On 3 April 2014, a copy of most of the investigation file was handed over to B'Tselem; more documents were provided on 10 April 2014. A request to provide additional missing documents and copies of all the digital media in the file was sent on 8 June 2014 to the unit that oversees MPIU investigations. On 24 November 2014, another request for the material was sent to Lieut. Col. Hirsch and to MPIU commander Col. Erez Raban. On 29 December 2014, B'Tselem received the additional documents and a copy of some of the digital media in the file that had not been provided until then. Nevertheless, there is additional material in the file that has not yet been handed over to B'Tselem, including material regarding the two reenactments that were conducted during the investigation. In these circumstances, the Appellants are forced to submit the appeal based on the existing material and insist that all of the material in the file be provided. They also reserve the right to add to the appeal, should it be necessary thereafter.

C. **Evidence Supporting the Argument that the Lethal Shot was Unlawful:**

i. **The tear-gas canister was fired in contravention of regulations, in a direct trajectory and at protesters:**

17. Open-fire regulations - The regulations of the Infantry and Paratroopers Headquarters regarding the use of the Ringo 40 mm tear-gas canister launcher are included in the investigation material in the file. The regulations set forth several important safety rules, including the requirement to be in visual contact with the protesters for whom the gas is meant. The regulations prohibit firing directly at protesters, and allow only firing only beside them, at a range of no less than 30 meters. The regulations stress that, as a rule, shooting should be carried out in an indirect trajectory, with the launcher barrel aimed upwards. In the exceptional cases in which tear gas is to be fired in a direct trajectory, soldiers must assiduously observe the requirement to ascertain no one is in the line of fire and that the shooting is not carried out behind or in front of protesters. Moreover, the regulations prohibit in all circumstances firing tear gas at a range of less than 100 meters away (this applies to a normal-range canister), and require that the shooting will be executed “upon the order of a commander and after ascertaining that there is no one in the line of fire and after examining the safety magazine when firing in a direct trajectory”.
18. The Shooting Angle - There is no real doubt that the fatal shot was fired in a direct trajectory. The moment of the shot and the moment Tamimi was hit are documented in photo IMG_7560, taken by Scwarczenberg, in which the tear-gas canister is seen immediately after it ricocheted off the face of the deceased.



IMG_7560

19. Among the witnesses to the incident, only A. and Swarczenberg saw the lethal shot itself. A. maintained that the shot was fired in an indirect trajectory of between 45 and 90 degrees, whereas Swarczenberg testified that the shot was aimed directly at Tamimi in a direct trajectory and at a 90-degree angle.³ The other witnesses said they did not see the lethal shot or else referred to it based on the documentation presented to them, which was photographed by Swarczenberg.
20. During his interrogation, A. gave evasive and patently unreasonable answers, and could not explain how he hit Tamimi if in fact he fired in an indirect trajectory. This was his first statement:

“Q. When you fire a tear-gas canister and aim upwards, how is it logical that it hits someone standing opposite you?”

A: I don’t know.”

And in his second statement, he said, **“I don’t know how to explain that part where the canister flew straight into his face...”**.

When A. was confronted with the photos of the moment of the shooting – IMG_7558-IMG-7560, he eventually acknowledged that **“the angle looks like 90-degrees in a direct trajectory.”**

21. Two military experts who were asked to provide their opinion during the investigation determined, on the basis of the evidence presented to them, that the fatal shot was fired in a direct trajectory. On the basis of a study of a series of photos documenting the moments of the shooting, Lieut. Col. Yoav, head of the ballistics section of the IDF Ordinance Corps, determined that not only was the rifle barrel not pointing upwards at a 45-degree angle or higher, but that it was pointed slightly downwards, so that it appears to be at a negative angle. Lieut. Col. Yoav also determined that there was a negative distance between the height of the barrel and the height of Tamimi’s head. Finally, he concluded that the canister hitting Tamimi’s head would have required shooting at a negative angle, and that at the range involved, that is, a short range of up to 10 meters, the ballistic trajectory of a tear-gas canister of the kind used in this case is approximately a straight line. In response to a question about whether it was conceivable, as A. had maintained in his statement, that the fatal shot was fired upwards, at an angle of 45 to 90-degrees, Lieut. Col. Yoav said unequivocally: **“The protester in this incident could not possibly have**

³ In certain instances, witnesses and experts speak of direct fire, horizontal fire, as firing at a 90-degree angle, and at other times they use the term for firing at a 0-degree angle. Wherever the speaker refers to horizontal firing, it will be explicitly stated.

been hit by a shot fired at a 45- to 90-degree angle. This is totally clear-cut to me, based on my knowledge of the weapon, the ammunition and their ballistic behavior, as well as the photos shown to me, and particularly the circumstances of the shooting, namely the distance and the height differentials.”

22. The second expert, Lieut. Col. N. said in his statement of 27 March 2012 that **“regarding the barrel, it appears that it was in fact aimed at 90 degrees. That is, in a direct trajectory”**. When N. received blown-up photo enlargements of images taken during the incident he determined **“the launcher barrel can be seen to be low and aimed lower than 90 degrees...”**, meaning horizontally or slightly downwards.
23. Later, Lieut. Col. N. was asked by the MPIU to prepare a detailed opinion. While his findings regarding A.’s field of vision fail to address significant information, as will be explained below, he did not dispute that the shot was fired in a direct trajectory as documented in the photos. He said that **“according to the findings in the reenactment and an analysis of the images taken during the incident, it can be said that the angle of the barrel when firing was at zero degrees or lower** (a simulated measurement yielded a figure of minus 3 degrees).” His opinion also noted that it was not possible to measure the road gradient at that spot, but nevertheless, in a statement made on 3 March 2013, Lieut. Col. N. did say that “the gradient of the road in that area is just a few degrees and should not have impacted the aim of the weapon or the angle of the barrel.”
24. Additional violations of the open-fire regulations - The determination Lieut. Col. Hirsch made in his reasons for closing the file, based on Lieut. Col. N.’s opinion, that A. could not have seen Tamimi during the fatal shooting, necessarily means that A. did not follow (nor could have followed) the requisite safety procedures and, above all, that he could not have ensured he was not firing directly at a person. Essentially, if one takes the conclusion of Lieut. Col. N. at face value, A. must have fired blindly, in absolute violation of directives.
25. As this appeal argues, there is no real doubt that the fatal shot was fired in a direct trajectory and that the canister hit Tamimi when he was about 10 meters from the shooter, A. None of the individuals questioned, including A., claimed that A. had received a directive or explicit permission to carry out the fatal shooting, which, as stated, is a violation of the regulations issued by the Chief Infantry and Paratroopers Officer regarding the firing of tear-gas canisters in a direct trajectory.
26. Even according to A.’s own account, which, as described in this appeal, should be rejected, the fatal shooting was carried out contrary to regulations. A. did in fact say he

fired at a group of protesters who were standing on the terraced fields. But they too were only about 30 meters away from the soldiers, much closer than the minimum 100 meter range specified in the regulations. Thus, even if we accept A.'s account as is, it is not clear how Lieut. Col. Hirsch could determine that "the shooting was carried out in accordance with the relevant rules and regulations and did not involve any offense whatsoever".

ii. Sgt. A. could have seen Tamimi before he fired:

27. As stated above, there is not much disagreement regarding most of the facts in the case, and the main factual dispute is whether A. saw Tamimi before the shooting and whether he could have seen him. In the notice announcing the closure of the investigation file, Lieut. Col. Hirsch wrote, "We received an expert opinion which determined that given the narrow opening of the jeep door and Tamimi's movement towards the jeep, the soldier who fired did not see Tamimi when he fired near him nor could he have seen him". Therefore, Lieut. Col. Hirsch concluded that the shooting was executed in accordance with rules and regulations.
28. In the expert opinion provided by N., to which Lieut. Col Hirsch referred, N. concluded that given A.'s limited angle of vision during the shooting, it cannot be proven that he fired deliberately in order to hit Tamimi and that it was more likely that Tamimi entered his line of fire. There were substantive lacunae and errors in this opinion, which significantly undermine the findings. The failures stem, among other things, from the fact that Lieut. Col N. had not seen the video footage taken by Sarit Michaeli and David Reeb when he wrote his opinion. The footage clearly demonstrates that there were many protesters on the road within A.'s field of vision and that the tear-gas canister that killed Tamimi was aimed at the road and not at the terraced fields. Below, we shall point out the flaws in the opinion.
29. The opinion ignores the field of vision from the windows of the jeep – Much of the opinion is devoted to the question of the extent of the opening of the jeep door, but ignores the fact that - even inside the jeep - it is possible to see what is happening outside through the windows located at the eye level of a rear-facing soldier, and which were designed expressly for this purpose. In this particular case, A. had a good angle of vision via both the window on the right side of the jeep (which was facing Tamimi and another protester while the jeep was turning around) and the two windows in the back doors of the jeep. For an unknown reason, the opinion makes no reference to these facts and does not reach the obvious conclusions in this matter.



A.'s seat, photos DSCF500 and DSCF499, from the series of photos of the jeep's structure taken during the reenactment of the incident and later also used in preparing the opinion.

30. Significant data absent from opinion – Not even once does the opinion provide an exact figure for the angle of the jeep door opening or the angle of A.'s field of vision. This is so despite the fact that while he was preparing his opinion, Lieut. Col. N. had examined and measured the actual jeep from which the fatal tear-gas canister had been fired. It would seem that it was not for naught that these important figures were missing from the opinion. The only reliable source available to Lieut. Col. N. in his calculations was the photographs taken by Scwarczenberg, who took pictures of the jeep nearly directly from behind and in such a way that the opening of the jeep door appeared only by projection. To what extent can the opening be accurately gauged? What is the range of error for such an estimate? How does the range of error affect the possible field of vision available to A.? The opinion makes no mention of any these questions, but they have a decisive impact on the ability to determine whether A. could have seen Tamimi.

31. The opinion ignores the change in the field of vision which was a function of the change in the opening of the door – In the sequence of photographs the jeep can be seen coming to a stop and afterwards the opening of the jeep door (Photo IMG_7556); however, until the photo which shows the fatal shooting (IMG_7560), it is easy to discern that the door opening was gradually widening. Though there is no dispute that this change substantially affected A.'s field of vision, oddly enough, the opinion does not address this matter.



Photos DSCF515 (left) and DSCF506 from the series of photos of the jeep's structure taken during the reenactment of the incident and later also used in preparing the opinion.

32. Tamimi's movement was from within the field of vision outward and not vice versa, as maintained in the opinion – Lieut. Col. N.'s conclusion that it is reasonable that Tamimi entered the line of fire without A. noticing him, because the jeep was stationary whereas the deceased was running and altered his location quickly, is not reasonable and patently mistaken.
33. From the time the jeep came to a stop, beginning with IMG_7556, until the moment of the shooting in photo IMG_7560, about four seconds elapsed (based on the properties indicated in the files). The photo sequence allows us to follow Tamimi's movements across space, but it must be stressed that the movement was negligible, at the most one step to the right which did not change his location significantly. Moreover, **Tamimi moved from left to right (from the camera's point of view) – which is the reverse of the direction of movement that would have brought him into A.'s field of vision and line of fire.** As there is no question that at the time he was shot, Tamimi was in A.'s line of fire i.e. field of vision, **Tamimi was, a fortiori, also in A.'s field of vision before he was hit.**





Sequence of photographs IMG_7556 through IMG_7560

34. The simulation Lieut. Col. N. made in order to reconstruct Tamimi's movements throughout the incident also clearly indicates that Tamimi consistently kept to his position on the left side of the road (i.e. his left) and did not run around and change his position frequently as N. maintained. On the contrary, according to the simulation, it is clear that Tamimi could be seen through the jeep's windows throughout all stages of the

incident. Since A. himself testified that he looked through the windows of the jeep before firing, the obvious conclusion is that he could have seen Tamimi.

35. The significance of the second tear-gas canister that was fired after the fatal one – In his opinion, Lieut. Col. N. attaches a great deal of importance to the fact that the fatal tear-gas canister was followed by the firing by another canister. As he put it, “firing a second shot after the deceased had been so seriously wounded constitutes ... proof of the limited vision from within the vehicle”.
36. The firing of the second tear-gas canister was also captured in Swarczenberg’s photos. Photo IMG_7561 shows another tear-gas canister being fired in the same direction, with Tamimi kneeling on the ground and the tear-gas canister that ricocheted off his face is still in motion at the foot of the jeep. According to their file properties, photos IMG_7560 through IMG_7562 were taken within the space of less than one second. This documentation is consistent with A.’s answer that aiming the weapon and firing took him “one second at the most; it takes a few hundredths of a second”. The answer illustrates that the second shot was fired automatically and extremely quickly. Therefore, contrary to Lieut. Col. N.’s conclusion, the firing of the second tear-gas canister cannot serve as an indication that A. could not have seen that Tamimi had been hit. If anything, it exacerbates rather than mitigates the gravity of the incident’s circumstances, since it shows that A.’s unsafe firing was not limited to the fatal shot.

iii. Sgt. A. should have been aware that there were protesters nearby:

37. There is a great deal of evidence, including visual documentation, which demonstrates that the group of protesters in the middle of the road and to the left of it was in the soldiers’ range of vision and that A. could see the protesters from outside and inside the jeep. This evidence is detailed below.
38. The interaction with the protesters prior to the fatal shooting – Some of the facts in the case address the circumstances regarding the arrival of the troops to the site where the fatal shooting took place. At some point during the protest, Deputy Battalion Commander Sagi decided to advance towards the village in order to clear away a roadblock of stones that had been placed on the village access road. The military force consisted of a convoy led by an armored digger followed by three jeeps: Deputy Battalion Commander Sagi rode in the first, next was an Engineering Corps jeep, and last came the jeep commanded by Lieut. Nitai. A. and two other soldiers were in this last jeep with Lieut. Nitai.
39. Meanwhile, a large number of protesters were standing nearby: in the middle of the road; on its left shoulder on the edge of the valley; and on the farming terraces to the right of

the road (from the soldiers' point of view). Based on the visual documentation, it can be established that there were about 15 protesters standing on the farming terraces, not dozens as the soldiers in the jeep maintained, and even they were standing no more than 30-40 meters from the soldiers, not 80-100 meters away as the soldiers claimed. A number of protesters approached the armored digger and the military force and began throwing stones at them. In photo IMG_7524 no fewer than four protesters can be seen in great proximity close to the soldiers, both on the side of the road and in the middle, and the video footage shows more protesters further along the road, not far from the soldiers and in their range of vision.



IMG_7524



Screenshot from the video footage taken by David Reeb, 04:30

40. While the digger removed the stone roadblock, Deputy Battalion Commander Sagi got out of the jeep and fired several tear-gas canisters towards the protesters. Soon after, A. joined him and also fired at the protesters. After the deputy battalion commander left the area, A. again fired tear-gas towards the protesters and then rejoined his comrades in the jeep, which was the only vehicle left.s
41. IMG_7536 shows the convoy after the digger and the deputy battalion commander's jeep had already turned around towards the village exit; **to the left of the road** (from the perspective of the jeep which had not yet turned around) were **two protesters** in a cloud of tear gas from A.'s shots. Another round of tear gas firing by A. at protesters standing **in the middle of the road** and in his range of vision, is documented by David Reeb at 04:51-04:58.



Screenshot from the video footage taken by David Reeb, 04:55

42. A.'s awareness of the presence of protesters nearby when he fired the fatal shot – During his questioning, A. said that he noticed dozens of protesters on **the farming terraces to the right of the road** and some **to the left of the road**. Also Lieut. Nitai and I., who were with A. in the jeep at the time of the fatal shooting, said they had seen protesters nearby, not just on the farming terraces in the distance. The driver, I., said that as he was making the u-turn, he asked A. to make sure he was not going to hit anyone. I.'s statement implies that he, too, was aware there were protesters near the jeep, or at the very least, was concerned that they might be nearby; otherwise, he would not have been worried about hitting a protester as he drove in reverse. It should be noted that the statements given by Lieut. Nitai and I. were shown to A. during his interrogation and he confirmed their contents.

43. In the set of photos taken by Swarczenberg while the jeep was turning back and just before the fatal shooting, the right side of the jeep fully faced Tamimi and the other protester. That was the side where A. was seated. At head level, next to his seat was a wide window facing the protesters, in addition to the windows in the back doors of the jeep. In a close-up of photo IMG_7545, Lieut. Nitai can be seen sitting beside the driver and he is **facing Tamimi and the other protester.**



IMG_7545



IMG_7545, close-up

iv. **The shooting was unwarranted and pointless:**

44. The MAG gave no weight whatsoever to the question of why A. opened fire in the first place, after all the other soldiers had withdrawn on the orders of the deputy battalion commander and the mission for which they entered the village had already been completed. In this regard, the MAG Corps manifestly disregarded the statements made by senior commanding officers themselves, as we will explain below, which made it

unequivocally clear that the shooting was entirely unnecessary. In these circumstances, the shooting cannot be considered reasonable.

45. When the deputy battalion commander, Sagi, was asked about the mission he had defined for the military force, he said that the objective of the entry was the removal of a stone roadblock erected on the village access road with a view to opening the road and preventing protesters from throwing stones on another road, further away, which was used by Israeli cars. The deputy battalion commander testified that when the force arrived, stone-throwing at the main road stopped. The deputy battalion commander added that, after the roadblock had been removed and tear gas fired at the protesters, “at this point I decided to withdraw and not proceed into the village, but to head out”.
46. When the commander of Binyamin Brigade, Col. Tzur, was asked whether the last shots were necessary, he replied in the negative: “It was not necessary because the digger and the convoy had already turned around and the mission had essentially been accomplished. It wasn’t necessary to shoot”.
47. Lieut. Nitai said he had ordered A. to back up Deputy Battalion Commander Sagi by firing tear gas, and that after he had provided cover for the digger, Sagi decided to return to the pillbox because “as far as he was concerned, the mission had been accomplished and most of the protesters had gone back to the village.”

D. The fatal shooting is tantamount to manslaughter:

48. A legal examination of the case indicates that A. should be tried for manslaughter, even if the argument that he did not see Tamimi before he fired is accepted. This is the case because A. fired in a direct trajectory in a way that was life-threatening, used poor judgment and ignored all the indications that there were protesters in his immediate vicinity. All of the above was in violation of regulations. The conclusion that shots that were fired blindly and resulted in a fatality were, as Col. Hirsch wrote, “carried out in accordance with the relevant rules and regulations and did not involve any offense whatsoever”, is unreasonable.
49. Thus, there is no doubt that in the case of A., the factual basis for substantiating the crime of manslaughter, i.e., causing death by an unlawful action or omission, is present. This violation does not require the mental element of premeditation or intent to cause the said result, but includes any act or omission which endangers the life of another, involves mens rea and produces a fatal outcome. Therefore, awareness of the nature of the act, the existence of the circumstances and the possibility of causing the outcome are sufficient, even if out of indifference or recklessness.

50. Sgt. A. is presumably a skilled soldier who has undergone appropriate training in the use of crowd control measures and is well aware of their inherent fatal potential. A. is also presumably aware of the genuine danger caused by a deviation, by act or omission, from open-fire regulations which are meant to safeguard lives and minimize harm. Tear-gas canisters have already caused the death of one protester and the critical wounding of another. Every soldier and commander are expected to internalize and follow the safety protocols.
51. A.'s account is disingenuous and lacks coherence. It is contradicted by objective evidence that indicates he was aware, or, at least, should have been aware, of the presence or protesters nearby. In these circumstances, it is obvious that A. acted while clearly aware of what was happening around him, or that he criminally turned a blind eye to the situation, which does not absolve him of liability for his actions. In the circumstances of the matter, it is clear that A. acted with indifference or took a patently unreasonable risk in firing the lethal shot. It is also clear that he was aware of the possibility of causing the fatal result, or at least should have been able to foresee the possibility, and it makes no difference whatsoever if he intended this result or even if hoped that it would not materialize.
52. The courts have often ruled that cases like the one at hand satisfy the requirements for the crime of manslaughter. For example, CrimA 1982/98 **Miro v. the State of Israel** IsrSC 52(5) 145, the appeal of a soldier convicted of killing his good friend in a game involving firearms (a petition for a further hearing was rejected in CrimFH 6939/98 **Miro v. State of Israel**, dated 24 February 1999, published on the website of the Judicial Authority). See also CrimA 10833/08, **Avraham v. State of Israel** (dated 25 February 2009, published on the website of the Judicial Authority), in which the appeal of a Border Police officer who had killed a suspect after illegally cocking his weapon and failing to scrupulously follow safety procedures was denied, even though he did not mean to shoot and kill the suspect:

With respect to the Appellant's matter – he was aware of the nature of the action - cocking the weapon with which he sought to threaten the Deceased and the Plaintiff with the object of deterring them. He was also aware that once the weapon was cocked, all the conditions for firing had been fulfilled and all that was left was to pull the trigger. As a soldier, the Appellant presumably knew that the trigger could be pulled by chance or absent mindedly and that this is an object “which is inherently dangerous to handle” (as Hon. Jus. Kedmi remarked in Miro). Safety procedures for handling weapons have been put in place in order to reduce this very danger. For instance, when checking a weapon it must not be facing a person or must have the safety on. The Appellant did none of these, despite being aware of the risk and the fatal result his actions may have.

Since all agree that the Appellant did not intend to cause the Deceased's death, all that remains to rule is that he acted recklessly, that is, with the knowledge that his act (cocking the weapon) and omission (not checking or putting the safety on the weapon), might lead to a shot that would cause a person's death. In these circumstances, he assumed an unreasonable risk, which he hoped to prevent. Unfortunately this hope was not fulfilled.

53. Even if there was room to only examine whether Sergeant A.'s actions amounted to negligence, given the overall circumstances of the case, these actions must be considered as gross negligence, which has been interpreted in case law as an expectation of risk that fully establishes mens rea. Justice S. Joubran articulated the issue clearly in CrimA 467/09 **Zilberman v. State of Israel** (dated 2 February 2010, published on the website of the Judicial Authority).

13. In principle, the distinction between negligence and mens rea characterized by recklessness rests on awareness. While the core element of recklessness is awareness that a certain action may have consequences, albeit undesired, coupled with the assumption of unreasonable risk that this consequence would, in fact, materialize, negligence lacks the element of awareness. (See, Megidish, p. 88; [CrimA 8827/01 Streizant v. State of Israel](#) *IsrSC 57(5) 506, 523, (2003)* (hereinafter: Streizant); [CrimA 8250/05 State of Israel v. Shalom](#) (published in Nevo, 3 October 2006), para. 16, (hereinafter: Shalom); [CrimA 2855/08 Yaakov v. State of Israel](#) (published in Nevo, 9 March 2009), para. 9. There is no requirement that this knowledge mean foreseeing the exact result that did occur in the unique circumstances of the case. Awareness of the risk the actions involve is sufficient (see, Megidish, p. 93, Streizant, p. 523).

14. Given that there is no possibility to read people's minds, proving an actor's awareness of the possible fatal consequence of their actions is usually based on presumptions of fact which help infer a person's thoughts from their actions. One such presumption of fact is that people are normally aware of the significance of their conduct, in terms of its physical nature, the circumstances in which it is taken and its possible natural outcomes. This presumption is meant to help prove the element of awareness, since it is based on the fact that people are usually aware of the significance and natural consequences of their actions. Another presumption of fact relates to proving the element of intent required for mens rea. According to this presumption, conduct that indicates gross negligence on the part of the actor implies, at the least, a mental state of recklessness (see: Streizant, p. 524). In cases such as the one herein, these two presumptions come together to form factual conclusions regarding a defendant's mens rea.

(Emphasis added, G.L.)

See also the judgment delivered by Hon. Just. T. Or in CrimA 498/89 **State of Israel v. Yifrah** *IsrSC 45(1) 384*, which took a hard line toward a person who had fired at a school in response to stone throwing at his car, and convicted him of manslaughter:

...The State is correct in asserting that the Appellant should have been convicted of manslaughter under section 298 of the Penal Code.

Everyone knows, as the Appellant certainly did as well, that using a firearm involves a clear risk, and that any case of a gunshot injury involves danger to the injured person's life or bodily integrity. Therefore, firearms should not be used unnecessarily. When they are used, care fitting the circumstances must be taken to avoid unnecessary harm to person or property.

At the time the injurious shot was fired, and even prior thereto, the Appellant and the car's passengers were no longer in danger, and in these circumstances, firing in the direction of a schoolyard, while students were there, constitutes gross negligence involving recklessness and indifference. The Appellant did not mean to hit the Deceased, or anyone else, but, as any reasonable person, he must have been aware of the risk involved in firing at a schoolyard.

E. Responsibility of the Commanders:

54. A.'s commanders also bear criminal liability for the fatal, unlawful shooting, as they failed to take the necessary steps to ensure such shooting does not take place, and even enabled it, as detailed below.

i. Open-fire regulations briefing and use of a tear-gas launcher:

55. Deputy Battalion Commander Sagi testified that he was the one who briefed all troops taking part in policing the demonstration on the regulations and orders ahead of the mission, including regulations on the use of weapons. The personnel in the jeep were further briefed on the open-fire regulations by Lieut. Nitai, who served as their commander in his capacity as deputy company commander. For unknown reasons, Deputy Battalion Commander Sagi and Lieut. Nitai were not asked about the content of the directives they briefed the soldiers on. However, the soldiers who were in the jeep all testified about the regulations for using the tear-gas canister launcher which were given in the briefing, or were in effect to the best of their knowledge. It is apparent that the soldiers and their commander were not clear on the circumstances in which each of them was permitted to fire tear-gas canisters or use crowd control measures.

56. The shooting soldier, A., stated that "On crowd control measures, the regulations say that tear gas is the lowest level. You don't need specific authorization to fire, unless a hold fire order had been issued". A. also said "[the deputy battalion commander gave me an order to shoot], but it wasn't for this specific shooting. It was for the whole mission. In principle, I don't have to get specific authorization every time I shoot, unless I was told to hold my fire, and in this case I wasn't told to hold my fire".

57. In his statement, Regional Brigade Commander Col. Tzur was presented with the statements made by the soldiers in the jeep. Col. Tzur did not say of any of the

regulations the soldiers mentioned as being valid were in fact wrong. Referring to A.'s comment on the use of weapons regulations, Col. Tzur said that A. had acted appropriately: **“The soldier correctly and competently followed the professional directives on using crowd control measures, and the directives issued by his commanders”**. Col. Tzur's statement thus confirms A.'s statements on this issue.

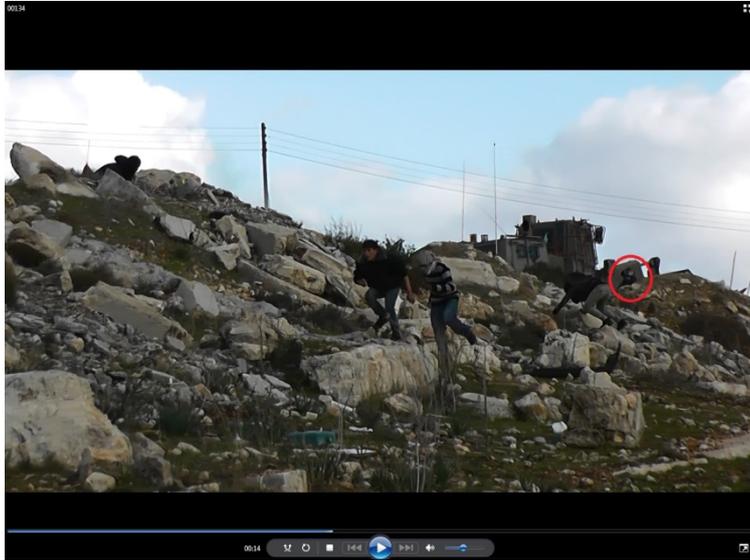
58. The regulations for using tear-gas launchers, as issued by the Infantry and Paratroopers Headquarters, explicitly state that firing tear-gas canisters in a direct trajectory is subject to a number of restrictions, including that it may be carried out solely on a commander's orders. It would seem that the regulations on the use of tear-gas launchers, as given by Deputy Battalion Commander Sagi and Lieut. Nitai, and as practiced at the regional brigade at the time, were that certain soldiers, namely those who had undergone appropriate training on the use of tear-gas launchers, have were given a free hand, subject only and exclusively to the individual soldier's discretion, until a “hold fire” order is issued, in grave deviation from open-fire regulations. The free hand A. was given to fire tear gas had a significant contribution to taking the fatal shot. The object of the open-fire regulations is to establish safety rules and minimize the inherent risk involved in using weapons, and particularly the risk of harming innocents and causing disproportionate harm. Accordingly, allowing a free hand to use weapons, increases the risk of such harm.

ii. **Encouragement of risky firing by the deputy battalion commander**

59. Not only did the regulations covering the use of weapons apparently give the soldiers a free hand to fire tear gas, it appears that Deputy Battalion Commander Sagi actively encouraged unlawful and dangerous use of the tear-gas launcher, thereby encouraging the fatal shot itself. Shortly before the fatal shot, when the convoy arrived at the roadblock and the digger cleared it, stones were thrown at the unit. The deputy battalion commander fired tear gas, and thereafter, A. also shot several tear-gas canisters, on the orders of Deputy Battalion Commander Sagi and Lieut. Nitai. Subsequently, Major Sagi praised A. for the shooting over the radio. This description was repeated, with minor variations, in the statements made by Deputy Battalion Commander Sagi (who did not mention praising the shooting), Lieut. Nitai (who added that he had guided A. and pointed to where he should shoot), K. and A.

60. This shooting by Sgt. A. was captured in Sarit Michaeli's video footage. File 00134 clearly shows A. firing tear-gas canisters at a number of protestors in the area, in a direct trajectory and at close range, while the protestors duck and take cover from the tear-gas canisters being fired in their direction. Such firing is dangerous and constitutes a breach of the open-fire regulations. If this prohibited, dangerous shooting was praised by Deputy

Battalion Commander Sagi, then such praise constitutes encouragement of dangerous, prohibited, firing and as such, Deputy Battalion Commander Sagi should also be considered responsible for the prohibited, fatal shot carried out by A. just a short while later.



A., wearing a gas mask, emerges from behind the digger and the deputy battalion commander's jeep which had both already turned around, firing at protesters on the left shoulder of the road and in the valley. From footage by Sarit Michaeli, 00134, 00:14.

iii. Poor judgment in the troops' actions from the outset:

61. Another matter that has to do with Deputy Battalion Commander Sagi's contributing part in the killing of Tamimi is raised in the opinion given by Lieut. Col. N., who wrote: "There is still a shadow hovering over the decision by the battalion commander [sic: should read deputy battalion commander] to stop the vehicle in that spot and fire at the public disturbance in the first place, rather than leaving the area as had the rest of the force".

F. Additional Offenses – Witness tampering and obstruction of the investigation

62. The initial statements given by all the soldiers who were in the jeep – other than A. – contained details they could not have known, based on their own accounts. A person who was looking toward the front of the jeep and claims not to have been looking at A. when he fired obviously cannot attest to details such as Tamimi's distance from the jeep at the time he was shot, A.'s posture at the time he shot, the angle at which he was holding the weapon and the angle of the shot. Indeed, when the three soldiers were confronted with this fact, they retracted some of the details they gave initially. One detail that is repeated in all four soldiers' statements, with which they were not confronted, is refuted in the

photographs taken by Swarczenberg, as detailed below. The fact that this detail, which is factually wrong, is repeated in all the statements, raises a strong suspicion that the four soldiers conspired to obstruct the investigation.

63. With minor variations, all four soldiers stated that after the digger had cleared the roadblock and the convoy turned around, their jeep remained last. They also wanted to turn back, but could not make a full u-turn as the road was not wide enough. Therefore, they had to complete the turn by driving in reverse, during which time A. opened the back door of the jeep. One account stated he did so because the jeep's rear camera was out of order. When he opened the back door, the jeep came under a barrage of stones, and A. was hit by two stones in the chest. Once the reverse was complete, A. asked the driver, I., to stop, so he could fire tear-gas canisters at the stone throwers.
64. The turn made by the jeep described by the four soldiers is well documented in the photos taken by Swarczenberg. The photos show the drive forward as ending in image IMG_7540 and the drive in reverse is documented in IMG_7541 to IMG_7551. **The jeep doors are not open in any of the photos.** Additionally, the photos clearly show that while some stones were thrown at the jeep as it was backing up, none came behind the jeep.
65. Thus, **the photos contradict the soldiers' account** that the back door of the jeep was opened while it was backing up, as well as the claim that stones hit A. in the chest. There is grave concern that the four soldiers coordinated their accounts in order to present the fatal shooting as reasonable to the greatest extent possible.

G. Conclusion

66. Lieut. Col. Hirsch's decision to close the investigation file without indicting any of the soldiers involved in the killing of Mustafa Tamimi is wrong and exceedingly unreasonable. Clearly, under any of the possible scenarios emerging from the evidence, the shooting was in breach of regulations and criminal offenses were committed. This decision runs counter to the MAG Corps' duty to enforce the law on soldiers, uncover the truth and safeguard the rights of victims and the protected persons of the West Bank. Worse, the decision conveys a message to other soldiers that they may commit criminal offenses and harm Palestinians with impunity.
67. Given all this, the shooter must be prosecuted for manslaughter (or, at the very least, for another offense for causing the death of Mustafa Tamimi). The case contains enough evidence, including a substantial amount of visual documentation, for indicting the shooter. There is no dispute as to the identity of the shooter, or the fact that he fired in a

direct trajectory at close range, in breach of the open-fire regulations, unnecessarily and without justification, while the shooter was aware, or, at the least, should have been aware, of the presence of protestors in his immediate vicinity.

68. In addition, criminal action should be taken against A.'s commanders, who should be prosecuted for their role in and contribution to the killing, in that the regulations they conveyed for using gas-canister launchers, they failed to establish appropriate restrictions, and even actively encouraged prohibited, dangerous firing.
69. Therefore, I request that you admit this appeal and bring to justice those responsible for killing Mustafa Tamimi. Additionally, the four soldiers in the jeep must be brought to justice for the offenses of obstruction of justice and conspiracy to obstruct justice.

Sincerely,

Gaby Lasky, Adv.

Copy:

Lieut. Col. Adoram Riegler, Military Advocate for Operational Affairs, by fax 03-7407847.