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15 February 2016

To:

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Re: Appeal against the Decision to Close Jerusalem MPIU File 339/11 concerning the Circumstances of Mustafa Tamimi's Death in the Village of Nabi Salah on 9 December 2011

Ref. of the Office of the Military Advocate for Operational Affairs: (IN 20114100550)

Your ref.: Appeal dated 26 February 2015

General

1. On 26 February 2015, the Office of the MAG Corps received a document of appeal on your behalf against the decision of the Military Advocate for Operational Affairs to order the closing of the investigative file concerning the circumstances of the death of Mustafa Tamimi (hereinafter: "**the Deceased**,") who was hit in the eye on 9 December 2011 by a gas canister fired by an IDF soldier during a violent disturbance that took place in the village of a-Nabi Salah. As a result of this injury the Deceased was rushed to Beilinson Hospital, where he died on the day following the incident.
2. The appeal detailed your numerous arguments against the decision by the Military Advocate for Operational Affairs to order the closing of the investigative file, being for the most part factual arguments to the effect that Sergeant A., the soldier who fired the gas canister, saw the Deceased prior to firing, or, alternatively, could have and should have anticipated his presence on the scene and hence also the fatal outcome of the shooting he carried out. According to your approach, in this state of affairs, the shooter should have refrained from unnecessary and dangerous shooting that was also contrary to the regulations for the use of a gas-canister launcher. Accordingly, the appeal argues, Sergeant A. should have been made to face the law and prosecuted on charges of manslaughter (or, at least, for negligent manslaughter) on account of his responsibility for the death of the Deceased. Your letter also raised various arguments concerning the criminal liability of Sergeant A.'s commanders for his actions, as well as arguments concerning the coordination of testimonies and the obstruction of the course of the investigation by the soldiers.

3. We would first like to apologize for the time it took to process the appeal. The incident at hand is a complex one and required in-depth examination of the evidential material. Ultimately, however, the MAG did not find grounds to alter the Military Advocate for Operational Affairs' decision to not take any measures against Sergeant A. and his commanders. This is due to the fact that the investigative material was not found to contain evidence that meets the threshold required in criminal law to substantiate awareness on the part of Sergeant A. of the presence of the Deceased nearby, or that the shooting was executed in deviation from the applicable regulations. I shall detail the chief grounds below, addressing in order to the arguments raised in your appeal.

The argument that the shooting was executed contrary to the relevant regulations

4. In opening, we should note that the investigative material does not contain evidence that can contradict Sergeant A.'s version concerning the actions he undertook prior to the shooting. Sergeant A. claims that he inspected the area and looked out of the window and the door entrance in order to ascertain there was no one in the line of fire or nearby. Even before pulling the trigger, while aiming his weapon, he also checked there was no one in the line of fire and opened his other eye, as required under the regulations for the use of a gas-canister launcher.
5. Furthermore, no one disputes that Sergeant A.'s shooting was carried out in a direct trajectory. It is true that Sergeant A. initially claimed that the shooting was executed in an indirect trajectory, at a 45 to 90-degree angle. However, he eventually corrected himself, after he was shown images from the incident, and stated that he fired at a "90 degree" angle (in this sentence, Sergeant A. meant firing in a direct trajectory at an angle of zero degrees relative the ground). Even if, for argument's sake, credence had not been given to Sergeant A.'s initial version regarding the angle of fire (though it is certainly possible that Sergeant A. did not precisely remember the angle due to the operational characteristics of the incident, and in this context we cannot ignore the fact that he included the "90 degree" angle in the range he gave in his first version), this would not be sufficient to prove that he deviated from the regulations for the use of a gas-canister launcher or that he intended to hit the Deceased, for the two reasons that will be detailed below.
6. Firstly, as noted in para. 17 of your appeal, there is no sweeping prohibition in the regulations for firing a gas canister in "a direct trajectory". Secondly, Lieutenant Colonel Yoav has expressed his opinion that in order to hit a target approximately 100 meters away, shooting is to be executed at an angle of only 5 degrees. Accordingly, it is not possible to rule out Sergeant A.'s claim that he aimed his weapon in order to disperse rioters standing at the end of the [agricultural] terrace, some 100 meters away from him, even if, in hindsight, it stands to reason that he erred in the vertical aiming of the weapon by a few of degrees.

7. We note, in passing, that it is unclear on what you base your argument that the distance between the troops and the rioters was just 30 meters; the various testimonies in the evidential material gauge this distance at approximately 70-150 meters. In these circumstances, Sergeant A.'s estimate of a distance of approximately 100 meters is not unreasonable.
8. As for your argument concerning the failure to obtain authorization from the commanders for the shooting, we should note that the wording of the regulations does not mandate the issuing of an order prior to **every shooting**. In this instance, instructions were given permitting soldiers trained for this purpose to execute the shooting of gas canisters in circumstances in which they felt threatened.
9. Lastly, you argued that if indeed Sergeant A. had not noticed the Deceased when he fired, as he claimed in his questioning, then he was necessarily "shooting blind" contrary to the relevant regulations. This conclusion does not necessarily emerge from the investigative material as you argue, as was made clear in the expert opinion included in the investigative file, and as detailed below.

The argument that Sergeant A. noticed the Deceased prior to shooting

10. The central argument in your appeal is that it is not possible that Sergeant A. did not notice the Deceased prior to shooting, which as noted was undertaken in a direct trajectory and at close range. This is indeed the central question on which the examination of the evidential material focused, and an expert opinion was requested for this purpose.
11. The expert used still photographs of the incident, taken by photographer Haim Swarczenberg, to recreate on an aerial photograph the course taken by the Deceased and his friend as they ran towards, and threw stones at, the jeep in which Sergeant A. and his friends were traveling. In addition, the expert marked on the same aerial photograph Sergeant A.'s estimated field of vision prior to shooting, based on an estimate of how far open the jeep door was at the time of the shooting (this evaluation was also based mainly on the photographs by photographer Haim Swarczenberg).
12. The expert opinion proved that it is possible that the Deceased and his friend ran toward the jeep while still outside the field of vision of Sergeant A., who during those fateful seconds was aiming his weapon out of the narrow opening created by opening the rear door of the jeep.
13. Since no one disputes that the Deceased was ultimately hit by a gas canister fired by Sergeant A. in a direct trajectory and at short range, as noted, the expert opinion indicated the possibility that, at the very last moment, the

Deceased entered the line of fire, after Sergeant A. had already pulled the trigger. While this is indeed an uncommon occurrence, the expert opinion proved that it is possible and, at the very least, creates reasonable doubt on this matter.

14. Thus the expert opinion did not enable ruling out Sergeant A.'s version that he did not notice the Deceased prior to shooting, and certainly not with the level of certainty required for a conviction in a criminal trial.
15. In addition, in your appeal you raised several specific arguments against the expert opinion, which we shall now address. You argued that, when writing his opinion, the expert did not have in front of him the video footage filmed by Sarit Michaeli and David Reeb, which demonstrate the presence of additional rioters on the road; you further argued that the opinion does not address or examine the shooter's field of vision through the windows of the vehicle; and that the opinion does not specify the precise angle of the opening in the door or the angle of Sergeant A.'s field of vision, as assessed by the expert. A further argument is that, contrary to what is stated in the opinion, the Deceased's direction of movement was from within Sergeant A.'s field of vision outwards, and not vice versa.
16. Regarding the video documentation filmed by Sarit Michaeli and David Reeb – after examining the video clips, it was not found that they can indicate Sergeant A.'s ability to see the rioters on the road. In fact, the clips show that as the incident progresses, **the road clears** and many rioters throw stones at the jeep from the direction of the terraces. It is indeed possible to distinguish a number of additional rioters on the other side of the road, but they are in a topographical area lower than the road on which the military vehicle was traveling, and it is unclear whether they could have been discerned at the time the vehicle was being turned around, while the location of the said rioters was opposite to the direction of travel and, as noted, in a topographical area lower than the road. Moreover, these clips also show the same rioters hiding behind rocks and using the low topography for concealment.

Consequently, this documentation does not rule out Sergeant A.'s testimony that, prior to the shooting, he looked through the windows and did not see rioters on the road, nor the statements by the other soldiers that they, too, do not recall the presence of rioters on the road at this stage of the incident.

17. As for the argument that the opinion lacks an examination of the field of vision through the windows of the jeep prior to the shooting, it should be noted that it is not possible to determine at what precise stage Sergeant A. looked through the windows of the jeep, in which direction he looked, and what his position and height were. Accordingly, it is not possible to assess his field of vision through the windows at any given moment. It should be recalled in this context that Sergeant A.'s field of vision was also restricted due to the gas

mask and the helmet shield. The only point of time at which it was possible to assess Sergeant A.'s field of vision was just before firing, since only then did he bear an obligation to look in the direction of the target, and he has indeed testified to doing so. At this point, Sergeant A. looked out through the door opening, and not through the window, and the expert addressed this in his opinion, as noted.

18. Regarding the argument that the expert opinion should have stated a precise figure regarding the angle of the door span, or the angle of Sergeant A.'s field of vision, as he assessed these – we do not believe that this constitutes a substantive flaw relating to the essence of the opinion. Firstly, and as you noted, these angles merely constitute an estimate by the expert, based on the best data available to him, and they cannot be determined precisely. Moreover, the fact that the expert did not state the range of error of his estimate is not significant for the purpose of the decision to close the investigative file since, in any case, a range of error can only alleviate the evidential picture from the suspect's standpoint.
19. Regarding the argument that the opinion does not address changes in how far the door was open, it should be noted that an examination of the door's opening was undertaken by the expert on the basis of the optimal information available to him, viz. an analysis of the photograph documenting the door's opening in the last photograph taken prior to the shooting, which is also the widest the door was open prior to the shooting. Accordingly, your argument in this context can only mitigate the evidential picture in terms of the suspect.
20. In your appeal, you further argued that the photographs taken by the photographer Swarczenberg show that during the final seconds before impact, the Deceased was moving from left to right (from the camera's perspective), viz. out of Sergeant A.'s field of vision. While the first part of this argument is correct, in itself, as also emerges from the aerial photograph prepared by the expert, it cannot prove your argument that the Deceased did not enter Sergeant A.'s field of vision and line of fire. The reason being that at the same time the Deceased moved from left to right, he also continued to advance toward the jeep. It is his movement on this plane (progress toward the jeep) that brought the Deceased into Sergeant A.'s line of fire according to the expert's opinion, as also clearly emerges from the aerial photograph he prepared.
21. Lastly, we accept your observation that the firing of the second gas canister by Sergeant A. does not create an assumption that he failed to notice the Deceased when firing the first gas canister (just as there is no reason to make the opposite assumption). However, we would note that this assumption did not, in any case, constitute a consideration in the decision to close the investigative file.

The argument that Sergeant A. should have been aware of the presence of rioters in his vicinity

22. In your appeal, you argued that Sergeant A. should have been aware of the presence of rioters in his vicinity due to his prior interaction with those same rioters when they were on the road, and due to his ability to discern the rioters through the windows of the jeep.
23. These arguments are misleading. In light of the change in the rioters' whereabouts throughout the incident, as detailed above, we do not believe that it is possible to argue evidentially that Sergeant A. should have assumed there were still rioters on the road, even if he did not see them (the argument that Sergeant A. should have seen the rioters through the windows of the jeep was addressed in para. 17 above).

The argument that the shooting was unjustified and pointless

24. In your appeal, you argued that the shooting executed by Sergeant A. was not necessary, since the troops' mission had already been accomplished. On this matter you relied, inter alia, on the remarks by the brigade commander. Regarding this argument, our reply is that even if it can be stated that the shooting executed by Sergeant A. was unnecessary under the circumstances, it cannot be determined that it constituted unreasonable shooting in light of the stones thrown at the jeep.

Additional arguments

25. In light of our conclusion that the investigative material does not contain evidence showing that the shooting executed by Sergeant A. was unlawful, as detailed above, we did not consider it necessary to address your arguments concerning the presence of the offense of manslaughter and the commanders' liability for the incident.
26. Lastly, it was argued in the appeal document that the individuals in the vehicle in which Sergeant A. was also traveling coordinated their versions prior to the investigation, on the basis of some of them providing information they could not have known, and because their claim that they opened the door during the reverse movement to complete the U-turn at which point stones struck Sergeant A. is not documented in the photographs taken by the photographer Swarczenberg.
27. Our reply to this argument is that it is not possible to see from the photographs by the photographer Swarczenberg whether or not the rear door of the jeep was opened during this reverse movement; moreover, since these are still photographs, it is not necessarily possible to discern stones or stones striking any of the persons in the vehicle, and accordingly nothing can be learned from

the absence of documentation of the throwing of stones or the opening of the door in the photographs.

28. As for the information given by the soldiers concerning the incident, they could have come to have knowledge of it by various means and, in any case, no evidence at all was found in the investigative material of the obstruction of the investigative processes by any of those involved.

Conclusion

29. In your appeal, you argued that the investigative file contains sufficient evidence for filing an indictment against Sergeant A. due the firing of the gas canister that hit the Deceased, since the evidential material collected shows that Sergeant A. saw or should have seen the Deceased, and since the shooting itself deviated from the regulations for the use of a gas-canister launcher.
30. As detailed extensively above, we believe that the expert opinion presents a reasonable possibility that Sergeant A. did not see the Deceased prior to the shooting, in other words it establishes reasonable doubt in his matter, and accordingly he cannot be prosecuted for the offense of manslaughter. Moreover, no evidence was found that Sergeant A. deviated from the relevant regulations at the time of executing the shooting, or that he should have been aware of the presence of the Deceased and his friend near the jeep, and the possibility of causing the fatal outcome. Accordingly, the MAG has decided to reject the appeal.
31. In accordance with Attorney General Guideline 4.5003, you may appeal to the Attorney General regarding the MAG's decision within 60 days.

Sincerely,

Sharon Zagagi-Pinhas, Colonel
Chief Military Prosecutor