

A large explosion with a massive black smoke plume rising over a city. The explosion is bright orange and yellow, with a large, dark, billowing cloud of smoke rising from it. In the foreground, there are several multi-story buildings, some of which appear to be damaged or under construction. The sky is a pale blue-grey.

Whitewash Protocol

**The So-Called Investigation of
Operation Protective Edge**

בִּתְּסֵלֶם
B'TSELEM
بتسيلم

Whitewash Protocol:
The So-Called Investigation of Operation Protective Edge

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Introduction

The summer of 2014 saw another round of fighting between Israel and Palestinians in the Gaza Strip. It was called Operation Protective Edge. In term of harm to Palestinians, it was the deadliest and most destructive bout of hostilities since 1967. During Operation Protective Edge, which lasted 50 days and included air strikes and later a ground incursion, Israel killed 2,202 Palestinians. Sixty-three percent of them (1,391) did not take part in the fighting. Of the total number of fatalities, 546 were under the age of 18; 526 of whom did not take part in the hostilities.¹ It is estimated that 18,000 homes were destroyed or severely damaged and that more than 100,000 Palestinians were rendered homeless.² Figures published by the Israel Security Agency (ISA) indicate that during the fighting, Palestinians fired 4,692 rockets and mortar shells from the Gaza Strip at Israel, killing six civilians inside Israel – including a Thai national and a 4-year-old boy.³ Sixty-two soldiers were killed by Palestinians in the course of the fighting. Three other soldiers were killed by friendly fire, and a fourth was killed in an operational accident.

In January 2015, B'Tselem published its grave findings with respect to the fighting during the operation, focusing on the Israeli policy of targeting residential buildings.⁴ Other human rights organizations – in Gaza, Israel and abroad – also published reports, both during the fighting and subsequently.⁵ The UN Human Rights Council published its own report about breaches of international humanitarian law (IHL) during the fighting, which also addressed issues plaguing Israel's existing investigation mechanisms.⁶

Even while fighting was still underway, then Military Advocate for Operational Affairs Lt. Col. Ronen Hirsch asked B'Tselem to provide him with information it had regarding “suspected breaches of law” during Operation Protective Edge.⁷ B'Tselem wrote back that, in a departure from its previous practice, it would not convey to the military information about violations of IHL during the fighting, as it did not believe complaints would bring about any meaningful results. B'Tselem's years of experience show that the examinations and

1. For detailed figures see B'Tselem's website: http://www.btselem.org/2014_gaza_conflict/en.

2. See, *inter alia*, OCHA, “Gaza One Year On – Humanitarian Concerns in the Aftermath of the 2014 Hostilities”, June 2015 (http://gaza.ochaopt.org/2015/06/key-figures-on-the-2014-hostilities/#_ftn6).

3. For detailed figures, see: <https://www.shabak.gov.il/publications/study/Pages/ReportY2014.aspx> [Hebrew].

4. B'Tselem, *Black Flag: The Legal and Moral Implications of the Policy of Attacking Residential Buildings in the Gaza Strip, Summer 2014*, January 2015.

5. See, for example: Human Rights Watch, *Unlawful Israeli Airstrikes Kill Civilians*, 15 July 2014; Amnesty International, *Families Under the Rubble: Israeli Attacks on Inhabited Homes*, November 2014; Al-Mezan Center for Human Rights, “Complaint submitted to the United Nations concerning large-scale destruction and damage to family houses in the Gaza Strip with associated profound loss of life and injury to Palestinian residents, during Israel's military operation between 7 July 2014 and 26 August 2014”, 30 September 2014; Physicians for Human Rights – Israel, *No Safe Place*, January 2015.

6. *Report of the Detailed Findings of the Commission of Inquiry on the 2014 Gaza Conflict*, A/HAC/29/CRP.4 <http://www.ohchr.org/EN/HRBodies/HRC/ColGazaConflict/Pages/ReportColGaza.aspx>.

7. Letter from Military Advocate of Operational Affairs Lieut.-Col. Ronen Hirsch to B'Tselem Executive Director Hagai El-Ad, dated 11 August 2014.

investigations conducted in response to previously filed complaints did not aim at uncovering the truth, nor did they lead to justice. They served only to help create the illusion of a functioning law enforcement system, while those responsible for extensive harm to people and property and for IHL violations were neither investigated nor punished.⁸

In addition to replying to the Military Advocate for Operational Affairs, B'Tselem also published a paper that pointed to three major problems with the way Israel handled the investigation of prior clashes in Gaza, namely Operation Cast Lead (early 2009) and Operation Pillar of Defense (November 2012):⁹

First, neither government officials nor senior military commanders – the people who devised the policy, were responsible for the orders, and made operational decisions during the fighting – were ever investigated by any official body nor held to account for their responsibility for the devastating effects of their decisions.

Second, the Military Advocate General (MAG), who is responsible for providing legal counsel to the military before and during combat, is also responsible for deciding whether to open criminal investigations against soldiers and officers suspected of breaking the law. This dual role creates an inherent conflict of interests, especially when such suspicions arise as a result of legal counsel dispensed by the MAG Corps itself.

Third, investigations by the Military Police Investigations Unit (MPIU) were launched in only a small number of cases, and those investigations involved incidents defined as “exceptional”. Only low-ranking soldiers and commanders in the field were the subject of investigation, and they alone were held to any account. Moreover, investigations were launched late, lasted a long time and were superficial, precluding any ability to get at the truth.

B'Tselem noted in its paper that it would welcome the establishment of a credible, professional and independent apparatus for examining suspected breaches of IHL during hostilities – a mechanism that would also review policies, orders, and the responsibility of government officials and senior military commanders – and that should such a mechanism be established, B'Tselem would provide it with any information it had. That said, Israel's obligation to investigate Operation Protective Edge incidents independently and effectively is certainly not contingent on any information B'Tselem did or did not provide to the MAG Corps, and Israel's duty to ensure accountability for every offense still stands.

Israeli officials dismissed the demand to establish an alternate investigation mechanism, saying the existing one meets legal requirements.¹⁰ Instead, once hostilities had ceased, three different Israeli bodies announced they were planning to investigate what had happened during the operation: The

8. Letter from B'Tselem Executive Director Hagai El-Ad to Military Advocate of Operational Affairs Lieut.-Col. Ronen Hirsch, dated 4 September 2014.

9. B'Tselem, “Israeli authorities have proven they cannot investigate suspected violations of international humanitarian law by Israel in the Gaza Strip”, September 2014.

10. See, e.g., letter from then Attorney General Yehuda Weinstein to Adv. Tamar Feldman, ACRI, dated 5 August 2014; and letter from Deputy Attorney General, International Law, Dr. Roi Scheindorf to Adv. Tamar Feldman and Adv. Roni Pelli, ACRI, dated 11 May 2016. The letters are available on ACRI's website: <http://www.acri.org.il/he/32152> [Hebrew].

Knesset Foreign Affairs and Defense Committee, the State Comptroller and the MAG Corps. The first two bodies primarily addressed the governmental decision-making process, the military's preparedness for dealing with the tunnels dug by Hamas and the performance of the intelligence agencies.¹¹ While the State Comptroller did say he was planning to address international law related issues, no document has been made public on this issue to date.¹²

Consequently, the military law enforcement system is the only official Israeli body that has investigated instances of harm to Palestinians and suspected breaches of IHL – with some investigations still pending. In keeping with past practice, this system focuses on “exceptional cases” only. The MAG Corps has so far issued five updates on the progress of these investigations. The latest, to date, was issued in late August 2016.¹³

This paper is a follow-up to the one B'Tselem published after the cessation of combat. It aims to review how Israel chose to investigate suspected breaches of IHL that took place during Operation Protective Edge. The recurring pattern of whitewashing, as described in that document, formed the basis for our decision to stop referring complaints to the military law enforcement system. However, as any system is capable of self-correction – at least in theory – we decided to examine, two years after the fighting ended, how the military law enforcement system has performed.

11. Ron Ben Yishai, “Netanyahu Has Already Appeared: This Is What the Operation Protective Edge Investigation Will Look Like”, ynetnews website, 1 September 2014 [Hebrew]; Yohai Ofer, “More than a Year Later: Operation Protective Edge Report Not Yet Published”, NRG website, 27 December 2015 [Hebrew]; see also, Amos Harel and Gili Cohen, “Operation Protective Edge Comptroller and Knesset Probes Stalled”, *Haaretz*, 4 February 2015 [Hebrew]; Amir Tibon, “Hamas Renews Tunnel Digging While Israel Hasn’t Finished Investigating Operation Protective Edge”, Walla website, 5 February 2016 [Hebrew].

12. Ron Ben Yishai, “Netanyahu Has Already Appeared: This Is What the Operation Protective Edge Investigation Will Look Like”, ynetnews website, 1 September 2014 [Hebrew]; Amos Harel, “Israel’s Lack of Preparedness on Gaza Tunnels a ‘Wake Up Call,’ Watchdog Says”, *Haaretz*, 5 February 2016, <http://www.haaretz.com/israel-news/.premium-1.701593>.

13. The updates are available on the MAG Corps website. For the updates in English, see: <http://www.mag.idf.il/14-en/Patzar.aspx>.

A. Even before the investigation began: “It was all lawful”

Even while Operation Protective Edge was still underway, and more so after it came to an end, various officials – including politicians, jurists and senior military officers, some of whom were directly involved in the fighting or in its planning – declared that the military had abided by the provisions of IHL and done everything in its power to avoid harm to civilians. Officials also said that inasmuch as there were any aberrations, wherein the military’s conduct was in breach of these provisions – they would, obviously, be investigated. For example, very shortly after the fighting ended, at a ceremony in honor of the new legal year, then Justice Minister Tzipi Livni said:

*When the fire stops, the legal fire directed at Israel, its leaders, its soldiers and its commanders will begin. I, as minister of justice, intend to stand at the frontlines in this battle, together with the Attorney General, the State Attorney and the MAG, as well as the State Comptroller, and we will give each soldier and each commander in the IDF a legal bulletproof vest.*¹⁴

At the same ceremony, State Attorney Shai Nitzan, made similar comments:

*We are not like our enemies, who break every legal principle of international law and commit every type of war crime. They deliberately target civilians, using their own civilians as human shields. We protect our civilians as best we can, and make every effort to avoid deliberate harm to their civilians.*¹⁵

Maj. Gen. Danny Efroni, then MAG and the person in charge of the military law enforcement system, also stated that in his view the military complied with IHL during the fighting. Maj. Gen. Efroni wrote an article in which he asserted: “The IDF attacks only military targets, not because of the principle of distinction, but because it is deeply committed to [the ethical code of] ‘purity of arms’. The IDF makes inordinate efforts to minimize harm to uninvolved individuals, not because of proportionality, but because it values human life.”¹⁶

In mid-June 2015, Israel published its official report about the fighting.¹⁷ Various agencies were involved in the preparation of the report, including the Ministry of Justice, the Ministry of Defense, the National Security Council and the MAG Corps, which was still busy at the time investigating some of the cases and deliberating on whether to launch criminal investigations in others. When the report was presented to the government, Prime Minister Benjamin Netanyahu said:

The State of Israel and the IDF are indeed committed to the rules of international law even as we fight against terrorist organizations that deliberately violate these rules. I must say that our obligation does not stem from this or that report or this or that UN committee. It stems from the fact that Israel is a democracy and a moral country with values, which operates in accordance with international law. Neither do we

14. These statements were made on 26 August 2014, at a ceremony to mark the beginning of the 2015-2016 legal year and published as a Ministry of Justice communiqué, see: <http://www.justice.gov.il/Publications/Articles/Pages/YearOfTrialOpeningCeremony.aspx> [Hebrew].

15. Ibid.

16. Danny Efroni, “The Military in the Jaws of the Law?”, *Mishpat ve’Tzava* [IDF Law Review], July 2015, Vol. 21(a), p. 10 [Hebrew].

17. *The 2014 Gaza Conflict, 7 July – 26 August 2014: Factual and Legal Aspects*, May 2015. <http://mfa.gov.il/ProtectiveEdge/Documents/2014GazaConflictFullReport.pdf>.

*shrink from investigating ourselves as necessary. The inquiry and investigation mechanisms that exist in the State of Israel about claims regarding violations of the laws of war are among the world's best. Credible claims are checked as required.*¹⁸

Shortly after, when the UN Human Rights Council published its report regarding Operation Protective Edge, which was extremely critical of Israel's conduct during the fighting,¹⁹ the prime minister reiterated these sentiments.²⁰ Knesset opposition leader, Isaac (Yitzhak) Herzog, said: "I don't need any international report or any international commission to know that the IDF is an ethical army. While for Hamas, killing innocents is the main objective, I can say – based on my personal experience of many security cabinet meetings – that the question of harm to uninvolved persons is always discussed".²¹

These statements make it clear that no one was interested in making a thorough investigation of policy, directives or the persons responsible for them – all of which were declared, in advance, to be legal and moral by officials, including by officials charged with overseeing decisions made by the government and senior military officers. Such declarations were made even before the outcome of the fighting was fully appreciated and before any investigation whatsoever had been launched. It therefore comes as no surprise that even now, two years after the fact, there has been no investigation of policy issues, including the policy of targeting inhabited homes, which resulted in the Israeli military killing hundreds of people; the policy of indiscriminate artillery fire at inhabited areas; and the policy of destroying farmland and thousands of homes.

18. PMO Secretary Announcement, "At the weekly Cabinet meeting 14.06.2015", 14 June 2016: <http://www.pmo.gov.il/English/MediaCenter/SecretaryAnnouncements/Pages/govmes140615.aspx>.

19. *Report of the Detailed Findings of the Commission of Inquiry on the 2014 Gaza Conflict*, A/HAC/29/CRP.4 <http://www.ohchr.org/EN/HRBodies/HRC/ColGazaConflict/Pages/ReportColGaza.aspx>.

20. Barak Ravid, "UN Commission Finds Evidence of War Crimes by Israel, Hamas During 2014 Gaza War", *Haaretz*, 22 June 2015: <http://www.haaretz.com/israel-news/1.662389>.

21. Zeev Kam, "Herzog Doesn't Need a Report to Know IDF Is Ethical", NRG website, 22 June 2015 [Hebrew].

B. The MAG's dual role

The investigation of “exceptional” cases was entrusted to the military law enforcement apparatus. Yet the MAG, who is responsible for these investigations, is faced with an inherent conflict of interests in the matter. On the one hand, he was the one responsible for providing legal counsel to the military during the fighting, and he was the one who signed off on the legality of the orders and policies implemented by the troops. On the other hand, he is now tasked with deciding what cases merit an investigation and what measures will be taken upon completion of investigations. Therefore, in cases in which suspected breaches of law relate to orders he personally approved, the MAG would have to order an investigation against himself, or his subordinates.

This dual role is clearly discernible in various statements by then-MAG Maj. Gen. Danny Efroni. On the one hand, he reiterated the importance of investigations, and pledged that the MAG Corps would investigate any suspected breach of law brought to its attention. According to Efroni, not only are such investigations no impediment to the military's operational capabilities, on the contrary, they strengthen its moral fiber. In an in-depth interview he gave to Israeli daily *Haaretz*, Maj. Gen. Efroni stressed the importance of the investigations carried out by the MAG Corps, saying: “I think that our army has good values, but some of this has to do with the fact that it investigates and examines suspected offenses in a professional way. If we don't do that, the IDF's values will very much be thrown into question.”²²

The July 2015 issue of the *IDF Law Review*, which is published by the MAG Corps, included an article by Maj. Gen. Efroni. In it he addressed the importance of the investigations that began even before the fighting was over:

*Setting up the mechanism as the fighting is going on, appointing a major general to head it, and his concerted efforts over the past months are all reflective of the IDF's commitment to review its operations, examine them and if required, investigate them.... We examine and investigate violations of the laws of war, because those who violate them are actually violating the IDF's norms and values; because those who violate the laws of war, generally violate the IDF's orders and instructions which embody the IDF's combat values.*²³

Yet, on the other hand, Maj. Gen. Efroni also explained that during the fighting, and even while such investigations were underway, the MAG Corps and the officers in charge of operations in the field worked closely together. In the interview he gave *Haaretz*, the MAG stressed that he himself, as well as others in the MAG Corps, were involved during the fighting in implementing the policy of strikes. He reported close cooperation between the MAG Corps and operational level personnel. He added: “We didn't decide to bomb all the commanders' homes. There were homes we didn't approve for attack... We did not permit punitive actions against buildings unless there was an operational context for that.”²⁴ Col. Noam Neuman, Head of the International Law Department at the MAG Corps, spoke in a similar vein: “What characterized Protective Edge was that commanders showed a lot more understanding for

22. Amos Harel and Gili Cohen, “Top IDF Attorney: I Will Never Call IDF the Most Moral Army in the World”, *Haaretz*, 9 April 2015, <http://www.haaretz.com/israel-news/1.651148>.

23. Efroni, *supra* note 16, p. 11.

24. Amos Harel and Gili Cohen, “Top IDF Attorney: I Will Never Call IDF the Most Moral Army in the World”, *Haaretz*, 9 April 2015, <http://www.haaretz.com/israel-news/1.651148>.

the importance of counsel. We received questions in the middle of the night. We were at the commanders' disposal 24 hours a day, seven days a week."²⁵

Since in any case the investigations carried out by the MAG Corps do not address policy or directives, the MAG's conflict of interests with respect to his involvement in these issues remains theoretical.

However, a conflict of interests may arise if there is a suspected IHL violation in a case that was defined as "exceptional", and if the MAG or his representatives were involved in approving it. B'Tselem has no information as to whether there are any such cases.

C. Investigations: In "exceptional cases" only

The investigations were limited, from the outset, to decontextualized isolated cases. They focused exclusively on the soldiers in the field, without examining the responsibility of those who issued orders or designed policy. As such, they are of limited benefit and their contribution to justice or real accountability for what happened during the hostilities remains negligible.

Nevertheless, Israel attaches a great deal of importance to these investigations; Israeli officials argue that the law enforcement system functions well and efficiently. What follows is an examination of this contention, based on information published by the MAG Corps.

1. The examination process

The most recent MAG Corps update, issued in August 2016, stated that the unit "continues to examine and investigate claims regarding allegations of exceptional incidents", and that it

received these allegations through complaints referred to it "on behalf of Palestinian residents of the Gaza Strip as well as by non-governmental organizations ('NGOs') – Israeli, Palestinian, and others", as well as allegations that arose from the media, or "internal IDF operational reports".

According to this update, each complaint undergoes a preliminary examination. Then, if "it is deemed credible, *prima facie*, and is sufficiently concrete, it is referred to the MAG, for a decision, as to whether an immediate criminal investigation is warranted without further examination, or whether the incident should be referred to the General Staff Mechanism for Fact-Finding Assessments (the 'FFA Mechanism'), for a prior factual examination before making a decision on whether to open a criminal investigation".

The establishment of the FFA Mechanism was announced early on, in the MAG Corps' first notice regarding investigations of incidents related to

25. Einat Sharon, "The Legal Battle over Operation Protective Edge Will Take Years", *Bamahane* [IDF magazine], 16 July 2015 [Hebrew].

the fighting during Operation Protective Edge. According to that notice, issued on 10 September 2014, the FFA Mechanism would examine “exceptional incidents” that took place during the operation. Maj. Gen. Noam Tibon was the first to head the FFA Mechanism. Upon his retirement from the military in early 2016, he was replaced by Maj. Gen. (reserves) Yitzhak Eitan. In keeping with the recommendations of the Turkel Commission, this mechanism is to be made permanent and was established in consultation with the Attorney General and with his support.²⁶

The MAG Corps noted in its statement that the FFA Mechanism is composed of several teams, each led by an officer holding the rank of colonel to major general (in either active service or in the reserves). Team members are mostly “high-ranking IDF reservist officers, possessing operational expertise in a range of military areas (such as artillery, intelligence and aerial operations), as well as members possessing both legal qualifications and professional experience in the field of investigations”. Each team has a legal adviser who is an expert in international law. In addition, a senior reserves officer, also an international law expert, has been appointed to assist the head of the FFA Mechanism. The statement by the MAG Corps emphasized that none of the officers in the mechanism had taken part in the fighting during Operation Protective Edge, or served as part of the chain of command during the operation.

The mechanism was tasked with examining only exceptional incidents. According to the MAG Corps statement, the role of the various teams is simply to establish the facts of the case and collect figures

and other materials relevant to the incident. The information collected is to be delivered to the MAG, who will make a “reasoned decision” on any further action, i.e. whether to close the case, recommend disciplinary action, order a criminal investigation by the MPIU, or ask the FFA Mechanism for more information. According to the MAG Corps statement, only the main points of the MAG’s decisions would be published, and this too “subject to restrictions under the law and limits pertaining to the security of classified information”. Like any other decision the MAG makes, the decisions in these cases can be appealed to the Attorney General, and they are also formally subject to judicial review by the High Court of Justice (HCJ).

The MAG Corps added that the teams were instructed to “complete their assignments within a short timeframe”, and that they were given “the requisite resources” to do so. The teams were also granted “broad ranging powers” in order to obtain all the required information from sources inside the military, as well as from civilians.

This examination process is purportedly thorough, comprehensive and transparent, but the MAG Corps’ statement conceals more than it reveals: it does not state how many teams were established, who their members are and what functions they fulfil inside the military. While it is important that these individuals did not participate in the fighting or in the chain of command during Operation Protective Edge, their ties to individuals who did participate in the fighting or were part of the chain of command are also significant, and no information was provided on this matter. The statement also fails to specify the duration of the “short timeframe”

26. See MAG Corps announcement dated 10 September 2014: <http://www.mag.idf.il/261-6858-en/Patzar.aspx>, as well as letter from Deputy Attorney General, International Law, Dr. Roi Scheindorf to Adv. Tamar Feldman and Adv. Roni Pelli, ACRI, dated 11 May 2016.

the teams were given to finish their work, what resources they were allocated and what powers they were given. In addition, the fact that only parts of the MAG's decisions would be made public limits the possibility of appealing a particular decision to the Attorney General or the HCJ. That said, these courses of action have proven ineffective avenues for oversight.²⁷

Most conspicuously absent from the MAG Corps' statement is any reference to the substantive aspects, namely: what are the MAG's criteria for deciding which cases will be referred to the FFA Mechanism; in which cases will the MAG order a criminal investigation launched immediately; and what constitutes "exceptional cases". The statement also indicates that the only authority granted to the teams is collecting information and figures. They do not have the power to make recommendations or decide what cases ought to be investigated, which begs the question why such senior officials are needed for information gathering and to what end they are provided with legal counsel.

Moreover, the MAG Corps' statement regarding the examination process must be considered in the context of the overt reservations expressed by senior officials as to the very notion of criminal investigations against soldiers who were involved in combat. For instance, Moshe Ya'alon, who was defense minister during Operation Protective Edge, said that he does not consider criminal investigations a tool for addressing suspected breaches of law during operational activity. In his view, criminal

investigations are to be used to handle exceptional cases in which soldiers disobeyed orders:

*A [criminal] investigation looks for people to blame. It looks at the past. There are times when this is vital: If someone, during a battle, committed a crime – for example, looting, rape or deliberately shooting a woman or a child or somebody waving a white flag – that is breaking the law, and that has a criminal aspect. That is where the [MPIU] engages in a criminal investigation... The fact that you fought heroically does not make you immune to being investigated to ensure that you did not commit a crime. You can be a hero and excel, but you have still committed a crime. At that point, there is no choice. Our camp must remain pure.*²⁸

Elsewhere Ya'alon added:

*If it's an operational question of a decision about flanking or opening fire – [there has to be] a command level inquiry, not an MPIU investigation. This is backing one's subordinates, because looking at these incidents through the eyes of the command is important. If there's no need, no suspicion, no concern over malice, or anything that has a criminal aspect, there is no reason whatsoever to take the operational realm into a criminal investigation instead of an operational inquiry.*²⁹

Col. Ehud Ben Eliezer, Chief Military Prosecutor at the end of Operation Protective Edge, said:

I am not eager to bring commanders in for investigation if there really isn't a need. We send people to fight, and I'm going to bring them in for investigation only when it is truly justified. If the circumstances indicate

27. For more details, see B'Tselem, *The Occupation's Fig Leaf: Israel's Military Law Enforcement System as a Whitewash Mechanism*, May 2016, pp. 25-27.

28. Gili Cohen and Amos Harel, "Defense Minister Ya'alon: 'No Place for Criminal Probe of Gaza War's Black Friday'", *Haaretz*, 8 January 2015: <http://www.haaretz.com/israel-news/premium-1.636074>.

29. Amir Bouhbout, "Ya'alon on Black Friday in Rafah: No Criminal Investigation", Walla website, 8 January 2015 [Hebrew].

*a sharp deviation from the expected norms, or from the orders – then yes, there will be certain cases, which must be chosen carefully, that will get a criminal investigation.*³⁰

Chief Military Police Officer Brig. Gen. Golan Maimon said:

*The sensitivity with which these cases are approached is truly remarkable. We don't use the same tools in the investigations of Operation Protective Edge cases as we do in the case of criminals or serious criminal incidents. They are completely different tools... Our pursuit of the truth is done with great sensitivity and a very clear recognition that these are soldiers in the Israel Defense Forces.*³¹

2. Figures: Outcome of investigations up to August 2016

In August 2016, the MAG Corps published its most recent update on Operation Protective Edge investigations. The notice stated that, to date, about 500 reports and complaints had been received with respect to about 360 incidents. Of these, some 360 reports and complaints regarding some 220 “exceptional incidents” had been referred to the FFA Mechanism. This update, like previous ones, provides no explanation as to why the MAG decided to refer those particular cases or what he considers a suspicion that requires an FFA Mechanism probe. B'Tselem applied to the IDF Spokesperson under the Freedom of Information Act, asking for detailed figures, but these communications were met with no response, in violation of the Act.³²

The MAG Corps update does not indicate how many cases the FFA Mechanism had referred back to the MAG by August 2016. The information it did provide was that some 80 cases that had gone through the FFA Mechanism probe had been closed by the MAG without his ordering an MPIU investigation, as “the actions of the IDF forces involved did not give rise to reasonable grounds for suspicion of criminal behavior”. The MAG Corps added that, with respect to some of the incidents, the MAG recommended that operational lessons be drawn, whereas in other cases the IDF was found not to have been involved.

The MAG Corps updates provide detailed grounds for closure with respect to only 26 of the sum total of cases the MAG closed subsequent to an FFA Mechanism probe. One case concerned alleged prevention of medical treatment and the other 25 involved shooting or bombing, according to the following breakdown:

- Seventeen of the cases – including thirteen related to strikes on residential buildings – involved fatalities.
- In the remaining eight cases, which did not involve fatalities, fire was directed at buildings that are protected under international law, such as schools and hospitals.

The MAG did order an MPIU investigation in seven cases that were referred back to him by the FFA Mechanism, all of them involving fatalities. The

30. Amos Harel and Gili Cohen, “Top IDF Attorney: I Will Never Call IDF the Most Moral Army in the World”, *Haaretz*, 9 April 2015, <http://www.haaretz.com/israel-news/1.651148>.

31. Tal Lev-Ram, “Chief Military Police Officer to IDF Radio: We Have Learned from Our Experience”, IDF Radio, 24 September 2015 [Hebrew].

32. B'Tselem first contacted the IDF Spokesperson on 12 November 2015 and then again on 5 January 2016 and 7 February 2016. The IDF Spokesperson Unit said it would need a further 30-day extension, in accordance with the Freedom of Information Act. B'Tselem contacted the IDF Spokesperson again, asking for the figures, on 15 March 2016 and 6 June 2016. No response has been received to these communications at the time of writing.

MAG Corps did not explain why the MAG ordered investigations in these particular cases, only that the “factual findings collated by the FFA Mechanism and presented to the MAG indicated the existence of grounds for a reasonable suspicion that the attack was not carried out in accordance with the rules and procedures applicable to IDF forces”.

By August 2016, the MAG Corps had reported one case in which the investigation had been concluded, having first been examined by the FFA Mechanism, and in which the MAG made a decision: the incident in which four children were killed on the beach in Gaza. The MAG closed the case with no further action.³³ The remaining cases are either still under investigation or pending the MAG’s decision.

In addition, the MAG Corps updates stated that in 24 other cases, the MAG ordered an immediate MPIU investigation without first referring the cases to the FFA Mechanism. According to the MAG Corps, these cases “indicated *prima facie* grounds for a reasonable suspicion of criminal misconduct”. The MAG Corps updates specify 22 cases in which the MAG ordered an MPIU investigation, including 13 instances of alleged looting and violence, three cases of shooting, two of which involved the killing of civilians in breach of orders, and six other cases involving other allegations. Only one investigation has thus far resulted in indictments: Two soldiers were charged with looting for the theft of NIS 2,420 [approx. USD 620] from a home in which troops had taken up positions in the Shuja’iyeh neighborhood, Gaza City. A third soldier was charged with aiding and abetting in the incident. The soldiers’ trial is still underway. Thirteen other investigations were closed

without any measures taken against those involved. In the remaining cases – investigations are either still underway or have been completed and are awaiting the MAG’s decision. The MAG Corps updates cite the grounds for closing the case in seven instances only, and the grounds given were lack of evidence (in two of the cases the notices state the complainant did not report to the MPIU to give a statement).

The information published by the MAG Corps provides no more than a partial picture. The MAG Corps updates provide no information about the total number of cases referred to it, precluding any insight as to what portion were then referred to the FFA Mechanism, the considerations underlying the referral, or the number of cases in which the MAG made a decision without an FFA Mechanism examination. The updates also do not state how many cases have not yet been processed, or the processing schedule set for them. As a result, there is no way of obtaining a clear picture as to the extent of the examinations performed by the MAG Corps, the issues being investigated or the results of the examination.

3. Examples: Cases closed

In January 2015, B’Tselem published a report entitled *Black Flag: The Legal and Moral Implications of the Policy of Attacking Residential Buildings in the Gaza Strip, Summer 2014*.³⁴ The report addressed the policy of attacking residential buildings in Gaza during Operation Protective Edge – a policy that became one of the horrific hallmarks of this particular bout of fighting, and resulted in the deaths of more than a quarter of the total number

33. “Decisions of the IDF MAG Regarding Exceptional Incidents that Allegedly Occurred During Operation ‘Protective Edge’- Update No. 4”, MAG Corps website, 11 June 2015, <http://www.mag.idf.il/163-7353-en/Patzar.aspx?SearchText=protective%20edge>.

34. B’Tselem, *Black Flag* (supra note 4).

of Palestinian fatalities. B'Tselem research for *Black Flag* examined seventy incidents in which at least three people were killed in their homes. A total of 606 Palestinians were killed in these incidents, the vast majority of whom did not participate in the hostilities. More than 70% of the fatalities were women, children and teenagers under 18, or adults over the age of 60.

The MAG Corps updates address eleven of the seventy incidents researched by B'Tselem. In ten of the eleven cases, the MAG had made a decision to not even launch an MPIU investigation. The MAG did order an investigation in one case – the bombing of the Abu Jame' home in Bani Suheila, an incident in which 25 people were killed [24 members of the family and a Hamas operative]. No reasons were provided as to why the MAG ordered an investigation in this particular case. The research conducted by B'Tselem reveals no substantive difference between this case and the others which could justify the different treatment.

The section below includes descriptions of three cases that were presented in detail in *Black Flag*. The facts of the case will be followed by the MAG Corps' reasons for the decision not to launch an MPIU investigation. The section also includes the one case, to date, in which the MAG made his decision subsequent to an MPIU investigation which he ordered launched on the basis of an examination by the FFA Mechanism. This section will be followed by a critical analysis of the MAG's reasoning.

Bombing of an office building in a-Rimal neighborhood, Gaza City; 12 people killed – 11 members of the Dirbas and al-Kilani families, and an Islamic Jihad operative, 21 July 2014

On 21 July 2014, the military bombed the four top floors of an eight-story office building in Gaza City's a-Rimal neighborhood. Eleven members of the Dirbas and al-Kilani families were killed in the strike, five of them children. Sha'ban a-Dahduh – a regiment commander in the Gaza City Brigade of the Islamic Jihad, according to a notice issued by the ISA – was also killed in the attack.

Adv. 'Abd al-Karim Siyam, 38, told B'Tselem's field researcher that he and his family had left their home in the a-Tufah neighborhood of Gaza because of the shelling, and took shelter in his office, on the second floor of the office building that was bombed. That night, after the meal marking the breaking of the Ramadan fast for the day, Siyam was praying at the entrance to the building with his father and a cousin. He described what happened next:

*We prayed, and then we sat for a while, and suddenly we heard the crash of wreckage and windows shattering. I also heard children screaming and, only then, I realized that the tower was being bombed. I opened the door to the building and started calling for people to come out. Then I saw my wife, my brothers, my mother and the children coming down from the office to the lower part of the tower. They were in shock, scared, and they were crying and shouting with fear. The fourth and fifth floors of the building had collapsed.*³⁵

One of the offices on the fifth floor of the building served as a refuge for members of the Dirbas and al-Kilani families. All told, they were 11 people who had fled their homes in Beit Lahiya: five brothers

35. He gave his testimony to B'Tselem field researcher Muhammad Sabah on 19 August 2014.

and sisters from the al-Kilani family, as well as Ibrahim Dirbas, the husband of Taghrid al-Kilani (one of the sisters), and their five children aged 3 to 11. Before they moved into the office building, they had fled to a-Tufah neighborhood, Gaza City, to the house of their brother Ahmad al-Kilani, but they had to flee his house too, because of persistent shelling and shooting. They were all killed in the strike.

In its update of 11 June 2015, the MAG Corps related that the target of the attack was Sha'ban a-Dahduh, who was in the building at the time of the strike. The MAG described the attack and the reasons for it as follows:

The attack was carried out in the late evening hours, in light of the assessment, premised upon timely intelligence, that there would not be civilians present at that time in the building, which was known to be an office building. Additionally, the attack was planned in such a way – from the type of munition selected, to the method according to which the attack was executed – that the damage would be limited to that part of the building where the target was located. The aim was to minimize, to the extent feasible, the collateral damage that would result from the attack, without frustrating its success. Regrettably, after the fact, there was an unforeseen collapse in the upper floors of the building approximately half an hour after the attack. As a result of the attack, the senior commander in question was killed, and it was alleged that a further 14 civilians were killed, most of them members of the Kilani and Derbas families, who had been staying, according to the complaints received by the MAG Corps, on the same floor in the building as the target of the attack. As a result of this incident, operational lessons regarding the IDF's methods for carrying out aerial attacks in similar cases were drawn, and were implemented whilst the Operation was still underway.

The MAG went on to explain why the attack was lawful: *After reviewing the factual findings and the material*

collated by the FFA Mechanism, the MAG found that the targeting process in question accorded with Israeli domestic law and international law requirements. The decision to attack was taken by the competent authorities and aimed at a lawful target – a senior commander in Palestinian Islamic Jihad, who was indeed killed as a result of the attack. The attack complied with the principle of proportionality, as at the time the decision was taken, it was considered that the collateral damage expected from the attack would not be excessive in relation to the military advantage anticipated from it, and this assessment was not unreasonable under the circumstances. Moreover, the attack was carried out while undertaking a number of precautionary measures which aimed to minimize the risk of collateral damage. Such measures included, inter alia, the choice of munition to be used, and the method according to which the attack was carried out. The fact that, in practice, a number of civilians who were not involved in the hostilities were harmed, is a regrettable result, but does not affect the legality of the attack ex post facto.

Given all this, “the MAG did not find that the actions of IDF forces raised grounds for a reasonable suspicion of criminal misconduct” and ordered the case closed.

Bombing of a vacant building in Jabalya R.C.; it collapsed on the home of the Abu 'Aytah family, killing five members of the family, 24 July 2014

The Abu 'Aytah family lived in a three-story building in Jabalya R.C.: Ibrahim and Jamileh Abu 'Aytah lived on the first floor with four of their children. Their three married sons lived with their families on the ground and second floors. A total of 20 people lived in the house. Mahmoud Abu 'Aytah, 30, who lived on the ground floor, told B'Tselem's field researcher that the family had been living in that house for 15 years. He said that the area where the house was

located had been relatively quiet and that the family had managed to lead an almost normal life during the fighting, including shopping at the market. He said they had even invited a relative who lives near Gaza's eastern border, in an area that was exposed to artillery fire, to take refuge in their house.

At around 1:30 A.M. on 24 July 2014, the air force attacked a nearby house. Testimonies collected by B'Tselem indicate that the military fired a warning missile, but local residents could not tell which home it had targeted and who was meant to leave. The house, which was already vacant, was completely destroyed and dozens of other nearby homes were damaged. One of them was the Abu 'Aytah home. Five members of the family were killed, including a four-year-old boy, and 12 were injured. Mahmoud Abu 'Aytah described what happened before the house was hit:

We were all at my parents' place on the first floor. We were sitting and talking with them, and we were happy. At about 11:30 P.M., my wife, my sisters Alaa and Manal, and I went down to my apartment on the ground floor. I watched the news and I was happy when they said there might be a cease-fire in the next few days.

At around 1:30 A.M., we heard a very loud, very close explosion. My brother Ahmad, his wife and his children came down to my apartment because the ground floor is safer. Then my parents, my brother Isma'il and my brother Muhammad and his family came downstairs too. We sat on mattresses and on the couches, and the children were playing by our side. Then we heard the sound of one missile, which sounded like a warning missile shot from a drone. We wanted to go outside to see which house had been warned, but my father refused and wouldn't let us go. So we sat back down. Less than two minutes later, I suddenly couldn't feel anything. I woke up the next day and saw I was in the hospital. I was in pain. The doctors told me a house

close to ours had been bombed and that I and the rest of my family were injured to various degrees. I saw my brother Isma'il, and he told me my wife was in the ICU. I was released from the hospital a few hours later. I went back to my father-in-law's house in the Tel a-Za'tar area in Jabalya R.C. It was only a few hours after later that I was told that some of my family had been killed. I was in shock when I heard that, and I collapsed. The moments when I heard they had been killed were extremely difficult.³⁶

The house was partially destroyed, and Muhammad Abu 'Aytah's parents, two of his married brothers, and the four-year-old son of one of the brothers were killed.

The MAG Corps update issued on 22 March 2015 said the target of the attack was "a weapons cache [...] that was located in the house of a senior military operative in Hamas, Ahmad Al-Ajrami". According to the update, the military warned local residents prior to the attack:

Prior to the strike on the cache, the IDF issued a number of detailed warnings over the telephone, wherein the residents of the building in which the weapons cache was located, and the residents of a number of surrounding buildings that were expected to be damaged as a result of the strike, were asked to vacate the premises. Additionally, a warning strike was executed on the roof of the building in which the weapons cache was located, as well as on the roof of the adjoining building which was expected to be significantly impacted as a result of the strike, as part of the "knock on the roof" procedure. During this time, many people were seen leaving these buildings. The strike was carried out after it was assessed that it was possible to conclude that civilians were not expected to be harmed in the building targeted and the adjoining buildings, as a result of the strike.

36. He gave his testimony to B'Tselem field researcher Muhammad Sabah on 11 September 2014.

The MAG stated that it is unclear if the five civilians killed in the attack “had been present in an adjoining building whose evacuation was specifically asked for, or whether they were in another adjoining building that had been damaged more significantly than had been expected”.

Regardless of the answer to this question, the MAG found the attack to be lawful under both Israeli law and international law:

The decision to strike was taken by the competent authorities, and was aimed at a military objective – a weapons cache. The strike complied with the principle of proportionality, as at the time the decision was taken, it was considered that the collateral damage expected from the strike would not be excessive in relation to the military advantage anticipated from it, and it appears that this estimation was not unreasonable under the circumstances. Moreover, the strike was carried out while undertaking a series of precautionary measures which aimed to minimize civilian harm. Inter alia, a specific warning was provided to the residents of the buildings which were expected to be impacted as a result of the strike, and ongoing visual surveillance of the event was used to confirm their evacuation.

Bombing of the Abu Nijem family home in Jabalya R.C.; 10 people killed, including two Islamic Jihad operatives, 3 August 2014

At approximately 9:00 P.M. on 3 August 2014, the military bombed the home of the Abu Nijem family in Jabalya R.C. in the northern Gaza Strip. The bombing destroyed the house and a neighboring house, killing two Islamic Jihad operatives who were in the house and eight other people: five people in the Abu Nijem house and a woman and two girls next door.

Husband and wife Muhammad and Fawziyeh Abu Nijem lived on the ground floor with two of their children – Muhammad, 20, and Ahmad, 17. Their son Bilal, his wife Maryam, and their two children lived on the first floor. Muhammad’s father, ‘Abd al-Karim, 92, lived on the second floor. That evening, Danyal Kamel Mansur, an Islamic Jihad operative, was visiting ‘Abd al-Karim on the second floor. At approximately 9:00 P.M. another man, ‘Abd a-Naser al-‘Ajuri, joined them. Shortly afterwards, the military bombed the house. After the attack, the ISA announced that the military had bombed a building where Mansur, “the commander of Islamic Jihad’s northern sector”, was present and that he had been killed.

Maryam Abu Nijem, 23, who lived on the first floor, told B’Tselem what happened that night:

At around 7:30 P.M., the Israeli military fired light flares. They lit up the whole area. We ate the al-Iftar meal (to break the fast) and washed the dishes. After prayers, we sat together for a bit and then I took my children into the bedroom. My husband sat with his mother and his brother Ahmad. My father-in-law took a cup of tea up to his father, Haj ‘Abd al-Karim, who was in his home on the second floor. I put my children to bed next to me. The power was out at the time.

Suddenly, I heard and saw our house come crumbling down around us. I cried out to my husband. I turned on a flashlight and heard my daughter Raw’ah screaming. She’s a year old. I looked for her and found her under the blankets. I grabbed her and my son Muhammad, who’s three years old, and ran out of the room. I saw Ahmad, my husband’s brother, lying dead next to the bedroom door. I saw rocks and everything in shambles. The house was completely destroyed. I heard someone groaning and looked around with my flashlight, but there was debris everywhere and I didn’t know where the sound was coming from. I held the flashlight and

*carried the children over the rubble to get out of the house. I left through the house next door, which had also been destroyed. Neighbors came and took me over to one of their houses. I sat with them.*³⁷

The bombing also damaged the home of neighbors Muhammad and Suha al-Masri, who were sheltering relatives of Muhammad's – Wael and May Qassem and their five children. Suha al-Masri, 38, and her four-year-old daughter, Raghad were killed, as was Shaymaa – Wael and May Qassem's 14-year-old daughter.

The MAG Corps update issued on 22 March 2015 said the target of the attack was Danyal Mansour, "a very senior commander in the Palestinian Islamic Jihad terror organization, with a rank equivalent to that of a brigade commander, responsible for the organization's operations in the northern Gaza Strip, and with overall responsibility for the organization's intelligence service". According to the MAG: *During the planning stages of the strike, it was assessed that there might be civilians present in the building, but that the extent of the harm to those civilians would not be excessive in relation to the significant military advantage anticipated to be achieved as a result of the strike. In this context, it should be noted that the building in question was thought to consist of only one residential apartment – the apartment in which Mansour was staying. The strike on the building was planned for execution by means of a precise munition, and in a way in which would allow achieving the aim of the strike whilst minimizing harm to the surrounding buildings. Likewise, a number of different checks were conducted in order to assess the extent of expected harm to civilians in the surrounding buildings.*

The MAG went on to determine that the operation was lawful and that there was no reasonable

suspicion of criminal misconduct and ordered the file closed:

After reviewing the factual findings and the material collated by the FFA Mechanism, the MAG found that the targeting process in question accorded with Israeli domestic law and international law requirements. The decision to strike was taken by the competent authorities and aimed at a lawful target, a very senior commander in Palestinian Islamic Jihad. The strike complied with the principle of proportionality, as at the time the decision was taken, it was considered that the collateral damage expected from the strike would not be excessive in relation to the military advantage anticipated from it. Moreover, the strike was carried out while undertaking precautionary measures which aimed to mitigate the risk of civilian harm, with an emphasis on those who were present in the surrounding buildings. Such measures included, inter alia, the choice of munition to be used, as well as the deployment of real-time visual coverage. Additionally, it was found that the provision of a specific warning prior to the attack, to the people present in the structure in which the target was located, or to those in adjacent buildings, was not required by law and was expected to result in the frustration of the strike's objective.

The killing of four children on the beach in Gaza, 16 July 2014

On 16 July 2014, four children who were playing soccer were killed in an air strike on the Gaza beach. The case received extensive worldwide media coverage, owing in part to the fact that foreign correspondents staying at a nearby hotel witnessed it firsthand.

Israeli officials wasted no time justifying the attack. The IDF Spokesperson said on Israel's Channel Two

37. She gave her testimony to B'Tselem field researcher Muhammad Sabah on 17 December 2014.

television newscast: *If, in fact, uninvolved civilians were killed in the incident, it is tragic... It is important to remember that Hamas's cynical exploitation of Gaza civilians whom it uses as hostages, often results in the abortion of plans to strike at terrorist targets, as has been proven many times over in the past few days, and that the IDF has no intention of harming civilians who are trapped in a war courtesy of Hamas.*³⁸

The IDF Spokesperson added that “it appears from the preliminary details that the IDF made an air strike on a structure in the area, which intelligence indicated was being used for terrorist activity. The military had also been alerted that terrorists were present in the area. This is apparently a case of mistaken identity which resulted in harm to the youths”. The same news story quoted a senior officer as saying: “We have no plan or operation directed at killing civilians or children who are not connected to the incident”.³⁹

The MAG Corps update issued 10 September 2014 stated that the MPIU had launched an investigation of the incident as the findings collected by the FFA Mechanism “indicated the existence of grounds for a reasonable suspicion that the strike was not carried out in accordance with IDF regulations”. In its update of 11 June 2015, the MAG Corps stated the MAG had decided to close the file without taking any measures against any of the individuals involved.

Barring sections that refer specifically to the investigation, the notice regarding closure of this case is almost identical to the reasons cited by the MAG for the decision not to launch an MPIU investigation into any of the first three cases

described above. According to the MAG update, the investigation had been “thorough and extensive”, including collection of testimonies “from a large number of IDF soldiers and officers who were involved in the planning and execution of the attack”, and that “an extensive number of documents relating to the attack were reviewed, along with video footage documenting the attack in real time, as well as media images and video footage which documented parts of the incident”. The update also stated that MPIU investigators had attempted to collect testimonies from Gaza residents “who were, allegedly, witnesses to the incident”. The attempt failed, and although arrangements were made to collect statements from three residents, investigators ultimately made do with having affidavits sent in. The update says nothing about gathering statements from members of the foreign press, many of whom had witnessed the incident and reported about it immediately.

The findings of the MPIU investigation did no more than confirm what Israeli officials said right after the incident. According to the MAG Corps update, the beach has a separate, fenced-in compound known to Gaza residents as a facility that serves Hamas's naval police. The military even attacked this compound in the days leading up to the incident. The update stated:

Shortly before the incident, an intelligence assessment was established which indicated that operatives from Hamas's Naval Forces would gather in the military compound in order to prepare for military activity against the IDF. On 16 July, aerial surveillance identified a number of figures entering the compound at a running pace. These figures entered a shed

38. Ehud Yaari, Nir Dvori, Ohad Hemo, “Report: 4 Palestinian Children Killed in IDF Attack”, Channel Two News, 16 July 2014, [Hebrew].

39. Anshel Pfeffer, “Four Kids Killed on Gaza Beach in front of Foreign Journalists”, *Haaretz*, 17 July 2014 [Hebrew].

adjoining the container which had been attacked the day prior. Against the backdrop of the aforementioned intelligence assessment, these were believed to be militants from Hamas's Naval Forces, who had arrived at the compound in order to prepare to execute the aforementioned military activity against the IDF. It should be stressed that the figures were not identified at any point during the incident, as children.

At that point, a decision was made to attack the persons who had gone into the compound: "After all the necessary authorizations for an attack had been obtained, and after a civilian presence in the area had been ruled out. When one of the identified figures entered into the remains of the container which had been attacked on the day prior to the incident, one missile was fired from the air towards the container and the adjoining shed. As a result of this attack, it appeared that one of the figures identified was hit". Immediately after that missile was fired, "the rest of the figures began to run in the direction of the compound's exit. Shortly before their exit from the compound, an additional missile was fired from the air towards them, which hit the figures in question after they had exited the compound". It then emerged that "tragically, the outcome of the attack was the death of four children, who had entered the military compound for reasons that remain unclear. It further arose from the investigation that, under the circumstances in question, it would not have been possible for the operational entities involved to have identified these figures, via aerial surveillance, as children".

The MAG ruled the attack lawful and decided to close the investigation without taking any legal action against anyone involved:

After reviewing the investigation's findings, the MAG found that the attack process in question accorded with Israeli domestic law and international law

requirements. The decision to attack was taken by the competent authorities, and the attack was aimed at figures who were understood to be militants from Hamas's Naval Forces, who had gathered in order to prepare to carry out military activities against the IDF. At the time that the decision was made, the attack was not, according to the assessment of the operational entities, expected to result in any collateral damage to civilians or to civilian property. Moreover, the attack was carried out while undertaking several precautionary measures, which aimed to prevent any harm to civilians. Such measures included, inter alia, the choice of a munition which was not expected to cause any harm to civilians, and the deployment of real time visual surveillance. The MAG found that the professional discretion exercised by all the commanders involved in the incident had not been unreasonable under the circumstances. However, it became clear after the fact that the identification of the figures as militants from Hamas's Naval Forces, was in error. Nonetheless, the tragic outcome of the incident does not affect the legality of the attack ex post facto.

4. The upshot: The process changed nothing, it was still “all lawful”

The MAG Corps issued reasoned decisions in 34 cases, each of which was ordered closed by the MAG without adopting any legal action against anyone implicated. In seven of the cases in which the MAG did order an MPIU investigation, insufficient evidence was given as the grounds given for closing the case. In five other cases, the MAG determined that the facts as stated in the complaint he received were incorrect and that the military was not responsible for the harm done: in four of the cases, the MAG found the firing had not been carried out by the military; in the fifth case, that alleged impeding medical treatment, he determined the findings indicated that the soldiers had not obstructed treatment.

In the other 22 cases, the MAG determined that the soldiers had acted lawfully, using stock phrases that outlined the four conditions requisite for an attack to be considered to have “accorded with Israeli domestic law and international law”: the decision was made by the competent authorities; the attack was aimed at a legitimate military target; it met the proportionality requirement insofar as “at the time the decision was taken, it was considered that the collateral damage expected from the attack would not be excessive in relation to the military advantage anticipated from it”; and there were “significant efforts to minimize civilian harm”.

The MAG’s decisions treat the cases he examined as isolated, unrelated incidents. In a talk Maj. Gen. Danny Efroni gave while still in office as MAG, he clarified that international law requires an individual

examination of each and every case, and noted that such examination might help Israel challenge any allegation that the high number of civilian fatalities during the fighting, per se, implies breaches of international law. According to Efroni:

The allegation is – as it turns out – captivating [...] and is also difficult to counter using the media, seeing as the images of devastation in Gaza leave a much deeper impression than the damage caused by rockets in Israel, thanks to the Iron Dome anti-missile defense system. However, in this case, specifically, international law is on our side, since each target is distinct and, in any case, whether or not the commander’s decision was reasonable must be examined in view of the information he had at the time of the attack, rather than retrospectively. In this case, which once again illustrates the gap between what is legal what is legitimate, the law is probably the most effective tool for fending off arguments made against us.⁴⁰

International law does require an individual examination of the legality of each attack, but the interpretation given by the MAG to this requirement is far reaching, and completely ignores the overall context, despite its being critical to the determination of the lawfulness of each individual attack. The incidents the MAG examined represent a small portion of countless, almost identical strikes, that took place over the fifty days of hostilities, always ending with tragic results. These attacks were the direct outcome of rules of engagement approved by the MAG himself. Opting to ignore all this renders hollow both the MAG’s conclusions and the meaning he accords to fundamental concepts and principles of international law, including “precautions”, “prior warning” and “proportionality”.

40. Lecture entitled “The Military in the Grip of the Law” by the MAG, Maj. Gen. Danny Efroni, given at a conference held by the Israeli Association of Public Law, on 11 January 2015. Published on the MAG website, <http://www.law.idf.il/163-7040-he/Patzar.aspx> [Hebrew].

For instance, one of the issues that arises when reading the MAG's decisions is the limitations of the intelligence channels at the disposal of the military with respect to its operations in Gaza. The MAG's remarks indicate that in thirteen of the fifteen cases of Palestinian fatalities that he examined, it was found – in retrospect – that the information available to those in charge of carrying out the attack had not been at all accurate.⁴¹

In nine cases, the intelligence was off. For example, in one incident, the military was unaware that the building it had targeted also housed a hostel for people with disabilities. Two women living in the hostel were killed. In another incident, the military assumed civilians had evacuated the area following “a widespread warning”, and did not know that many civilians remained in their homes. Thirty-one people were killed in that strike. In yet another incident, the working premise of the individuals in charge of the strike was that there was only one residential unit in the building it targeted, when in fact, it was a three-story building. Eight civilians were killed in the attack. In another incident, the military targeted an office building it assumed vacant, whereas in fact, several families had been sheltering there. Eleven civilians were killed.

In four other cases, it turned out that the military does not have the ability to distinguish the presence of civilians in the object of an attack in real time. For instance, in one case, a vehicle that was apparently marked with the letters TV was hit and one person was killed. The MAG argued that the factual material collected in the case indicated that “at the time of the strike the IDF forces could not discern whether the vehicle was marked ‘TV’”. In the case described above of the four children killed on the beach in

Gaza, the MAG concluded that it was not possible to determine via the surveillance instruments that they were children and not combatants. In another case, those responsible for the attack could not – “with the means that were at their disposal, and under the visibility conditions prevailing at that time” – discern the presence of civilians close to a motorcycle they were targeting; these civilians were killed.

In each of these cases, the MAG was satisfied with making the argument that the error was discovered only after the fact, and consequently does not detract from the lawfulness of the attack. Obviously, errors will occur whenever there is fighting, and clearly, not every error amounts to a breach of law. However, if errors pointing to substantive limitations in the military's technological and intelligence capacities were found in so many of the cases that the MAG examined, what does this mean for the scores of other cases which the MAG did not examine and which resulted in hundreds of civilian fatalities? If the military's technological and intelligence capabilities do not allow it to detect the presence of civilians and determine their identity and age, or discern how many stories there are in a building being targeted, to what extent can the information given to those responsible for other strikes during Operation Protective Edge be relied upon?

There are only two possibilities: If all the other cases, in which so many civilians were killed, were also the result of being based on erroneous information at the disposal of those responsible for the attacks, then it can no longer be said that this was a “mistake”. On the other hand, if the other cases relied on accurate rather than erroneous information – in other words, if the people responsible for the attacks knew in advance that the strike would harm so many

41. In another case the MAG ruled a technical error was at fault, in another, that the missile was fired only after the civilians evacuated the building, but that they returned after the missile had been fired and it was too late to abort the strike.

civilians – then the attacks were unlawful and must be investigated by the MAG.

A similar problem arises with respect to the MAG's determination that, in the cases he examined, civilians were warned whenever it was feasible to do so. The MAG addressed the various means used to warn civilians before carrying out an attack: making telephone calls to homes that were targeted, firing a "warning projectile" at the roof (known as "knock on the roof procedure"), using "precise munitions" that were not meant to cause widespread damage, and relying on real-time surveillance or intelligence assessments. Nevertheless, in all the cases examined by the MAG, none of these measures managed to avert the severe harm to civilians. Here too, the outcomes were partly the result of incomplete and inaccurate information given to those responsible for the attack – information that could not have been used as a tool for selecting precautionary measures that were suitable for the situation on the ground.

This once again raises the same question: What happened in the scores of other cases in which hundreds of civilians were killed? Did the military issue a warning, but it was ineffective? If no warning was issued, was this always justified? Disregard of the wider context renders meaningless the MAG's claim that civilians were given warnings.

B'Tselem has previously warned of the limited efficacy of the military's precautionary measures, which, in practice, do not always allow civilians to protect themselves.⁴² For instance, with regard to the "knock on the roof procedure" adopted by the

military, civilians often cannot tell that a missile has hit the roof of their home, especially during times of intense fighting while other strikes are taking place nearby. Even if they are able to recognize this, it is unclear how they are to understand that the missile constitutes "a warning" of an impending attack and that they must clear the premises, and in any case residents are not always given enough time to flee their homes. In some cases, residents did manage to flee, but people living in nearby homes, who were not warned, were harmed. Nor did issuing sweeping calls to tens of thousands of civilians to evacuate entire neighborhoods always enable residents to flee; in many cases, with the entire Gaza Strip under air raids, there was nowhere to go. In practice, many residents remained home, while some of those who did flee were killed in the places where they sought refuge.

IHL acknowledges that there can be situations in which it is not possible to warn civilians prior to an attack. However, when civilians can be warned, the requirement to do so is substantive, not technical. The law requires parties to hostilities to take effective precautions that would actually allow civilians to protect themselves.⁴³

The MAG's conclusion that all the attacks he examined were lawful in that those responsible for them could disregard the harsh outcomes of dozens of other attacks that took place during the fighting has a far-reaching implication that applies to all strikes carried out during the operation: It absolves every level of officials involved in the attacks – from the prime minister, through the MAG himself through to the soldiers who ultimately fired – of the

42. *Black Flag*, supra note 4, pp. 54-55; B'Tselem, *Guidelines for Israel's Investigation into Operation Cast Lead: 27 December 2008 – 18 January 2009*, pp. 10-11.

43. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Art. 57(2)(c).

duty to do everything in their power to minimize harm to civilians. In fact, the MAG sets the bar very low in terms of what is required of those responsible for the attacks – including senior military officers and the MAG (who are not under investigation in any case) – by doing no more than examining what they knew in practice, while entirely disregarding the question of what they should have known, including the obligation to learn from their own experience.

Consequently, the MAG's determination that the attacks he examined did, in fact, meet the proportionality requirement is also cast into doubt. This principle is based on balancing the assessment by those responsible as to the anticipated military advantage against their assessment as to the anticipated harm to civilians. Yet when the projection as to harm is made while knowingly disregarding the result of nearly identical strikes carried out in the days prior to the making of the assessment, namely that dropping a bomb in the middle of a residential neighborhood could result in many more civilian deaths than anticipated; that the warnings the military gives are not always efficient and that the intelligence information is sometimes incomplete or inaccurate – then their assessments of anticipated harm to civilians become hollow and worthless.

Proportionality is one of the basic tenets of IHL,⁴⁴ but it is also an elusive and vague. There are no cut and dried definitions for what might be considered a “significant” military advantage, or what might be considered “excessive” harm to civilians. This principle relies on a delicate balance between contradictory requirements. Moreover, the implementation of this principle is predicated on ethical and moral assessments rather than cold legal analysis. As former Chief Justice Aharon Barak stated: “It is a values-based test. It is based upon a balancing between conflicting values and interests”.⁴⁵

The MAG disregards the complexity of the proportionality principle and treats it as a purely legal question, which is to be answered simply by examining whether the requisite balancing was carried out, in isolation from a substantive examination of the information those responsible for the attack had at their disposal. Instead, the MAG accused his detractors – human rights organizations as well as those claiming he is holding the military back – of levelling immaterial criticism. According to the MAG: *Criticism from both sides only illustrates that some view international law as prohibitive while others view it as permissive; all based on their moral worldview. This criticism will not lead the IDF astray and we will continue to abide by the law in all areas of operations, during routine operations and emergencies alike.*⁴⁶

⁴⁴. This principle is enshrined in several provisions of IHL. See, e.g. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Art. 51(b), Art. 57(2)(a)(3), Art. 57(2)(b). For commentary on this principle, see, e.g.: Y. Sandoz, C. Swinarski, B. Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, International Committee of the Red Cross, Martinus Nijhoff Publishers, Geneva, 1987, pp. 683-685.

⁴⁵. HCJ 769/02 **The Public Committee Against Torture in Israel v. The Government of Israel**, para. 45, English translation available on Supreme Court website: http://elyon1.court.gov.il/Files_ENG/02/690/007/a34/02007690.a34.pdf; See also, Yuval Shani, “International Law and the Fighting in Gaza: Coordinating Expectations”, *Mishpatim al Atar* 1 (2009) [online legal journal, Hebrew].

⁴⁶. Lecture entitled “The Military in the Grip of the Law” by the MAG, Maj. Gen. Danny Efroni, given at a conference held by the Israeli Association of Public Law, on 11 January 2015. Published on the MAG website, <http://www.law.idf.il/163-7040-he/Patzar.aspx> [Hebrew].

Like any other legal rule, IHL is also up for interpretation. Interpretation is also obviously influenced by the worldview of the person offering it, including the MAG, yet as long as it is reasonable and reflects the purpose of the law it is considered legitimate. However, an

interpretation whereby such extreme harm to civilians (as was seen in Operation Protective Edge) is lawful and is not considered “excessive” – as the MAG argues – is unreasonable, legally wrong, and founded on a morally repugnant worldview.

Conclusions

About a year after the fighting came to an end, MPIU Commander Col. Erez Raban said: “Among the incidents we investigated, we did not find a conspicuous case of an extreme violation of the laws of war”.⁴⁷ Several months earlier, Chief Military Police Officer Brig. Gen. Golan Maimon said: “I have the tools and the professional personnel to know how to check, and the fact is, that of all the Operation Protective Edge investigations, only one suspect was arrested: a suspected looter”.⁴⁸

This outcome should not be attributed solely to the credit (or detriment) of MPIU investigators. It is primarily the result of the choice Israel has made not to investigate policies implemented during the fighting or the lawfulness of the orders given to soldiers. The political leadership and the senior military command never put themselves into the sphere of investigations, and the MAG Corps chose to investigate only “exceptional” cases. Even these isolated cases were handled based on an unreasonable interpretation of IHL, which granted legitimacy to instances of harm to civilians not involved in the fighting, and led to many cases being

closed without any measures taken whatsoever. So far, only one indictment has been served, against three soldiers implicated in the theft of NIS 2,420 [approx. USD 620].

Some MPIU investigations are still underway, other cases are still under FFA Mechanism review, and some are pending the MAG’s decision on how to proceed in them. For instance, former MAG Maj. Gen. Danny Efroni has avoided a decision on whether to launch an investigation into what came to be known as Black Friday in Rafah, when scores of Palestinians were killed in a blanket Israeli air raid, presumably undertaken to foil the kidnapping of a soldier. The case has been passed on to the new MAG, Brig. Gen. Sharon Afek, who has also failed to make a decision to date. Former Minister of Defense Moshe Ya’alon has already expressed his opposition to a criminal investigation of these incidents.⁴⁹

All this leads to the inevitable conclusion that – as before, also in Operation Protective Edge – the work of the military law enforcement system does no

47. Noga Artzi, “Behind the Scenes of Operation Protective Edge Investigations”, *Bamahane* [IDF magazine], 16 July 2015 [Hebrew].

48. Noam Amir, “The Man with the Armor: Chief Military Police Officer Strives to Avert Terrorist Attacks”, *Maariv*, 2 November 2015 [Hebrew].

49. Gili Cohen, “Defense Minister Ya’alon: No Place for Criminal Probe of Gaza War’s Black Friday”, *Haaretz*, 8 January 2015: <http://www.haaretz.com/israel-news/.premium-1.636074>.

more than offer the illusion that Israel is fulfilling its obligation to investigate breaches of law. The changes made to the investigation system in view of the Turkel Commission recommendations – first and foremost, the introduction of the FFA Mechanism while the fighting was still going on – might have helped appearances, but they have done nothing to improve the essence of the investigations.

Statements made by officials imply that one of the reasons they are in favor – even if merely ostensibly – of investigating suspected violations of breaches of law during Operation Protective Edge is a desire to preempt the International Criminal Court (ICC) in The Hague from carrying out its own investigation. According to the ICC’s constitution, it will not intervene so long as Israel can prove it is willing and able to investigate breaches of IHL on its own. On the other hand, should Israel refuse to investigate, or should its investigations fail to live up to the required standards, the ICC would be able to step in and launch criminal proceedings against the individuals responsible for the violations.⁵⁰

Former MAG Maj. Gen. Danny Efroni has said: “If we do our work properly, I am not worried... The ICC will not take action to replace the prosecution in a place where the legal system of the country is unbiased and does its work.” The MAG stressed that the investigations must be genuine, saying: “If the probe is a whitewash and not a true investigation, nothing

will stop the ICC.”⁵¹ Similarly, Col. Noam Neuman, Head of the International Law Department at the MAG Corps, has said: “In the efforts to prevent legal proceedings abroad, the fact that Israel has a process in place for examining and investigating suspected war crimes is highly important”.⁵² Chief Military Police Officer Brig. Gen. Golan Maimon also addressed the issue, noting: “According to the law, the state is expected to take every action necessary to get at the truth. If you are subjectively perceived not to have taken the actions, it will land you in court in The Hague.”⁵³

As this report indicates, Israel has failed to meet even this target. The chief prosecutor of the ICC has not made her decision as to whether the ICC has jurisdiction to investigate what took place during the fighting in Operation Protective Edge. However, should the prosecutor decide such jurisdiction does exist, it is highly doubtful that the investigations conducted by Israel so far would keep the ICC from stepping in, mainly since Israel has decided to investigate only “exceptional” cases and entirely ignores the responsibility carried by the political leadership and the senior military command for determining policies and directives.

In late May 2016, B’Tselem published a report entitled *The Occupation’s Fig Leaf: Israel’s Military Law Enforcement System as a Whitewash Mechanism*. In this report, B’Tselem explains its decision to

50. Rome Statute of the International Criminal Court, Art. 17.

51. Amos Harel and Gili Cohen, “Top IDF Attorney: I Will Never Call IDF the Most Moral Army in the World”, *Haaretz*, 9 April 2015, <http://www.haaretz.com/israel-news/1.651148>.

52. Einat Sharon, “The Legal Battle over Operation Protective Edge Will Take Years”, *Bamahane* [IDF magazine], 16 July 2015 [Hebrew].

53. Noam Amir, “The Man with the Armor: Chief Military Police Officer Strives to Avert Terrorist Attacks”, *Maariv*, 2 November 2015 [Hebrew].

stop referring complaints to the military, due to the system's ongoing failure to ensure accountability in cases in which soldiers harm Palestinians. The report reviews B'Tselem's work vis-à-vis the MAG Corps and the MPIU over the course of 25 years, and demonstrates how the system produces the semblance of law enforcement, when, in actual fact, its success is measured by its ability to whitewash violations.

As we stated in the document published at the end of Operation Protective Edge, and as the current report shows – the whitewash mechanism is in play also in the investigation of incidents that occurred during the fighting in the Gaza Strip. Here, too, the system's main concern is with achieving the false impression of a functioning system which allegedly strives to get at the truth. In fact, the investigations are perfunctory examinations of isolated, decontextualized incidents, and the people who are truly responsible for the violation are never investigated.

After Operation Protective Edge, B'Tselem announced it would not refer complaints to the military law enforcement system, despite receiving an official request to do so. We did, however, note that we would eagerly retract our decision if we see that serious, independent investigations are conducted with respect to the persons responsible for violations of IHL during the fighting. Two years

have gone by but we see that, regrettably, what we said then still holds true, and Israel continues to devote most of its efforts to painting a façade, nothing more.

The fighting during Operation Protective Edge was brutal and violent. Israel implemented a policy of air strikes against homes, which killed hundreds of people, including entire families. Tens of thousands of people were left homeless, losing all they held dear. Genuine, effective investigations are needed not just for the sake of achieving justice for the victims and their loved ones. They are needed as a deterrent to forestall future actions of this sort and to avert further losses. When nothing is investigated, when the consensus is that everything done during the fighting was moral and legal – the stage is set for actions such as these, or even worse, to recur. There was no accountability after Operation Cast Lead, only whitewashing. Now, after Operation Protective Edge, there is no accountability either, only whitewashing. This is not a theoretical legal issue: we are talking about human lives, and the toll might, heaven forbid, mount even higher.

