

The Petitioners:           1. **B'Tselem – The Israeli Information Center for Human Rights in the Occupied Territories**  
                                  2. **The Association for Civil Rights in Israel**  
                                  both by attorneys Noa Stein and/or Dan Yakir and/or Dana Alexander and/or Hadas Tagri and/or Avner Finchuk and/or 'Awani Bana and/or Michal Finchuk and/or Fatma al-Aju & Leyla Margalit and/or Bana Shagri-Badarna and/or Sharon Avraham-Weiss and/or Sonya Bulous and/or Oded Feller  
                                  of The Association for Civil Rights in Israel  
                                  PO Box 35401, Jerusalem 91352  
                                  Tel. 02-6521218; Fax. 02-62521219

v.

The Respondent:           **Judge Advocate General**  
                                  6 David Elazar Street, The Kirya, Tel Aviv

### **Petition for Order Nisi**

A petition for order nisi is hereby filed to direct the Respondent to show cause:

1. Why he does not order a Military Police investigation into the circumstances of the deaths of Amjad 'Abd al-Hadi Jabbur, Nidal 'Abd a-Rauf Abu Makhsin, Fatma Abu Thaher, Fatma Zaqrneh and her two children, 'Abir and Basel, Taher 'Abdu, and Rami Abu Shab, who were killed during IDF actions in the Occupied Territories;
2. Why he does not order a Military Police investigation in every case in which he is informed of the death of a Palestinian who did not take part in the hostilities, in the course of IDF operations in the Occupied Territories, and conduct the investigation within a reasonable time after the incident occurs.

### **Request for Expedited Hearing**

1. This petition involves the duty of the Respondent to order a Military Police investigation in cases of the deaths of Palestinian civilians who are killed in the course of IDF operations in the Occupied Territories.

2. The conduct of a complete and thorough investigation in cases of death requires the collection of evidence and questioning of eye witnesses, including the questioning of IDF soldiers who were involved in the incident. To enable an efficient investigation that will ultimately disclose the truth, the investigation must be conducted as soon as possible after the incident.
3. The Palestinian civilians whose deaths are the basis for this petition were killed in incidents that took place between May 2002 to May 2003. Regarding five of these persons, it was decided not to open a Military Police investigation. As for the other three persons, Petitioner 1 sent a request to the Respondent as soon as possible after the three died. To date, Petitioner 1 has not been informed if a Military Police investigation has been opened to determine the circumstances of these deaths.
4. The passage of time from the occurrence of the incident that led to the death of the civilians and the investigation is liable to hamper the investigation and distort its results. Most of the evidence in such cases is collected from passersby and soldiers. Thus, the quality of the investigations is affected by the precision of the testimonies. As time passes, the witnesses' recollection diminishes, and it becomes increasingly difficult to locate the relevant witnesses.
5. Six of the cases of death described below *occurred more than one year ago*, and the passage of time will surely affect the investigations. However, the deaths of Taher 'Abdu and Rami Abu Shab occurred in February and March 2003. In the months that have passed since then, no action has been taken to collect evidence. Further delay in hearing the petition is liable to impair its main objective – to investigate and disclose the truth about the circumstances of the deaths of Palestinian civilians and to prosecute the persons responsible if it is found that their deaths resulted from the commission of an offense.
6. In light of the aforesaid, the Honorable Court is requested to order that the petition be heard in an expedited manner.

**The grounds for the petition are as follows:**

1. Petitioner 1 is a non-profit organization that collects and investigates information regarding human rights violations in the Occupied Territories.
2. Petitioner 2 is a non-profit organization engaged in promoting human rights in Israel and in the territories under its control.

3. The Respondent is the Judge Advocate General, who serves, pursuant to Section 177 of the Military Justice Law, 5715 – 1955 (hereafter: “the Military Justice Law”). Section 252(A)(3) of the Military Justice Law empowers the Respondent to order the investigation of complaints and suspicions regarding offenses allegedly committed by IDF soldiers.

The Respondent is granted broad powers in conducting criminal investigations in the military. He is empowered to order, complete, or terminate an investigation, transfer the investigation from one investigator to another, receive the investigative material at any stage of the investigation, dismiss a complaint, or order the filing of an indictment. These powers are set forth in sections 278, 279, 280, 281, and 282 of the Military Justice Law.

### **Factual background**

4. According to data received by Petitioner 1, from the outbreak of the al-Aqsa Intifada, at the end of September 2000, to the end of September 2003, 2,155 Palestinians have been killed by Israeli security forces’ gunfire. The number of Palestinians killed since January 2002 include 11 infants under two years old, 90 children from 3 to 12 years old, 304 youths from 13 to 17 years old, and some 70 women ranging in age from 20 to 95 years old. Information from Amnesty International indicates that most of the cases of death resulted from excessive force employed by IDF soldiers against demonstrators and stone throwers, and from indiscriminate gunfire and shelling.

See the report of Amnesty International, Israel, the Occupied Territories, and the Palestinian Authority, *Burying the Future: Children on the Firing Line*, attached hereto, marked P/1.

According to figures of the Palestinian Red Crescent, over the same period, 5,207 Palestinians were wounded by IDF forces’ live fire. Rubber bullets wounded 5,626 Palestinians.

These figures were published on the organization’s Web site. See [www.palestinercs.org/crisistables/feb\\_2003\\_table.htm](http://www.palestinercs.org/crisistables/feb_2003_table.htm)

The defense establishment’s statistics, which were reported in an article in *Ha’aretz* on 13 March 2003, indicate that since the beginning of the confrontation [September 2000], 1,945 Palestinians have been killed, 235 of whom were not found to have terrorist ties. One hundred and thirty of those killed were under 17 years old.

Attached hereto is a copy of the article, marked P/2.

**Circumstances of the deaths of eight Palestinian civilians as to whom request for investigation was made**

5. The circumstances of the deaths of eight Palestinian civilians killed during IDF operations in the Occupied Territories will be described below. The first relief sought by this petition relates to investigation of the circumstances of their deaths. The information on six of the incidents that are described below is based on testimonies given to researchers on the staff of Petitioner 1. In all the cases presented, the Respondent did not order a Military Police investigation, although requested to do so by Petitioner 1.

**Death of Amjad 'Abd al-Hadi Jabbur**

6. Amjad 'Abd al-Hadi Jabbur, a resident of Sallem, was killed during an IDF operation in his village on the night between 1-2 August 2002. Jabbur was taken from his house at the order of IDF soldiers. The soldiers ordered him to undress and then to put his clothes back on. His hands were then tied behind his back, and the soldiers began to interrogate him. The family members were removed from the house on the contention that it was going to be searched.  
  
While his wife and children were standing outside the house watching the events unfold, the soldiers walked Jabbur toward army vehicles that were parked about 50 meters away. Two soldiers were standing on each side of Jabbur, holding him by the shoulder. Suddenly, the soldiers moved away from him and ordered him to stop, although the witnesses said that he did not try to escape. Then one of the soldiers fired a few shots into the air, and another soldier fired directly at Jabbur, from a distance of about 15 meters. Jabbur fell to the ground, dead. An eyewitness, Rida Ibrahim Yusuf a-Shatiya, heard one of the soldiers say to the other soldiers that he did not tell them to kill him, but only to injure him.

Attached hereto is a copy of the testimonies of Rida Ibrahim Yusuf a-Shatiya, Rania Qassem Yusuf A-Shatiya, and Hamed Talal Hamed 'Odeh, Jabbur's neighbors. The testimonies, which were given to 'Ali Daraghmeh, a fieldworker of Petitioner 1, and translated by Petitioner 1, are marked P/3.

On 8 August 2002, Petitioner 1 requested that the Respondent order an investigation into the circumstances of Jabbur's death. More than five months later, Lt. Col. Einat Ron, the Chief Military Prosecutor, replied to the request. She stated that *a decision had been made not to open a criminal investigation*. The reason given was that Jabbur was suspected of involvement in terrorist activity, and had fled from the place where he was being held. Some of the arguments on which the Respondent's decision was

based conflicted with the testimonies given to Petitioner 1. According to these testimonies, Jabbur was not held anywhere, but had been accompanied by soldiers while his hands were bound behind him. Also, according to the testimonies, he did not attempt to run away. Therefore, it is not clear why he was shot. Even if there was support for the contention that he fled, this would not justify firing at him. It was not contended that Jabbur endangered the soldiers, and thus less lethal action could have been taken. In her reply of 28 May 2003, Lt. Col. Ron repeated her earlier contentions, and added that while running away, he also removed the handcuffs and the blindfold that had been placed over his eyes.

This reply, too, does not explain what justification existed to fire at Jabbur and kill him. Even if the Respondent's contention is correct, that Jabbur endangered the safety of the soldiers (though it is not clear how that could have been the case as he was unarmed), Jabbur was in the soldiers' custody, and thus had a increased duty to ensure his safety and certainly not to harm him.

Attached hereto is a copy of the correspondence between Petitioner 1 and the Respondent, marked P/4-P/8.

#### **Death of Nidal 'Abd a-Rauf Abu Makhsin**

7. Nidal Abu Makhsin, 19, a resident of Tubas, was killed on 14 August during an IDF operation in Tubas in which the army used the illegal procedure referred to as the "neighbor procedure" (see H CJ 3799/02, *Adalah et al. v. Yitzhak Eitan, OC Central Command et al.*, in which the matter of the legality of the procedure was raised). IDF soldiers entered the village in the afternoon and ordered Abu Makhsin and his brother Yunis to go to one of the houses, in which the soldiers had previously been, to remove a wounded person. After they removed the individual, the soldiers handcuffed Yunis and ordered Abu Makhsin to go house to house and tell the occupants to go outside into the street. The soldiers later ordered Abu Makhsin to go with them to the house of a village resident.

An eyewitness stated that the soldiers dressed Abu Makhsin in an army garment, and sent him inside the house along with a dog. When he was in the house, a battle ensued, during which the soldiers fired at and into the house. An army bulldozer later demolished the house. After that, soldiers were seen throwing an unidentified body from a stretcher. Body parts were also seen in the ruins.

The residents did not see Abu Makhsin leave the house, so they began to look for him at the end of the army's action. One of the eyewitnesses, an employee of Petitioner 1,

called Petitioner 1's office. Only then was he informed by Petitioner 1's staff that Abu Makhsin had died during the action.

Attached hereto is the testimony of 'Ali Ahmad Ibrahim Daraghmeh, a fieldworker for Petitioner 1, which he gave on 15 August 2002, marked P/9.

On 15 August 2002, Petitioner 1 demanded that the Respondent order an investigation into the circumstances of the death of Abu Makhsin.

Attached hereto is the letter of Petitioner 1 and the Respondent's letter acknowledging receipt of the letter in his office, marked P/10 and P/11, respectively.

On 9 July 2003, Lt. Col. Ron replied, stating that *it was decided not to open a criminal investigation* into the circumstances of the death. The reason she gave was that "the commanding officers in the field did not believe that the assistance provided by Mr. Abu Makhsin would endanger his life." For that reason, Lt. Col. Ron stated, the commanding officers did not violate the commitment given by the IDF to the High Court of Justice that it would not use the "neighbor procedure." Lt. Col. Ron emphasized that the temporary order given in that petition, which provided that the use of the "neighbor procedure" should not be used in any case, and not only when it endangers the life of the "neighbor," was issued after the unfortunate incident in which Abu Makhsin died.

Attached hereto is the letter of Lt. Col. Ron, marked P/12.

The reasons presented by Lt. Col. Ron cannot justify the failure to investigate the death of Abu Makhsin. First, soldiers were forbidden to use the neighbor procedure whether it was done before or after that ruling or another ruling of the Court. Second, Abu Makhsin was in the custody of the soldiers, which increased their obligation to protect him from injury and death.

#### **The death of Fatma Abu Thaher**

8. Fatma Abu Thaher, 85, a resident of Dir el-Balah, was killed on 1 August 2002 in the yard of her house. She was sitting there with her son Muhammad, who lived with her. Around 1:00 A.M., soldiers opened fire at the house. Abu Thaher was hit in the thighs, cutting her right thigh almost in half.

When the gunfire stopped, the soldiers came to the house. The soldiers' comments to Abu Thaher's granddaughter indicate that they were looking for the body of the terrorist, whom they had intended to kill. When the soldiers saw the wounded Abu Thaher, they summoned a physician. Four of the soldiers carried her to Kissufim Road, from where she was taken to Soroka Hospital, in Beersheva. At 8:00 A.M. the

following morning, the D.C.O. [District Coordinating Office] informed her son that she had died in the hospital.

At the al-Aqsa Hospital, to which the body had been removed, the son noticed that both of her legs had been amputated. A physician at the hospital told him that Abu Thaher had also been hit in the chest and abdomen.

Attached hereto is the testimony of the son, Muhammad Suliman Abu Thaher, which was given to Nabil Mekherez, a fieldworker of Petitioner 1, and translated by Petitioner 1, marked P/13.

On 18 August 2002, Petitioner 1 requested of the Respondent that he order an investigation into the circumstances of the death. In reply, Petitioner 1 was informed that an investigation would not be opened.

Attached hereto are copies of the letter sent by Petitioner 1 and the Respondent's reply, marked P/14 and P/15, respectively.

#### **Death of Fatma Zaqrneh and her two children, Abir and Basel**

9. On 5 May 2002, the Abu Samra family, from Qabatiya, was picking grape leaves on their plot of land in Wadi al-Suah. Others were also working in the area at the time. The family was working on this plot as hired employees. Two of the four children of Muhammad Yusuf Abu Samra and his wife Fatma Zaqrneh were picking along with their parents.

Around 11:30 A.M., an armored IDF vehicle appeared. When it got to about 30-40 meters from the Abu Samra family, a tank shell was fired at, and killed, Zaqrneh and her two children. According to an eyewitness who was working in the area, the tank continued to fire in all directions. The eyewitness noticed that one of the chains of the tank became detached and lay on the road, and that the tank had swerved from its path.

Attached hereto is the testimony of Raf'a Hassan Ahmad Kamil, which was given to Najib Abu Rokaya, a staff member of Petitioner 1, and translated by Petitioner 1, marked P/16.

The IDF Spokesperson contends that the sound of an explosion was heard in the tank when the chain snapped, which made the soldiers in the tank believe that an explosive device aimed at them had been detonated, and that the soldiers had acted in accordance with the "explosive-device procedure," and fired in all directions.

Petitioner 1 wrote to the Respondent on 6 May 2002 and demanded an investigation into the circumstances of the death of the mother and her two children. On 13 June 2002, Lt. Col. Ron replied that the soldiers had not fired in all directions, but at suspects who were hiding in the thickets. Lt. Col. Ron contended that the firing at those figures did not deviate from the standard of what is reasonable, and thus *there was no basis for suspicion that an offense had been committed*.

Attached hereto are copies of the letter sent by Petitioner 1 and Lt. Col. Ron's reply, marked P/17 and P/18, respectively.

The reasons mentioned by Lt. Col. Ron raise doubts about the legality of the "explosive-device procedure," because it endangers innocent persons. Firing at unidentified figures in an agricultural area, where people routinely work, cannot be considered a reasonable action.

#### **Death of Taher 'Abdu**

10. Taher 'Abdu, 28, a resident of Imrin, a village north of Nablus, was shot to death on 16 May 2003 by IDF soldiers. At the time, he and his sister and sister-in-law were grazing the families' sheep in fields near the Burqa-Imran road. At about 5:00 P.M., an IDF armored personnel carrier approached from the direction of Burqa. Three soldiers got out of the carrier and ordered 'Abdu and two of the farmers working their fields to come over to them. The farmers obeyed the soldiers, but 'Abdu did not.

The two farmers explained to the soldiers that 'Abdu was severely mentally disabled and did not speak. 'Abdu continued to walk toward Imrin. The soldiers ordered him to stop, but he continued to move away from them. The soldiers started to chase him, while another of the farmers told the soldiers that 'Abdu was mentally disabled, and that was the reason that he did not obey them. Despite this, the soldiers continued to chase 'Abdu. They shot him, hitting him in the chest. He died a short time later.

On 9 June 2003, Petitioner 1 wrote to the Respondent and demanded an investigation of the circumstances of 'Abdu's death. On 1 July 2003, the Respondent's office acknowledged receipt of the letter, but has not, to date, responded substantively to Petitioner 1's demand.

Attached hereto are translations of the testimonies of Hani Mufid Shaqer Abu Hussein, Husam Muhammad 'Ali 'Abdu, and Nafez Muhammad 'Abd al-Hamid Faqiya, farmers who were present at the time of the incident, marked P/19, P/20, and P/21, respectively.

Also, attached hereto are the letter of Petitioner 1 regarding the incident, and the reply of Lt. Col. Ron, marked P/22 and P/23 respectively.

### **Death of Rami Abu Shab**

11. On 3 February 2003, Rami Abu Shab, 25, and his two brothers, Muhammad 'Ata and Zohir, went to hunt for birds in an agricultural area near the fence separating the Gaza Strip from Israel, near 'Ibsan. After the three arranged the nets to catch the birds, they sat down and waited. About an hour later, an IDF tank approached from the north. The three could not hide because there were no trees, and they were clearly visible. The tank opened fire intermittently. Abu Shab ignored the gunfire and went to check the nets. The tank then opened intense fire at the three, even though they posed no danger to the soldiers' safety.

Abu Shab was hit and killed by the shooting, and his brother Zohir was wounded. A Palestinian ambulance that came to the site to remove Shab's body and Zohir who was wounded was also fired at. The ambulance staff had to wait until the firing stopped before it could continue its work.

On 18 February 2003, Petitioner 1 wrote to the Respondent and demanded that he investigate the circumstances of the shooting. The reply, of 12 March, stated that a substantive response would be provided following a review of the request. No further reply has been received in the matter.

Attached hereto is a translation of the testimony of Muhammad 'Ata Abu Shab, the letter of Petitioner 1, and the Respondent's reply, marked P/24, P/25, and P/26, respectively.

### **Requests submitted by the Petitioners**

12. From March 2002 to the end of September 2003, Petitioner 2 has written to the Respondent 35 times to demand that he open Military Police investigations into the circumstances of the deaths of 78 Palestinian civilians. These requests were related to cases in which Petitioner 2 had information that the persons killed had not taken part in the fighting. Despite the great urgency of these requests, the decisions as to whether to open a Military Police investigation were made after several months had passed. Furthermore, there were instances in which Petitioner 2 was not informed of the decision at all. The Respondent ordered a Military Police investigation in only two of the cases raised by Petitioner 2. In those cases, the result of the investigations is unclear.

Since September 2000, Petitioner 1 wrote to the Respondent 55 times to demand that he order an investigation into the circumstances of the deaths of Palestinian civilians. In only 10 cases were investigations initiated (one order was subsequently retracted); in 17 cases, no investigation was opened; and 25 cases are still under review. In one case, no reply has been received.

13. On 12 December 2002, Petitioner 2 wrote to the Respondent and demanded that he order a Military Police investigation whenever a Palestinian is maltreated during IDF actions in the Occupied Territories.

A copy of Petitioner 2's letter is attached hereto, marked P/27.

In his response of 29 December 2002, the Respondent mentioned that it had been decided that, as a rule, the operational debriefing would serve as the initial investigation in cases in which Palestinians were injured. The debriefings are forwarded to the JAG's office and checked, along with other material on the incident, such as letters from human rights organizations and press reports. If the review of the material raises a suspicion of criminal conduct by the soldiers, a directive to open a Military Police investigation is given.

The response also states that it unreasonable and unrealistic, in the reality of the current hostilities, to comply with the demand that where fighting against terrorist entities takes place in a crowded urban environment, a criminal investigation be opened in every case in which a Palestinian is killed.

A copy of the Respondent's response is attached hereto, marked P/28.

On 11 March 2003, Petitioner 2 wrote to the Respondent to obtain more precise information on the number of criminal investigations opened relating to the deaths of Palestinians, and the number and nature of the indictments filed following the investigations. In her reply of 10 April 2003, Lt. Col. Sharon Ofek, head of the Security and Foreign Relations Department of the Judge Advocate General's office, stated that, since the outbreak of the al-Aqsa Intifada, more than 320 Military Police investigations had been opened, 45 of which related to illegal use of weapons. Following these 320 investigations, some 40 indictments involving various offenses, were filed. In four cases, the indictment alleges the offense of causing death by negligence. The proceedings in these indictments continue.

A copy of Petitioner 2's letter and the Respondent's additional response are attached hereto, marked P/29 and P/30, respectively.

In two meetings of the Knesset's Constitution, Law and Justice Committee, which were held on 30 June and 6 July 2003, in which representatives of the Petitioners took part, the Respondent provided updated data: 365 Military Police investigations had been opened since October 2000, 55 of which dealt with shooting-related offenses. The Respondent did not mention how many involved incidents in which the perpetrator caused the death of an individual. Eight indictments were filed in shooting-related offenses.

The minutes of the committee's meetings can be found on the Knesset's Web site, at <http://knesset.gov.il/protocols/search.asp>

On 3 April 2003, the Respondent met with representatives of Petitioner 2, who stated their contentions regarding the Respondent's policy on opening Military Police investigations. The Respondent repeated the arguments he made in his above-mentioned letter and in his letters that are described below, and indicated that he was willing to continue a dialog with representatives of human rights organizations. However, the Respondent's policy mentioned above did not change, and he continued to insist that it was impossible and improper to open a criminal investigation in every case in which a Palestinian is killed by IDF gunfire. It should be mentioned that on 12 January 2003, the Respondent held a similar meeting with representatives of Petitioner 1.

Furthermore, at the beginning of the meeting, Petitioner 2's representatives were given a letter that the Respondent addressed to the president of Petitioner 2, Mr. Sami Micha'el, in which the Respondent related to the advertisement published by Petitioner 2 in *Ha'aretz* on 28 March 2003. The advertisement, titled "Regrettable Mistakes," protested the IDF's policy not to investigate cases of deaths of Palestinians by IDF gunfire in the Occupied Territories. This letter set forth the basic elements and the rationale of the Respondent's investigations policy.

The Respondent again mentioned that the initial clarification and investigation is performed by means of the operational debriefing, which is generally made shortly after the incident, and generally by a senior army official. After examining the debriefing and other material available to the JAG's office, in those cases where criminal conduct by soldiers is suspected, an order is given to open a Military Police investigation.

In Section 11 of his letter, the Respondent states that, "after the events of 'Ebb and Flow,' in September 2000, the question arose as to whether it was correct to automatically order a Military Police investigation in every case of a Palestinian

death.” The answer given to this questions was that “It is not necessary and is impossible.” The Respondent argued that, in the conditions in which the fighting in the territories is taking place, the very fact that a Palestinian is killed, even a civilian, is not an indication of criminal conduct by the soldiers involved. In addition, the Respondent contended that there are practical problems that make it difficult to investigate the circumstances of death: there is no way to reach the Palestinian witnesses and obtain their cooperation, it is difficult to reconstruct the scene of the incident, it is unclear if the person killed was a terrorist or a civilian. The Respondent also relied on comparative review of comparable conditions of hostilities that take place elsewhere in the world. His review indicated that other armies, too, do not open criminal investigations.

On 15 April 2003, Petitioner 2 responded to the Respondent’s letter and his contentions, including the fundamental contentions relating to the investigation policy (described below at length), and the response given to the requests that Petitioner 2 raised in the Respondent’s office.

A copy of the Respondent’s letter and Petitioner 2’s reply are attached hereto, marked P/31 and P/32, respectively.

On 21 May 2003, the Respondent replied to Petitioner 2’s response in a letter that is essentially comparable to his previous correspondence.

Attached hereto is a copy of the letter, marked P/33.

## **Legal argument**

### **Respondent’s policy regarding opening Military Police investigations**

14. During the events of the first Intifada, the IDF acted in accordance with General Staff Command 33.0304, which requires the opening of a Military Police investigation in every case in which information is received that a civilian has been killed by IDF soldiers, except in cases of hostile terrorist activity. Whether this command remains in effect or not, it clearly is not being implemented.
15. As previously mentioned, since the outbreak of the al-Aqsa Intifada in September 2000, the Respondent decided not to open a Military Police investigations in every such case, but only in cases in which there is a suspicion of criminal conduct by the soldiers involved.

## **Opening investigations in a combat situation**

16. The Respondent argues that there is no justification to continue the policy implemented during the first Intifada, in which every case of death automatically warranted a criminal investigation. The Respondent contends that, since the outbreak of the al-Aqsa Intifada, the IDF has been involved in a combat situation which was not previously the case, and that it is improper to demand that a criminal investigation be opened in every case in which a civilian is killed.

At a meeting of the Knesset's Constitution, Law and Justice Committee (see the minutes on the Knesset's Web site at the link mentioned above), the Respondent stated:

I see a fundamental difference between the period of the Intifada from 1989 to 1993 and the current period, which is a period of combat, for which reason I mentioned it. In the Intifada, every case of death underwent a criminal investigation because it was assumed that when the commanders are involved primarily in policing actions, every case calls for a criminal investigation. In comparison, given that we currently find ourselves in combat, 810 Israelis have been killed and more than 5,500 wounded, and the Palestinian side has a much higher number of casualties... not every case of death resulting from combat action or gunfire justifies a criminal investigation.

Indeed in recent years, the IDF has waged a harsh war against terror. However, IDF operations in the Occupied Territories, or the large number of victims, cannot justify the failure to investigate the deaths of civilians who did not take part in terrorist activity. This attempted justification raises the risk that a culture of disregard for human life will be inculcated among IDF soldiers. The truth is that the duty to investigate cases of death applies even more so in times of hostilities, as will be described below.

Furthermore, the Respondent's comments to the Knesset's Constitution, Law and Justice Committee indicate that when policing actions are involved, justification exists to open criminal investigations. However, he contends that the IDF's actions in the Occupied Territories are different from those that occurred during the first Intifada. This sweeping statement is not accurate. A substantial portion of the IDF's current activity in the Occupied Territories entails policing actions. For a long time, the IDF has controlled the civilian population in most Palestinian towns and villages, imposing an internal closure, checkpoints throughout the Occupied Territories,

prolonged curfew and other policing actions. The IDF's control over the Palestinian civilian population has a grave effect on all realms of their daily lives. *In this context, it should be mentioned that many of the Palestinian civilians who were killed died in the course of IDF operations to maintain order in the Occupied Territories (enforcing curfew, staffing checkpoints, dispersal of demonstrations), and not during combat.* Therefore, in cases in which civilians were killed as a result of actions defined as policing actions, there is no justification in changing the earlier policy. As mentioned above, in cases in which the civilian's death resulted from combat action, then too, the IDF has the obligation to order an investigation.

17. In justifying his failure to investigate every case of death, the Respondent contends that other armies around the world do not conduct investigations into cases of death that occurred during wars and in the course of army operations. Even if this contention that other armies do not investigate cases of death is accurate, this fact does not affect the Respondent's obligation. The State of Israel's obligation to investigate cases of death is an explicit legal duty imposed on it by international humanitarian law, as will be presented at length below. The fact that other states breach this legal duty, does not permit the State of Israel to act similarly.

### **Technical difficulties**

18. Another reason raised by the Respondent is the technical difficulties that are likely to arise during the criminal investigation. Technical difficulties are not a proper justification for the Respondent's policy, nor is it even precise to say the least. The Respondent contends that since the beginning of the al-Aqsa Intifada, 45 cases of illegal shooting have been investigated. In the event that cases in which Palestinian civilians died as a result of IDF operations in the Occupied Territories (and not in other incidents resulting from illegal use of weapons), how can this fact be reconciled with the Respondent's contention regarding the technical difficulties in investigating such cases?

Furthermore, as for technical difficulties that are liable to result from insufficient resources and personnel, this Honorable Court has already ruled that the need to increase personnel or expend additional resources cannot justify the unreasonable infringement of human rights.

In H CJ 253/88, *Sajadiya et al. v. Minister of Defense, Piskei Din* 42 (3) 801, 820, which dealt with the conditions in which administrative detainees are held, the Court stated:

If there is a great number of detainees, it is necessary to add more legally-trained judges to hear appeals. A possible organizational problem in establishing arrangements increasing the number of legally-trained judges called into service to hear quickly and efficiently a detainee's appeal, cannot justify the length of time a person is detained without his matter undergoing judicial review.

On this point, see, also, H CJ 3239/02, *Mar'av v. Commander of IDF Forces, Takdin Elyon* 2003 (1) 937, Par. 35.

Furthermore, even if there are technical problems in conducting the investigation in the Occupied Territories, this reason cannot justify a sweeping policy not to open investigation from the outset. In *Velasquez Rodriguez*, of 29 July 1988, the Inter-American Human Rights Court heard a case involving the disappearance of a Honduras national who was abducted (as were some 150 other persons) by unknown individuals during the 1980s. The court held that the government of Honduras did not seriously investigate the disappearance of Rodriguez. Therefore, the government failed to meet its duty to protect his right to physical liberty and his right not to have this right denied him arbitrarily. For this infringement, the government was ordered to pay damages to Rodriguez's family.

In Section 177 of its judgment, the court stated that the failure of the investigation does not constitute breach of the obligation, but that the investigation must be serious and independent:

In certain circumstances, it may be difficult to investigate acts that violate an individual's rights. The duty to investigate, like the duty to prevent, is not breached merely because the investigation does not produce a satisfactory result. Nevertheless, it must be undertaken in a serious manner and not as a mere formality preordained to be ineffective. **An investigation must have an objective and be assumed by the State as its own legal duty, not as a step taken by private interests that depends upon the initiative of the victim or his family or upon their offer of proof, without an effective search for the truth by the government.** This is true regardless of what agent is eventually found responsible for the violation.

This judgment dealt with the state's duty to investigate the actions of civilians (or militia groups). The duty to investigate is even greater when the harm to civilians is committed by the army.

The decision appears on the Web site of the International Human Rights Court:  
[www.corteidh.or.cr/juris\\_ing/index.html](http://www.corteidh.or.cr/juris_ing/index.html)

### **Reliance on the operational debriefing**

19. As the Respondent's responses show, his decision whether to open a Military Police investigation is based on the results of the operational debriefing. The

debriefing is made shortly after the incident that led to the death of a civilian, and is performed by the *command echelon of the forces who were involved in the incident*. The results of the debriefing are forwarded to the Respondent. Based on the debriefing's results, the Respondent decides if a suspicion exists that IDF soldiers committed a criminal offense.

20. The operational debriefing is conducted by the same forces whose actions would be investigated by the Military Police. Given that the debriefing is the primary basis for determining whether to open a Military Police investigation, it is not surprising that the number of Military Police criminal investigations is so small in comparison with the number of Palestinian civilian deaths. It is unlikely that soldiers in the field would conduct objective debriefings regarding the proper conduct of their actions. Similarly, there has been criticism of the procedure for the investigation of complaints of police brutality.

On this point, see Prof. Menachem Amir, *Supervisory Power, Violent Conduct of Police: People, Situation, and Organization* (Ministry of Public Security, 1998) (in Hebrew), Chap. 17:

Where the officers themselves conduct the investigations on complaints about their subordinates at the station level, before the investigation reaches the special investigations unit, a problematic situation arises. They depend on the policemen and women to perform assignments, and will try not to harm them and the unit's reputation, or that of the organization as a whole. Conviction of police officers, should such occur, and the very existence of the complaint and accusation also means that they, as the commanding officers, are responsible for that situation, at least for the failure to supervise their subordinates...

21. Reliance on the results of the operational debriefing in determining whether to open a Military Police investigation hampers the objective of the criminal investigation, which is the investigation of the truth. The debriefing is liable to be affected by extraneous considerations, such as the unwillingness of the forces' commanders to expose errors, and the desire to support their friends or subordinates. In this spirit, the Inter-American Human Rights Court held in *Velasquez Rodriguez*, in Paragraph 180 of its judgment, that the investigation performed by the unit was carried out by armed forces that were suspected of abducting civilians, thus raising severe doubts about the seriousness of the investigation. The court stated:

The offer of an investigation in accord with Resolution 30/83 of the Commission resulted in an investigation by the Armed Forces, the same body accused of direct responsibility for the disappearances.

This raises grave questions regarding the seriousness of the investigation.

22. Furthermore, the commanders who carry out the debriefings do not have the skills needed to conduct investigations and ascertain the truth, which the soldiers being investigated will naturally try to conceal. Military Police investigators, on the other hand, supposedly undergo professional training in conducting investigations of this kind. The Respondent should order a Military Police investigation regardless of the debriefing. If there is a debriefing, it should be included as part of the investigation material.
23. Not only does the operational debriefing not reflect the objective reality, soldiers' testimonies given to Petitioner 1 indicate that some of the debriefings are superficial and not thorough. On this point, see B'Tselem's report *Trigger Happy: Unjustified Shooting and the Open-Fire Regulations during the al-Aqsa Intifada*, at page 9. The report is attached hereto, marked P/34.
24. Furthermore, in one of the shooting cases which occurred during the Intifada, the Respondent acted in the reverse manner and opened a Military Police investigation before the operational debriefing was carried out. In that case, the debriefing's results were the opposite of the results reached by the Military Police investigation. The investigation related to the circumstances of the death of a press photographer by IDF gunfire towards a jeep in which the photographer was riding. Based on the Military Police investigation's results, the Respondent decided to issue an indictment. The subsequent debriefing, which was carried out at the brigade level, found that the soldiers had not violated the directives regarding the use of weapons.  
  
On this point, see the article published in *Ha'aretz* on 24 December 2002, attached hereto, marked P/35.
25. In another case, Petitioner 1 requested that the Respondent investigate the circumstances of the death of Ahmad Jihad 'Abd a-Rahman al-Qoreni. Qoreni was shot on 10 August 2002 by IDF soldiers while driving his commercial vehicle during curfew, while he was on duty for the Nablus Municipality. The Chief Military Prosecutor, Lt. Col. Einat Ron, replied on 10 September 2002 that a decision had been reached not to open a criminal investigation into the circumstances of the death, contending that no suspicion of wrongdoing had been found. Her main argument to support this decision was that the commercial vehicle in which Qoreni was driving was not identified as belonging to the municipality because it did not have a blinking orange light on it. The IDF and

the municipality had agreed that the blinking light would be a sign of recognition of a municipal vehicle.

Contrary to the inquiry into the events, carried out with the soldiers who were involved in the incident, video footage taken by the AP news agency, which Petitioner 1 obtained, clearly showed a blinking orange light on the roof of the vehicle. The tape was sent to the Respondent, after which a Military Police investigation into the circumstances of the death was ordered. This indicates that if the Respondent had relied on the internal debriefing, he would not have ordered a Military Police investigation, as the soldiers contended that they did not see, for unknown reasons, the blinking light on the roof of the vehicle.

Attached hereto is the exchange of correspondence in the Qoreni matter, marked P/36 to P/41.

The above indicates that the procedure whereby the Respondent orders a Military Police investigation only when the operational debriefing raises suspicion of criminal conduct is improper and unreasonable. This procedure is liable to lead to the failure to uncover cases in which the soldiers committed a criminal offense.

**Authority to order criminal investigation pursuant to the Military Justice Law, 5715 – 1955**

26. The Respondent's powers regarding the investigation of complaints into allegations that soldiers committed offenses is set forth in Section 282 of the Military Justice Law, which states:

Where the Judge Advocate General receives a complaint as set forth in Sections 278, 279 or in another manner, *he can do* one of the things mentioned in sections 280 or 281 or order a preliminary investigation even if an examination has been made... (emphasis added)

Sections 280 and 281 of the Military Justice Law list a wide variety of powers: to order completion of the examination, to order that the complaint be dismissed, to issue an indictment, to order that the complaint be heard in the context of a disciplinary action, or order a preliminary investigation.

27. The Military Justice Law does not mention the considerations to be taken into account in deciding whether to open a Military Police investigation. However, these considerations can be derived from the purpose for which the Respondent is given this power which is to enforce the rule of law and prevent further offenses from being committed.

In addition to enforcing the rule of law and preventing offenses, there are additional considerations that support the opening of Military Police investigations whenever a Palestinian civilian is killed in an IDF operation in the Occupied Territories in which the Palestinian did not take part in the fighting. These additional considerations relate to the right to life and to the army's duty to respect and protect this right, and to the IDF's duty to ensure order and safety in the areas under its control, as will be described below.

28. The cumulative effect of these considerations limits the discretion of the Respondent to one possible reasonable option in reaching a decision. In effect, the Respondent's power, which the law describes as a permissive, becomes a power that the Respondent is required to exercise.

On this point, see the treatise of Yitzhak Zamir, *Administrative Authority*, Vol. 224 A, (1996) 224 (hereafter: Zamir).

Indeed, this Court has ruled more than once that in a particular instance, when all the considerations supporting exercise of the power in a certain manner, notwithstanding the wording of the statute, the power was interpreted to be compulsory. For example, in H CJ 3094/93, *Movement for Quality Government in Israel v. Government of Israel*, *Piskei Din* 47 (5) 404, which dealt with the power of the Prime Minister to remove a minister, the Court held, on page 421:

There are circumstances in which one concludes – also regarding a discretionary power, that refraining from exercising the power is so unreasonable that it extends to the very foundation of the matter... A power that may be exercised becomes a power that must be exercised when the factual circumstances are such that the fundamental values of our constitutional and judicial system make the failure to exercise the power unreasonable in a manner that goes to the very foundation of the matter.

### **Considerations regarding law enforcement**

29. A similar power to that of the Respondent is given to the Israel Police Force in the end of Section 59 of the Criminal Procedure Law [Consolidated Version], 5742 – 1982 (hereafter: the Criminal Procedure Law). This section states that, in the case of misdemeanors, a police officer may decide not to conduct a police investigation into the matter for one of the following two reasons: when the matter is not of public interest, or when another authority is empowered by law to investigate it.

Offenses related to causing death are among the gravest of offenses. There is special public interest in the investigation of the circumstances of the deaths of Palestinian civilians during IDF actions in the Occupied Territories.

The beginning of Section 59 of the Criminal Procedure Law illustrates the importance given by the legislature to the investigation of serious acts, such as those of this kind. According to this section, when the police is aware that a felony has been committed, *it is required* to open an investigation, and the law does not grant it any discretion or allow it to refuse to open such an investigation. As mentioned, reliance on the results of an operational debriefing in making the decision whether to open an investigation is unreasonable and cannot give the Respondent any real insight into whether an offense has been committed.

30. The Respondent's policy on opening Military Police investigations into the circumstances of the death of Palestinian civilians raises the fear that the Respondent did not properly balance the military and [defense] establishment's considerations with the law enforcement considerations. The Respondent did not give proper weight to the need to prevent the recurrence of criminal offenses. Therefore, the Respondent's policy on conducting Military Police investigations is extremely unreasonable and illegal. Ordering the Military Police to investigate cases of deaths of civilians is necessary to deter soldiers from excessive use of force and disregard for human life. A policy to the contrary gives IDF soldiers the feeling that they are not subject to any review of their actions. The practical effect of such a policy is the lack of enforcement of the rules of basic conduct, routine breach of these rules, and the unnecessary loss of life.
31. It should be emphasized that the objective of the demand that the Respondent order the opening of a Military Police investigation is not to punish soldiers, but to inculcate among the soldiers the binding rules of conduct, which the Respondent also recognizes, the foremost being respect for human life. This

objective will not be attained without active enforcement. The Respondent's policy not to investigate the deaths of civilians renders meaningless and purely declarative his recognition of the applicability of international humanitarian law, which prohibits the infliction of harm on civilians.

**The right to life in Israeli constitutional law**

32. The right to life is a fundamental constitutional right granted to every person. This right is closely connected to the principle of the sanctity of life, which is an integral part of Israeli law. The constitutional status of this right is enshrined in the fundamental principals set forth in Section 1 of the Basic Law: Human Dignity and Liberty, which states that, "This Basic Law is anchored in the recognition of the sanctity of life and human dignity and liberty..."

See Perm. Civ. App. 5587/97, *Attorney General v. John Doe – a Minor*, Piskei Din 51 (4) 830, 850, where the Court discussed the status of the right to life of a minor.

The right to life is also enshrined in Section 4 of the Basic Law: Human Dignity and Liberty, as follows:

All persons are entitled to protection of their life, body and dignity.

**International human rights law**

33. The right to life is set forth in international human rights law in two conventions, which Israel has signed and ratified

34. Article 6 of the International covenant on Civil and Political Rights, of 1966, states:

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

The comments made in General Comment 14 of the UN Human Rights Commission to this Article explains the importance of this right, and emphasize that derogation is not permitted even in time of public emergency:

. . . the right to life enunciated in the first paragraph of Article 6 of the International Covenant on Civil and Political Rights is the supreme right from which no derogation is permitted even in time of public emergency.

This firm statement clearly indicates that the security situation which the IDF is currently facing does not exempt the Respondent from opening a criminal investigation when the fundamental right to life of civilians is involved.

In similar spirit, Article 6 of the Convention on the Rights of the Child, of 1989, states:

1. States Parties recognize that every child has the inherent right to life.

2. States Parties shall ensure to the maximum extent possible the survival and development of the child.

Section 38(4) of this convention states:

In accordance with their obligations under international humanitarian law to protect the civilian population in armed conflicts, States Parties shall take all feasible measures to ensure protection and care of children who are affected by an armed conflict.

Here, too, the convention states the consistent principle that protection of the right to life, and of the duty to take actual measures to ensure that this right is not infringed, apply also, and with greater vigor, during time of armed conflict. Even if one accepts

the Respondent's argument that Israel is engaged in an armed conflict, this fact does not exempt it from the duty to take the steps necessary to safeguard the right to life. Such steps include any means available to protect the civilian population from the ramifications of the armed conflict, i.e., conduct a criminal investigation of those cases in which the right to life was infringed.

**International humanitarian law**

34. As the occupier and the party that effectively controls the territories, Israel is required to ensure the welfare and safety of the residents living there. This duty is enshrined in Article 43 of the Regulations Attached to the Hague Convention concerning the Laws and Customs of War on Land, of 1907 (hereafter: "the Hague Regulations"), which provides as follows:

The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.

35. Article 46 of the Hague Regulations directs the parties to the convention, as follows:

Family honor and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected.

36. The Fourth Geneva Convention on the Protection of Civilians in Time of War, of 1949, enshrines the right to life of protected persons, and emphasizes that it may not be denied, whatever the circumstances. Article 27 of the convention states:

Protected persons are entitled, in all circumstances, to respect for their persons, their honor, their family rights... They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof . . .

It should be mentioned that this article is of a purely humanitarian nature, and it is indisputable that Israel is required to comply with its provisions.

In the official commentary of the International Committee of the Red Cross on the Fourth Geneva Convention, Prof. Jean Pictet explains that, although Article 27 does not explicitly mention the right to life,

It is nevertheless obvious that this right is implied, for without it there would be no reason for the other rights mentioned.

Jean S. Pictet, *Commentary on Geneva Convention IV of 1949* (Geneva, 1958) 20.

37. The First Protocol to the Geneva Conventions, of 1977 (hereafter: "the Protocol"), requires a party to a conflict to protect the civilian population from the

effects of the hostilities. Although Israel has never signed the Protocol, its provisions that are mentioned below constitute part of international customary law and, at least serve as a source for interpreting the law applying in Israel.

In this spirit, Article 48 of the Protocol directs the parties to the conflict to distinguish between the civilians and civilian object and combatants and military targets. Article 51 of the Protocol provides civilians general protection against dangers arising from military operations, and prohibits civilians from becoming the target of an attack. In addition, Articles 57 and 58 requires the parties to the conflict to take precautionary measures to spare the civilian population.

### **The right to life and duty to investigate cases of death**

38. The Respondent's duty to honor the right to life imposes on him the obligation to employ a mechanism for investigating cases in which IDF soldiers may have caused the death of innocent civilians. By implementing a policy in which every such case of death is not investigated, the Respondent breaches his duty and illegally infringes the right to protection of life.
39. Section 11 of the Basic Law: Human Dignity and Liberty imposes a duty on every governmental authority to respect the right of every person to the protection of his or her life. This duty means that the governmental authority *must act* to protect the life of every person. See Aharon Barak, *Interpretation in the Law – Constitutional Interpretation* (Nevo, 1994) 365.
40. International law also recognizes the approach whereby the right to life imposes a positive duty on the state, as will be set forth at length below.

In the Israeli system of law, international law is part of the domestic law (and applies unless contradictory Israeli legislation exists). In addition, according to the “presumption of conformity,” courts must interpret domestic law to the extent possible in a manner that is consistent with Israel's international obligations, as reflected in conventions to which Israel is party, and to international customary law.

This approach leads to the conclusion that, “the human rights incorporated within the Israeli legal system (e.g., the right to life and bodily integrity) should be seen to include also the positive component of a duty to battle against harm to the protected values that is committed by individuals.” (Yuval Shani, “My House is Not My Castle: Violence in the Family as a Kind of Prohibited Torture,” *HaMishpat* (5762-2002) 151, 187).

41. The opinion that the occupying state must investigate cases of death of civilians as part of its duty to protect the lives of civilians finds support in the comments of Prof. Yoram Dinstein in his treatise *Laws of Law* (Schocken, 1983) 222:

The protection of the lives of the civilian population in occupied territory is reflected not only in a negative manner (in the sense of a prohibition on denying life arbitrarily), but also in a positive manner.

42. The case law of the European Court and the Inter-American Human Rights Court adopts the approach that part of a state's duty to honor human rights is the positive duty to implement an enforcement mechanism that contains investigation and prosecution components. Although these decisions are not binding in Israeli courts, they set forth accepted international norms

Consistent with this approach, the Inter-American Human Rights Court (in the case involving Velasquez Rodriguez), held:

The State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation...

This duty to prevent includes all those means of a legal, political, administrative and cultural nature that promote the protection of human rights and ensure that any violations are considered and treated as illegal acts, which, as such, may lead to the punishment of those responsible and the obligation to indemnify the victims for damages.

(Sections 174 and 175 of the judgment)

In Sections 176 and 177, the court held:

The State is obligated to investigate every situation involving a violation of the rights protected by the Convention. If the State apparatus acts in such a way that the violation goes unpunished and the victim's full enjoyment of such rights is not restored as soon as possible, the State has failed to comply with its duty to ensure the free and full exercise of those rights to the persons within its jurisdiction...

*...Where the acts of private parties that violate the Convention are not seriously investigated, those parties are aided in a sense by the government, thereby making the State responsible on the international plane.* (emphasis added)

In *Jordan v. United Kingdom* (24746/94), decided by the European Human Rights Court, the petitioner, a national of Ireland and the United Kingdom, contended that his son was unlawfully killed by a police officer, and that a proper investigation as to the circumstances of his death was not conducted, in breach of the state's duty to honor

his son's right to life. In its discussion on the right to life, the court held, in Section 105 of its judgment, as follows:

The obligation to protect the right to life under Article 2 of the Convention, read in conjunction with the State's general duty under Article 1 of the Convention . . . also requires by implication that *there should be some form of effective official investigation when individuals have been killed as a result of the use of force* . . . The essential purpose of such investigation is *to secure the effective implementation of the domestic laws which protect the right to life* and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility...

The court emphasized that the government authorities must themselves initiate the investigation and not wait for a relative of the deceased to request it:

. . . However, whatever mode is employed, *the authorities must act of their own motion, once the matter has come to their attention*. They cannot leave it to the initiative of the next of kin either to lodge a formal complaint or to take responsibility for the conduct of any investigative procedures. (emphasis added)

In *Kaya v. Turkey* (22729/93), the European Human Rights Court heard the case of a Turkish national who was killed by Turkish security forces. The petitioner, the brother of the deceased, contended that his brother was killed illegally. The state contended that the petitioner's brother was killed during a gun battle between security forces and a group of terrorists belonging to the P.K.K. The court noted the importance of an investigation not only as a means to reveal the truth, but also as a means to prevent excessive use of force, by imposing accountability on those who used force. In Section 87 of its opinion, the court held::

The Court observes that the procedural protection of the right to life. . . secures the accountability of agents of the State for their use of lethal force by subjecting their actions to some form of independent and public scrutiny capable of leading to a determination of whether the force used was or was not justified in a particular set of circumstances.

The court held that the state breached its duty to protect the person's right to life in that the state did not take any action to investigate the circumstances in which the deceased died.

On this point, see *McShane v. United Kingdom* (43290/98), decided by the European Human Rights Court. In this case, an Irish national was killed by the use of excessive force during disturbances in Belfast. The court emphasized that the duty to investigate entails not only an inquiry into cases where the killing was deliberate, but also where human life was lost as a result of negligence or by accident:

The text of Article 2, read as a whole, demonstrates that it covers not only intentional killing but also the situations where it is permitted to

“use force” which may result, as an unintended outcome, in the deprivation of life. The deliberate or intended use of lethal force is only one factor however to be taken into account in assessing its necessity

The court’s decision appears on the Web site of the European Human Rights Court:  
[www.echr.coe.int/Eng/Judgments.htm](http://www.echr.coe.int/Eng/Judgments.htm)

43. As stated, the IDF’s definition of the security situation in the Occupied Territories as “armed conflict short of war” exempts it, so it contends, from opening a criminal investigation in most of the cases in which civilians are killed.

According to the Respondent, the past policy is applied only in cases of deliberate violence by soldiers against Palestinian civilians, and in every such case a Military Police investigation will be conducted. See the Respondent’s article “Law in the Time of Hostilities,” 16 *Law and Military*, vol. 1 (August 2002) 15.

However, the military operations carried out by the IDF in Judea and Samaria and in Gaza do not exempt him from investigating the cases in which innocent civilians are killed by IDF forces. Even if all the IDF’s actions are of a combat nature, that would not exempt the IDF from its duty to investigate deaths that occurred in combat. The duty to investigate is even greater when policing actions are involved, as described above in Section 16. The right of residents of the Occupied Territories is not based on the security situation as defined by the IDF. In *Kaya*, cited above, the court held:

The Court notes that loss of life is tragic and frequent occurrence in view of the security situation in south-east Turkey . . . However, *neither the prevalence of violent armed clashes nor the high incidence of fatalities can displace the obligation under Article 2 to ensure that an effective, independent investigation is conducted* into deaths arising out of clashes involving the security forces, more so in cases as the present where the circumstances are in many respects unclear.

(Section 91 of the judgment, emphasis added)

44. In sum, the Respondent is obligated to order Military Police investigations in every case in which a suspicion exists that an IDF soldier caused the death of a Palestinian civilian in the territories under IDF control. This obligation is dictated by the principles of administrative law, which require the Respondent to act reasonably and to take into account the relevant considerations, as well as constitutional law and international law.

It seems that the most important practical prohibition relating to the laws of war is the prohibition on harming civilians who are not taking direct part in the hostilities – a prohibition that history shows is not enforced, whether deliberately, negligently, and sometimes even in the absence of both.

(From the article written by Major General Menachem Finkelstein,  
cited above, page 31)

In light of the aforesaid, the Honorable Court is hereby requested to issue an order nisi  
as requested, and after receiving the Respondent's response, to make the order final.

*[signed]*

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Noa Stein, Attorney