Report to the Committee against Torture,
57th Session, May 2016

Response to Israel's 5th Periodic Report/Israel's Reply

to the UN-CAT's List of Issues: questions 1 & 35, art. 12, 13

The duty to investigate Israeli soldiers' alleged violations

March 2016

YESH DIN - Volunteers for Human Rights, respectfully submits this Report to the United Nations Committee against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter: ***UN-CAT***).* ***YESH DIN*** is an Israeli NGO established in March, 2005, with the goal of promoting a substantive and sustainable improvement to the human rights situation in the territories occupied by the State of Israel. Among other goals, ***YESH DIN*** works to improve accountability within the Israeli security forces, by monitoring Israeli investigation and prosecution of alleged crimes committed by Israeli soldiers against Palestinians civilians and their property in the West Bank, and through advocacy on behalf of Palestinian victims of Israel Defense Forces (IDF) violence and other misconduct for prompt and impartial investigations.

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In light of Israel's inadequate answer to question 35 of CAT's List of Issues of June 2012, ***YESH DIN*** submits this report as an update of the Report it submitted to the UN Human Rights Committee on 8.9.14,[1] focusing on Israel's failure to comply with its duty to **promptly and impartially** investigate allegations of torture and other acts of cruel, inhuman or degrading treatment or punishment committed by Israeli soldiers against Palestinians, in violation of Articles 1, 4, 12, 13 and 16 of the ***UN-CAT***.[2]

In a nutshell, ***YESH DIN*** wishes to emphasize that although in February 2013 the Israeli government-appointed commission of inquiry, known as the "*Turkel Commission*"[3] recommended amending the applicable examination and investigation mechanisms in order to meet the obligation to conduct prompt and impartial investigations.[4] Non the less, the subsequent task force charged with implementing the aforementioned recommendations, the *Ciechanover Implementation Task-Force*,[5] avoided making concrete, practicable recommendations related to the human resources and budgeting requirements necessary to this end, and some of its recommendations lack timetables and stages for implementation. Therefore, crimes committed by Israeli soldiers in violation of ***UN-CAT*** are not investigated promptly and impartially, and Israel is violating its` obligation under articles 12 & 13. In addition the crime of torture, as well as legislation regarding command responsibility and war crimes have not yet been incorporated either in Israeli military law or in criminal law as recommended in the *Turkel* report.

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[1] YESH DIN, Shadow Report To The Fourth Periodic Report Of Israel, 112th Session of the Human Rights Committee, 07 – 31 October 2014. Available at: http://www.yesh-din.org/userfiles/file/YESH%20DIN_%20Shadow%20Report_Israel%20Fourth%20Periodic%20Cycle%20final%20(1).pdf

[2] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, December 1984.

[3] The *Turkel* commission was established in 14/6/10 by the Government of Israel (Government resolution No.1766,32 government) in order to examine the *Mavi Marmara* flotilla incident, as well as Israel's mechanisms for examining and investigating allegations and claims of violations of the law of armed conflict according to international law. In February 2013 the Turkel Commission issued its second report, focusing on the latter issue available at: http://www.turkel-committee.gov.il/files/newDoc3/The%20Turkel%20Report%20for%20website.pdf (hereinafter: *Turkel Report*).

[4] The *Turkel* Report addresses the obligations under IHL and IHRL and thus the terms "prompt and impartial" interpreted to also includ "effective." See also *General Comment No. 3: Implementation of Article 14 by States Parties*, 13 December 2012, CAT/C/GC/3, para. 16-17.

[5] The *Ciechanover Report* is a Report of the Government-appointed *Task-Force for the Review and Implementation of the Second Report of the Public Commission for the Examination of the Maritime Incident of May 31st 2010 Regarding Israel's Mechanisms for Examining and Investigating Complaints and Claims of Violations of the Law of Armed Conflict According to International Law*, August 2015, available at http://www.pmo.gov.il/Documents/ReportEng.pdf (hereinafter: the *Ciechanover Report*).

Question 1: Incorporating the Crime of Torture and crimes against humanity into Israeli Law

1. **The crime of torture, as defined in the *UN-CAT*, is still not expressly and directly incorporated either under Israeli military law, or under criminal law**, despite the clear recommendation of the *Turkel Report*[6] from February 2013. The Ciechanover Commission chose to advise the preparation of draft bills on the incorporation of the crime of torture and crimes against humanity into Israeli law, when such crimes are **committed as part of a systematic or widespread policy**. The fact that in addressing legislative measures, the Ciechanover Commission glossed over offenses that are commonly committed in the West Bank and may amount to war crimes, yet are not committed in the context of systemic use of force, such as beating restrained detainees and other violent offenses, is a cause for concern. The Commission also ignored offenses committed during times of war, leaving the current lacuna in Israeli law unchanged. While Israeli criminal law contains offenses that may be used against soldiers who beat civilians in checkpoints or harm property (though, these soldiers cannot be charged with war crimes) when it comes to offenses committed during combat, criminal law offers no parallel offenses that allow laying charges

2. In addition, the *Ciechanover Report* entirely circumvented *Turkel's* recommendation to impose "command responsibility" on military commanders and civilian superiors for offenses committed by their subordinates.[7] The *Turkel Report* recommended that the Ministry of Justice initiate legislation processes wherever there is a deficiency regarding international criminal prohibitions that do not have a "regular" (domestic) equivalent in the Israeli Penal Law.[8] According to the *Ciechanover Report*, the Attorney-General has instructed to formulate draft bills on the issue of torture and recommended that the Ministry of Justice act

[6] See recommendation No. 1, p, 365, *Turkel Report*.
[7] *YESH DIN*, THE *CIECHANOVER REPORT* – DODGING THE CRIMINALIZATION OF WAR CRIMES AND PRACTICAL STEPS TOWARD IMPLEMENTATION, 1.10.2015 (hereinafter: Yesh Din position paper), available at: http://www.yesh-din.org/userfiles/Ciechanover%20Eng.pdf
[8] *Turkel report*, supra note 6, at 362-366.

soon, but the Task-Force did not set a specific timeframe for this purpose[9]. Today, more than three years after the *Turkel* recommendations, and 7 months after the *Ciechanover* report, we are not aware of any such draft legislation.

3. Therefore, in the rare cases in which a criminal investigation is initiated following a complaint of torture or cruel, degrading or inhumane actions allegedly committed by a soldier against a Palestinian, it may at most result in related criminal charges that do not meet the gravity of the offence as an international crime, or include all the elements of the offense, and which do not carry adequate penalties commensurable with the gravity of such actions.[10]

Question 35: The Failure to Conduct Prompt, Impartial and Effective Investigation into Alleged Violations of UN-CAT by Israeli Soldiers

4. The State of Israel's response to Question 35 does not provide any statistical data on the number of complaints submitted against Israeli soldiers suspected of violating ***UN-CAT***, and only describes two cases that were prosecuted. According to data provided by the IDF Spokesperson to ***YESH DIN***, the Military Police Criminal Investigations Division (MPCID),[11] an entity that operates within the IDF in charge of investigating allegations of criminal offences committed by soldiers, received 239 complaints of criminal offenses allegedly committed by IDF soldiers against Palestinians in 2014:[12] 156 complaints led to criminal investigation, as well as three investigations based on media reports, in addition to 70 complaints that had been received in previous years and were investigated during 2014. In

[9] the *Ciechanover Report*, supra note 7, at 11-12.
[10] Examples of such related offences often used in cases of torture, absent explicit torture legislation, include: *Military Justice Law*, section 65 (abuse); section 72 (Exceeding authority to the point of risking life or health), section 114 (Unlawful detention), section 85 (Illegal use of firearms), section 85 (negligence), section 130 (Misconduct); section 115 (Crimes related to detention), 1955.
[11] In Hebrew, מצ"ח- משטרה צבאית חוקרת
[12] *YESH DIN*, Law Enforcement On IDF Soldiers Suspected Of Harming Palestinians, Figures for 2014, data sheet December 2015, at page 3. (hereinafter**: data sheet 2015**), available at: http://yesh-din.org/userfiles/Law%20enforcment_IDF_Decmber%202015_English.pdf

total, 209 criminal investigations have been opened on the grounds of harm caused to Palestinians **but only 6 have led to indictments during 2014.**[13]

5. Through extensive legal advocacy and research (based on a caseload of approximately 500 files, and official data acquired through freedom of information requests), ***YESH DIN*** has acquired in-depth knowledge concerning investigations into alleged offenses committed by Israeli soldiers against Palestinians. This experience, backed by the findings of Israeli and international bodies, indicates that the Israeli military investigation system into offenses committed against Palestinians is marred by two main structural failures[14]: **(i) Ineffective investigations and (ii) Lack of promptness.** We briefly attend to these flaws below.

(i) Launching and Conducting Criminal Investigations: The Ineffective IDF Investigation Policy

6. The Military Advocate-General (hereinafter: MAG) is in charge of handling the complaints filed against soldiers during their service.[15] The MAG can delegate his investigation authority to the investigative body (the MPCID) and delegate his prosecution authority to the Military Advocate-General's Corps (hereinafter: MAGC), that oversees investigations and decides whether to indict.[16] There is no requirement to investigate every complaint submitted against soldiers' violence or misconduct. The MAG has great discretion in deciding on ordering a preliminary inquiry or ordering a criminal investigation by MPCID.[17] In practice, a victim or any other person or body that wishes to complain about soldier violence or other misconduct must submit a notice to the MPCID or to the MAGC.[18] Extensive coordination is required between the MPCID which actually investigates the complaints, and the MAGC, which, as noted above, is

[13] *Id*, at 7.
[14] Four general principles have been identified as applying to investigations: independence, impartiality, effectiveness and thoroughness, and promptness. International human rights law further articulates transparency as a fifth principle. See Turkel Report page 114.
[15] *Military Justice Law*, Arts. At 177, 251- 252.
[16] In Hebrew פרקליטות צבאית
[17] *Id* At 278- 282.
[18] For further information see *Yesh Din*'s report: Alleged Investigation: The failure of investigations into offenses committed by IDF soldiers against Palestinians (August 2011) (**hereinafter "Alleged Investigation**"), at 23-24, 32-44.

authorized to order a preliminary inquiry to decide whether to initiate criminal investigation, and upon completion of the investigation, to determine whether to serve an indictment.

7. This division of responsibilities, and problems in coordination between the two bodies, creates considerable obstacles for those wishing to monitor the progress of the investigation.[19] The fact that the MAGC does not assume responsibility for the entire process leads to a situation whereby there is not one body in the IDF charged with processing complaints, keeping records, monitoring the progress of preliminary inquiries and investigations and recording how long investigations take with an overall systemic outlook geared toward effective, exhaustive investigations.[20]

8. This policy has several significant ramifications creating a general lack of effectiveness. First, certain complaints are simply not investigated, posing an obstacle for the prosecution of offenders. Second, the policy of the IDF is to conduct operational debriefings (or: command inquiries) after every operation in which there is concern that the forces may have acted improperly or there was harm to persons or property. In the Israeli system the decision about whether to open an investigation into incidents that occurred within the framework of an operation is based on the results of the operational debriefing, this stalls the opening of an investigation and also has bearings on how effective the investigation can be after time has passed, the scene of the crime is lost, and testimonies have perhaps been coordinated.[21]

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[19] See the **Public Committee against Torture** report 2014, available at: http://stoptorture.org.il/wp-content/uploads/2015/09/%D7%91%D7%9E%D7%A6%D7%97-%D7%9C%D7%90-%D7%A0%D7%97%D7%95%D7%A9%D7%94-%D7%99%D7%95%D7%A0%D7%99-2014.pdf.

[20] Data Sheet 2015, supra note 13, at 2.

[21] It can be noted that the MAG changed the policy in March 2011 regarding incidents of death, but a decision whether to investigate serious injury including torture that does not result in death, and which occurred during an operational context, as of today will be based on the operational debriefing. However, for deaths resulting from operations of an "overtly combative character" the decision to initiate the investigation remains subject to the discretion of the MAGC. From the announcement made by the Military Advocate General's Corps dated April 6, 2011 in HCJ 9594/03, B'Tselem - The Israeli Information Center for Human Rights in the Occupied Territories and the Association for Civil Rights in Israel v .Military Advocate General.

9. The *Turkel Report* recommended that a separate mechanism be established in order to conduct a quick fact–finding assessment, which will enable conducting an assessment that complies with international legal requirements, i.e., a prompt and professional assessment, which facilitates a potential investigation and does not hinder it.[22] The *Ciechanover* team recommended establishing a permanent mechanism within the IDF which would serve the strategic and operational objectives of the IDF and would be responsible for the factual assessment.[23] The team described the manner in which the mechanism should operate, but failed to mention a timeframe for its establishment of allocate resources. During the military operation on Gaza named "Protective Edge" this mechanism was established, but over a year and a half later the mechanism still hasn't completed its work examining all complaints. Setting a separate mechanism is crucial for insuring the impartiality and independence of an investigation.

10. Moreover, a review of investigation files indicates several defects in conducting investigations and the failure to perform basic investigative actions. These range from a lack of investigative actions in the field (no visits to the site of the offense, no searches, no location of documents), to collecting testimony from witnesses and victims only *months* after the incident, to unprofessional and unskilled investigators and a shortage of Arabic-speaking investigators.[24] One of the main causes of the lack of professionalism is that the MPCID investigators receive only general investigation training, which is inadequate to cope with the complexity, severity, and gravity of the cases over which they are responsible.[25] Although representatives of the MAGC updated the *Ciechanover Team* that the authorized entities in the military had provided instructions regarding the allocation of appropriate resources for the required professional training,[26] the

[22] Turkel report ,supra note 6, at 378-383
[23] The *Ciechanover* Report, supra note 7, at21-24
[24] For information on the lack of accessibility of Palestinian victims to investigation mechanisms, including the shortage in Arabic speaking investigators and interpreters please see *YESH DIN* alternative report to HRC and the report Alleged Investigations.
[25] *YESH DIN*, **The Duty to Investigate Compatibility of Israel's Duties under International Law with the Examination and Investigation of Complaints regarding Violations of the Law of Armed Conflict**, position paper at. 41.
[26] The Ciechanover Report, supra note 7, at 35-34.

Ciechanover Report failed to address the length of time required to train investigators and the budgetary implications of these measures.

(ii) Lack of Promptness: Delays in investigation and prosecution

11. According to ***YESH DIN*** monitoring, the military law enforcement system works at a strikingly slow pace, due to delays and foot-dragging at all levels of the apparatus.[27] Today the decision whether to open an MPCID investigation takes such a long time that the delay often completely precludes the chances for a professional and effective investigation.[28] MPCID logs also indicate additional significant delays in carrying out an investigation after receiving a complaint or an order from the MAGC to investigate. According to many testimonies, the mere start of investigation activities may be delayed a few weeks until an investigator is assigned to the case.

12. After beginning its investigation, in many cases the MPCID approaches Palestinian victims and witnesses to collect testimony many months after the incident.[29] At the end of the MPCID investigation the materials are handed to the MAGC to decide whether to submit an indictment. The review of 44 files monitored by ***YESH-DIN*** found that the average lapse from the end of an MPCID investigation until the MAGC makes a decision is **14 months**, and in a significant number of cases no decision had been made even two years after the end of the investigation.[30]

13. Even if these delays are a consequence of a lack of human resources, they frequently thwart investigations.[31] These long periods of time substantially harm the potential of complaints to lead to indictment and conviction due to the fact that hard evidence is often stale or no longer available, witnesses are harder to locate, and events are more difficult to describe clearly and accurately as time passes. These delays significantly hinder effective investigation under conditions that are already inadequate.

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[27] *YESH DIN*, **The Duty to Investigate Compatibility of Israel's Duties under International Law with the Examination and Investigation of Complaints regarding Violations of the Law of Armed Conflict**, position paper at. 86-95.
[28] Yesh Din File 1237/06 (**Sharon and Samaria** MPCID File 67/07), Yesh Din File 1581/08 **(Jerusalem MPCID** File 313/08), Jerusalem MPCID File 193/09, Military Police Unit for Internal Investigations File 20/09, Yesh Din File 1631/08 (Jerusalem MPCID Notice 968/08).
[29] Examples of this issue appear in: Yesh Din Alternative Report to the United Nations HRC, page 8.
[30] alleged investigation, at . 11.
[31] *Id, at* 48

14. The slow pace of work of the IDF law enforcement system has an additional significant impact on accountability. Most soldiers serve in the IDF for up to three years. The **Military Justice Law** establishes that a soldier cannot be indicted for an offense under the law once 180 days have elapsed since his or her discharge from the army, or one year in cases raising suspicion of more serious offenses. Soldiers suspected of committing offenses often finish their military service without being prosecuted, and then cease to be subject to the Military Justice Law and therefore cannot be prosecuted except under exceptional cases.[32]

15. The *Turkel Report* recommends the MAG have a timeframe of few weeks in order to decide whether to open an investigation based on the material before him.[33] The *Ciechanover Report* recommends that the IDF formulate a guideline by the Chief Military Prosecutor (hereinafter: CMP) which will set forth the timeframes for opening an investigation in case of a complaint, and recommends that a final decision of how to handle the complaint should be decided within 14 weeks from the notice of the incident's occurrence. In exceptional cases another 14 weeks may be granted with written grounds and MAG approval.[34]

16. The *Turkel Report* also recommended that the MAG must determine the overall timeframe for criminal investigation. To ensure this timeframe, the MAG must submit, at least once a year, **statistical data regarding this matter**.[35] The *Ciechanover Report* recommends a timeframe of up to nine months for the investigation of cases of a non-complicated nature and up to nine additional months for a decision by a prosecutor,[36] which is in our opinion a period that violates the duty to conduct prompt investigation. Investigations, which are currently inordinately protracted, sometimes taking years,

[32] Once a soldier is considered a civilian s/he may be prosecuted by the Attorney General and State Attorney, but this is a rarely utilized procedure.
[33] Turkel Report, at 385.
[34] the Ciechanover Report, at 24-26.
[35] Turkel report, at 397-399.
[36] the Ciechanover Report, at 34-37. The overall time frame from the time of filing a complaint in "complicated cases" may amount to 3 years.

cannot reasonably be expected to become more expeditious without the allocation of suitable resources. What is more, this prolonged timeframe severely limits the military law enforcement system's ability to conduct effective investigations capable of uncovering the truth and leading to effective prosecution of the perpetrators of crimes against Palestinians.

Recommendations

The IDF investigation system is in need of fundamental reform in order to become an independent, effective apparatus capable of **promptly** uncovering the truth. Immediate implementation of all *Turkel* Commission recommendations can lead to significant improvements.

1. **Legislation**: incorporating into Israeli law the crime of torture and offenses of war crimes in a manner that conforms to international law including the principle of command responsibility.

2. **Immediate Opening Of Investigations And Conducting Effective Prompt Investigations**: The MPCID must launch criminal investigations of all complaints that indicate suspicion of violating the prohibition against torture and other form of cruel, inhuman or degrading treatment or punishment. In operational conditions, an independent preliminary inquiry into the facts must be restricted to no more than a few days' duration, and conducted separately from the operational debriefing. Additionally, The MAGC must limit the period for MPCID investigations and MAGC decisions as to whether to close a file or proceed with an indictment.

3. In order to execute the above-mentioned recommendations and to meet the standard of effective investigations, the GOI must allocate the necessary funds and personnel.