The IDF Military Justice System

Undated

IDF Military Advocate General's Corps

https://www.idf.il/en/minisites/military-advocate-generals-corps/the-idf-military-justice-system/

The IDF maintains a multi-layered military justice system, with checks and balances to ensure impartiality and independence before investigative, administrative and judicial authorities.

The three main components of the military justice system are the Military Advocate General's Corps, the Military Police Criminal Investigation Division, and the Military Courts (also known as Military Tribunals). Additionally, as a democratic country committed to the rule of law, Israel subjects the IDF’s military justice system to civilian oversight.

Note: The following is intended to provide a general overview of the IDF military justice system only, and does not constitute a comprehensive detail of this system. More information on the military justice system can be found in relevant Israeli legislation and legal guidelines and IDF orders.

Components of the Military Justice System

Military Advocate General's Corps

The Military Advocate General's Corps (the MAG Corps) is responsible for enforcing the law (both military and criminal) throughout the IDF and for providing legal advice to all military authorities.

The head of the MAG Corps (the MAG), who serves on the IDF General Staff, is appointed by the Minister of Defense, a civilian authority, and is "subject to no authority but the law." The MAG’s professional independence extends to every subordinate military attorney serving as an officer within the MAG Corps. These officers are subordinate to and report directly to their MAG Corps commanders, who, in turn, report to the MAG himself. This legal chain of command is an important and fundamental aspect of the MAG Corps, implemented to insulate military legal officers and maintain their professional independence. No commanders outside of the MAG Corps are part of the legal chain of command.

Beginning in 2007, the MAG Corps separated its law enforcement units from its legal advice units, in order to further improve its ability to implement and enforce the rule of law. As a result, the MAG Corps officers responsible for military prosecutions (i.e., the Chief Military Prosecutor and subordinate military prosecutors in the Military Prosecution) do not provide legal advice to the military bodies whose activities they may prosecute. The dual (but separate) enforcement and advisory responsibilities that the MAG himself retains, parallel those of the Attorney General of the State of Israel.

The Military Prosecution includes a specialized department – the Office of the Military Advocate for Operational Affairs – tasked with overseeing all investigations and conducting all prosecutions of alleged misconduct by IDF soldiers occurring in the context of operational activity, including alleged mistreatment of detainees, looting, abuse of authority, or the use of force in a manner not conforming with IDF rules and regulations (which incorporate the Law of Armed Conflict). This Office’s mandate specifically includes prosecution of alleged violations of the Law of Armed Conflict. Prosecutors assigned to the Office receive special training to ensure they competently manage these sensitive cases and effectively advise military police investigators on how to conduct investigations regarding IDF operations.

The MAG Corps also includes the Military Defense, which provides legal advice and representation to any soldier or officer under criminal investigation or standing trial in the military justice system, upon request and free of charge. The Military Defense enjoys full professional independence from the Military Advocate General. In accordance with IDF directives a military defender, when fulfilling his or her duty, is not subject to anyone except the immediate commander, and must act only in the defendant's best interests.

Military Police Criminal Investigation Division

The Military Police Criminal Investigation Division (“MPCID”) ­– the IDF’s primary entity for investigating allegations of criminal offences – enjoys complete professional independence similar to that of the MAG Corps. The Military Police, in which the MPCID sits, is a separate and distinct unit from the MAG Corps and other IDF units, and MPCID investigators are not subordinate to any commanders outside the military justice system.

The MPCID maintains a specialized department – the National Unit for Operational Affairs – tasked with investigating alleged misconduct by IDF soldiers occurring in the context of operational activity. Investigators in this unit receive additional training that includes relevant international law, reconstruction of battlefield situations, and gathering of evidence from witnesses and alleged victims outside Israeli territory. Investigators handling complaints involving Palestinians are assisted by Arabic-speaking interpreters.

Military Courts

The Military Courts – which are independent of both the MAG and the IDF chain of command – adjudicate charges against IDF soldiers for military and other criminal offenses. The Military Courts system includes regional courts of first instance, as well as a Military Court of Appeals. The head of the Military Courts system, the President of the Military Court of Appeals, is a Major General. Professional military judges (appointed by an independent commission) and regular IDF officers (who have no connection to the cases they hear) serve on these Military Courts. Each bench of the Military Courts must include at least one professional military judge, and professional judges must constitute a majority of any appellate panel. Under the Military Justice Law, "[i]n judicial matters, a military judge is not subject to any authority save that of the law, and is not subject in any way to the authority of his commanders."

The proceedings of Military Courts are generally open to the public, except in rare cases when an open proceeding would jeopardize national security. The media covers Military Court proceedings, and many judgments of the Military Court are published online. Furthermore, Military Court typically apply the same rules of evidence used in civilian criminal proceedings.

Civilian Oversight

Attorney General of Israel

The Attorney General of Israel, who heads the public prosecution system and is the chief legal advisor to the Government of Israel, provides civilian supervision of the military justice system. The professional directives of the Attorney General bind all state authorities.

The Attorney General may review decisions of the MAG that the Attorney General considers to be of special public interest. Moreover, a complainant or non-governmental organization can challenge the MAG’s decision before the Attorney General as to whether to open a criminal investigation or to file an indictment in cases concerning alleged violations of the Law of Armed Conflict.

Supreme Court of Israel

Israel’s Supreme Court provides judicial review for the military justice system. Under the Military Justice Law, the Supreme Court may hear direct appeals from a judgment of the Military Court of Appeals "concerning an important, difficult, or innovative legal question." Complainants or non-governmental organizations also may petition the Supreme Court, sitting as the High Court of Justice ("HCJ"), against a decision of the MAG or the Attorney General. The Supreme Court may review and reverse decisions of the MAG and the Attorney General, including decisions whether to open a criminal investigation, whether to file a criminal indictment, whether to bring certain charges, or whether to appeal a decision of the Military Courts.

The scope of the Court’s review is broad. According to the jurisprudence and practice of the High Court of Justice, any interested party (including non-governmental organizations) – or any person (including those who are neither citizens nor residents of Israel) who is affected or potentially affected by the actions of a government authority (including the IDF or the Attorney General) – is entitled to petition the High Court of Justice, as a court of first instance, on any claim that a government action or an action of the IDF is ultra vires, unlawful, or substantially unreasonable.

Israel’s Supreme Court has earned international respect and recognition for its jurisprudence, as well as for its independence in enforcing international law. Its landmark rulings in several cases related to the balancing of security and the protection of individuals are highly regarded by jurists and academic scholars of international law, and have been cited favourably by foreign courts, including the Supreme Court of Canada, the House of Lords in the United Kingdom, and the European Court of Justice.

Independent Public Commission of Inquiry

The Government of Israel from time to time may establish independent public commissions of inquiry to review Israel’s practices and policies.

Procedures for Dealing with Complaints Concerning Operational Activity

Israel has multiple avenues for obtaining information regarding alleged misconduct by IDF soldiers, and the MAG Corps constantly reviews any complaints and other information that may suggest IDF misconduct, regardless of the source.

As an open and democratic society, Israel has a free press and an active community of domestic and international non-governmental organisations, which are a source of many of the allegations of misconduct. Such allegations also may come from putative victims, their family members, attorneys, or witnesses of the conduct at issue. Any person can file a complaint alleging misconduct by IDF soldiers at any civilian police or MPCID station, either by appearing in person or through written communication. Persons outside of Israel may file complaints directly to the MAG through Israel’s liaison mechanism with the Palestinian Authority, through a non-governmental organisation acting on their behalf, or through an attorney (who need not be Israeli).

In addition, Israeli commanders, soldiers, police, or other law enforcement officers who witness an offence being committed may file a report to a competent officer. Under the Military Justice Law, any IDF "commander... or soldier who knows or has reasonable grounds to believe that another soldier committed an offense" must prepare a complaint and present it to a competent officer. The IDF maintains a specific directive asserting a duty to file a report, for example, when there is reasonable suspicion that an IDF soldier committed a serious violation of Israeli or international law, as well as in certain other cases even if no such cause for suspicion arises, such as when medical facilities are damaged.

Each report, complaint or other piece of information suggesting IDF misconduct undergoes an initial screening process by the MAG Corps to determine whether it is sufficiently concrete and credible prima facie to merit further review by the MAG. In certain cases, where the known facts are sufficient to indicate that the alleged wrongdoing could be criminal in nature (such as looting or the abuse of detainees), the MAG immediately refers the complaint to the MPCID. In other cases – for example, when an allegation is sufficiently credible yet partial or circumstantial – the MAG may require additional information in order to decide whether to open a criminal investigation. Because the death or injury of civilians during an armed conflict does not, in and of itself, establish a reasonable suspicion of criminal misconduct, the collection of additional information is often critical when addressing allegations of wrongdoing during operational activity. In such cases, the IDF will conduct a preliminary fact-finding assessment in order to develop the factual record so that the MAG can make a fully informed decision whether there is a reasonable suspicion of criminal misconduct that justifies opening a criminal investigation.

Such fact-finding assessments are often carried out by the General Staff Fact-Finding Assessment Mechanism (the FFA Mechanism). The FFA Mechanism is designed to conduct, based on proper expertise, a prompt, professional examination of exceptional incidents that took place during military operations, so that the MAG has sufficient factual information to determine whether allegations give rise to a reasonable suspicion of criminal misconduct. The FFA Mechanism examines all exceptional incidents referred to it by the MAG. The FFA Mechanism is headed by a senior officer and relies on high-ranking IDF reservist and active duty officers who are outside the chain of command for the operational activity being examined. The FFA Mechanism includes officers with operational expertise and qualifications in a number of fields. The FFA Mechanism is also provided with legal advice.

The FFA Mechanism has broad-ranging powers to obtain information from within and outside the IDF, and to seek information from civilians and from persons outside of Israeli sovereign territory. IDF soldiers are obliged to cooperate with the FFA Mechanism. To encourage full disclosure of relevant information, Israeli law treats the materials and findings of the FFA Mechanism as privileged.

Once a fact-finding assessment is complete, the MAG decides whether the findings and collected materials meet the requirements for a criminal investigation. In order to make this decision, the MAG may request supplementary examinations and materials from the FFA Mechanism or other relevant entities. Complainants (including residents and NGO’s outside of Israel) receive notification of the MAG’s decision, which may also be made public subject to legal and national security restrictions regarding the scope of information that can be disclosed.

If so directed by the MAG, the MPCID must conduct a criminal investigation. MPCID staff may investigate any IDF soldier or officer, collect evidence from a wide range of sources (including witness testimony of persons outside of Israeli territory), and seek counsel from military prosecutors. When the MPCID concludes its investigation, it transfers the case file to the Office of the Military Advocate for Operational Affairs. After a thorough review of the investigation materials, the military prosecutors can request supplemental investigations.

The MAG may also refer the findings and materials collected during the fact-finding assessment to an Investigative Officer, who is an operational commander outside the chain of command for the operational activity being investigated and who is specifically vested with the same investigatory authorities exercised by the MPCID.

Following a criminal investigation (or investigation by an Investigative Officer), the file is transferred back to the Office of the Military Advocate for Operational Affairs for review. After this review, the MAG decides whether to initiate criminal or disciplinary proceedings. The MAG’s decision must be based on the evidence available and the nature of the alleged misconduct. In accordance with well-established principles of criminal law, military prosecutors may file an indictment in the Military Courts if the evidence is sufficient to establish a reasonable chance of conviction. The Military Prosecution may appeal an acquittal or a sentencing decision to the Military Court of Appeals, and then may request to appeal the decision of the Military Court of Appeals to Israel’s Supreme Court.