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ISRAEL'S TRUTH-TELLING WITHOUT ACCOUNTABILITY

Inquest Faults Police in Killings at Jerusalem Holy Site But Judge Orders No Charges

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I. Introduction

Middle East Watch commends the extensive investigation published by Israeli Magistrate Ezra Kama on July 18 into the Temple Mount/Haram al-Sharif killings. However, Middle East Watch is disturbed that, in light of evidence establishing criminal conduct by identifiable police officers, none of the officers involved in the incident has been prosecuted or disciplined. Middle East Watch also believes that the police's criminal investigation of the incident last fall was grossly negligent and in effect sabotaged the task of determining responsibility for the killings.

The events at the holy site last October 8 attracted world attention not only because it was the bloodiest incident of the Palestinian uprising, but also because it occurred at a site revered both by Jews and Muslims. The area, known to Jews as the Temple Mount and to Muslims as al-Haram al-Sharif (the Noble Sanctuary), is an enclosed area located on a small plateau in Jerusalem's walled old city. The sanctuary contains the Aqsa Mosque and the Dome of the Rock, from which the Prophet Muhammad is said to have made a night journey to heaven. It sits atop the site of the Second Temple, the western wall of which still stands and is Judaism's holiest site. The site will be referred to as "the Sanctuary" in this report.

October 8 is the anniversary of the clash at the Temple Mount/Haram al-Sharif, in which 17 Palestinians died.

- *Why have no policemen been charged or disciplined in connection with the incident?*
- *Why have no commanders been charged or in any way punished for mishandling the operation?*
- *What have the police done to comply with the Zamir Commission's recommendation to immediately develop alternatives to the use of live ammunition in riot-control situations?*

In letters to Israeli Attorney General Joseph Harish and Police Minister Ronnie Milo, Middle East Watch urged appropriate punitive actions against policemen involved, on the basis of the factual record established by Judge Kama's inquest. Middle East Watch also urged that those responsible be held accountable for the failure of the police investigators to inspect the site until ten days after the incident, and to ascertain which guns were used by which

policemen. The letter to Attorney General Harish is attached to this newsletter.

Last month, Avigdor Feldman, an attorney representing the family of one of those killed, wrote to Jerusalem District Attorney Uzi Chason, saying he would petition Israel's High Court of Justice if the district attorney decided against filing charges.

The inquest by Judge Kama is the most thorough probe to date to determine precisely how 17 Palestinians were killed during the October 8 clash at the Sanctuary.¹ During the course of seven months, in sessions that were almost always open to the public, Judge Kama heard the testimony of dozens of witnesses, including policemen and Jewish and Palestinian civilians who witnessed the events. He permitted lawyers representing families of the deceased to introduce extensive evidence bearing on the case, and viewed videotapes of the events that had been taken by persons in the vicinity. The proceedings generated a factual record (the *protocol*, as it is known in Hebrew) filling some 4,000 pages. On July 18, Judge Kama issued a 54-page report summarizing his findings. Both the report and the factual record were made available to the public, with minor deletions to protect the privacy of certain individuals.

Judge Kama in effect gives the police a mixed verdict. While he says the evidence was insufficient to connect individual policemen to particular fatalities, he describes numerous incidents in which policemen opened fire on Palestinians when the officers' lives were not in danger, or in which the police mishandled the situation in ways that contributed to the high number of casualties. Some of Judge Kama's findings are:

¶ The eruption of full-scale violence was probably an accident in a "highly stressful atmosphere,"² rather than a premeditated provocation.

¶ Police did not prepare adequately for the possibility of violence, despite advance knowledge that disturbances might occur that day. They were not adequately supplied with riot-control equipment, such as gas masks, or appropriate nonlethal ammunition.

¶ After the troops initially retreated from the Sanctuary, four policemen – named in the report (see below, page 10) – stood outside the Moghrabi Gate firing rubber bullets and tear gas into the Sanctuary at a time when they were not in danger and could not aim properly, and after Jewish worshippers at the Western Wall plaza had already been evacuated.

¶ Commanders on the scene ordered troops to re-enter the Sanctuary without making basic preparations for the operation. The fact that the troops had already used most of their supply of tear gas and rubber bullets precipitated their use of live ammunition when storming the Sanctuary. Also, police carried out the assault "with no communication with headquarters that could direct their actions."

¶ The force re-entering the Sanctuary "got carried away with shooting...There was no lack of cases in which there is doubt as to the true danger faced by the policemen or they exaggerated the risks that faced them."

Judge Kama's findings contradict an earlier report on the clash, issued October 26 by a government-

¹ Early reports incorrectly put the death toll at the Sanctuary as high as 21 Palestinians.

² All citations of the Kama report are from a translation by Middle East Watch.

appointed commission headed by Zvi Zamir, the former head of the Mossad intelligence agency.³ While criticizing some operational aspects of the police performance, the Zamir Commission largely exonerated the police.

* * *

The confrontation at the holy site between Palestinians and forces of the police and Border Police⁴ left 17 Palestinians dead and at least 100 wounded. Nine Jewish civilians were lightly wounded, most of them worshippers who were hit by stones while in the plaza in front of the Western Wall, and 19 policemen were injured, according to the Zamir Commission.⁵

In the weeks following the incident, many human rights organizations and journalists conducted their own investigations of what happened, visiting the Sanctuary, interviewing security officials, witnesses and wounded Palestinians, and viewing amateur videotapes of the events. Many of them found evidence to suggest that the police commanders had badly mishandled the confrontation in a number of ways, and that at least some of the policemen involved had opened fire unjustifiably or used their weapons in a reckless manner.⁶

The Zamir Commission painted the police's performance in a far more favorable light, blaming Palestinians for having provoked the clash and concluding that, in general, the "use of live ammunition on the Temple Mount under the prevailing conditions was justified" because the policemen's lives were genuinely in danger.⁷ The commission, did, however, criticize commanders for failing to take preventive measures on the basis of information that there might be trouble that day, and for inadequately supervising their forces once the clashes erupted. The report also noted, in passing, that there was some "unsupervised" [בלוי מבוקר]⁸ shooting of live ammunition by policemen.

³ The other two members of the commission, which was appointed October 10 by Prime Minister Yitzhak Shamir, were Yaakov Ne'eman, a prominent private lawyer and former partner in a Tel Aviv firm with Israeli President Chaim Herzog, and Chaim Kubersky, a former director general of the Interior Ministry.

⁴ The Border Police are a paramilitary unit of the Israeli police which operates under police supervision when inside Israel, and under the direction of the Israel Defense Force when in the occupied territories. The Israeli police are responsible for law-and-order functions in the eastern sector of Jerusalem, which Israel unilaterally annexed after its capture in the 1967 war. The Temple Mount/Haram al-Sharif is located in this area.

⁵ See Middle East Watch press release of October 10, 1990.

⁶ Among the reports in English are: "The Battle at Temple Mount: Neither Palestinian Nor Israeli Version Tells Real Story," *Washington Post*, October 14, 1990; "Slaughter on the Mount," *Sunday Times* (London), October 14, 1990; B'Tselem, The Israeli Information Center for Human Rights in the Occupied Territories, "Loss of Control: The Temple Mount Events -- Preliminary Investigation," October 14, 1990; "Death in Jerusalem: Passions and Violence Led to Tragedy," *New York Times*, October 15, 1990; Al-Haq, "Reconstruction of Events al-Haram al-Sharif," October 28, 1990; Report of the Islamic Commission of Inquiry on the al-Haram al-Sharif Massacre, October 28, 1990; Palestine Human Rights Information Center, "The Massacre of Palestinians at al-Haram al-Sharif," October 31, 1990; "New Evidence: Two Startling Videotapes Support Arab Charges," *Village Voice*, November 13, 1990.

⁷ All citations from the Zamir Commission report are from the English-language summary issued on October 26, 1990 by the Consulate General of Israel in New York.

⁸ The English summary translation of the Zamir Commission report prepared by the Israeli Consulate in New York translated this word as "indiscriminate." However, several commentators have suggested that the meaning intended by the Hebrew original is closer to "unsupervised."

Most Israeli officials expressed great satisfaction with the Zamir report, which was unanimously endorsed on October 28. Defense Minister Moshe Arens said, "The report corroborates what each of us knew in his heart when we heard about the incident: that the responsibility for the tragic and massive loss of human lives lies solely with the inciters and those who heeded their calls...The police are not to blame. The guilty ones are those who started the violence."⁹

Police Minister Ronnie Milo, despite initial speculation that he might dismiss three officers whom the Zamir report had singled out for criticism, declined to discipline any of the police involved. On November 12, he promoted one of the three, Deputy Commander Aryeh Bibi, to the rank of full commander.¹⁰ No disciplinary measures were taken by Border Police Commander Meshulam Amit, who declared, "An initial look at the report surely makes me pleased with the actions of the Border Police."¹¹

Some human rights groups expressed disappointment with the Zamir report. For B'Tselem, the Israeli Information Center for Human Rights in the Occupied Territories, the main flaw was the commission's neglect of "the central question: that of the opening of fire and the loss of human life." B'Tselem also criticized the commission's methodology, noting that it lacked the power to subpoena witnesses and relied heavily on the testimony of security forces. Third, B'Tselem faulted the commission for withholding the evidence and sources for its findings. While the commission said that withholding the evidence and sources enabled it to release its findings in their entirety, B'Tselem argued that it denied the public the record necessary for evaluating the soundness of its conclusions.¹²

Given the Zamir Commission's failure to explain how so many people lost their lives, many in Israel's human rights community held out hope that a more thorough accounting would emerge from the judicial inquest that was opened a week after the events and ran concurrently with the Zamir probe.¹³ The inquest was begun at the request of the police, in accordance with Israel's Investigation of Causes of Death Law (1958), which provides for an inquest by an investigating judge in cases of unnatural death, at the request of the victim's family, the police or the attorney general. Unlike the Zamir Commission, the judge conducting an inquest can subpoena witnesses, order autopsies, and direct the district attorney to bring criminal charges against suspects, although the judge is not obligated to do so and does not have the authority to try criminal suspects. In addition, the district attorney on his own can decide to press charges after examining the evidence amassed during the inquest, along with any additional evidence he collects.

Since the release of Judge Kama's report, no criminal or disciplinary proceedings have been announced. A spokesman at the Ministry of Justice stated on July 25 that the Kama report was under study.

⁹ Interview in Hebrew on Israel Television, October 27, 1990, as reported in Foreign Broadcast Information Service, Near East and South Asia report, October 30, 1990.

¹⁰ *New York Times* and *Jerusalem Post*, November 13, 1990.

¹¹ Tel Aviv IDF Radio in Hebrew, October 27, 1990, as reported in Foreign Broadcast Information Service, Near East and South Asia report, October 30, 1990.

¹² See B'Tselem press release of October 28, 1990.

¹³ On October 17, the Jerusalem Magistrate Court assigned to Judge David Chesin the inquest into the killings at the Sanctuary. A few days later, the file was reassigned to Judge Kama after Chesin was promoted to a District Court judgeship. Informed observers attached no political motives to the transfer.

The Police Ministry, for its part, announced the creation of a panel to examine whether, on the basis of Judge Kama's report, there is a need to take further action. On August 26, a ministry spokesperson said the panel had not yet completed its work. She added that there had been no response to the report by the Ministry since Minister Ronnie Milo was interviewed on July 18 on the Israeli television show *Mabat le Chadashot*. In that interview Milo expressed overall satisfaction with Kama's findings:

It was very clear from this report that the reason for the event was the behavior of these Arabs, who were on the Temple Mount, their outburst, the endangering of the lives of the policemen who were there after the events reached the level that they reached. There were, probably, a few violations here and there, as the judge states. But in general the responsibility for what happened is on those who threw the stones and acted wildly.

Milo seemed to be dismissing the violations, as if the allegation that Palestinians initiated the clash rendered the police misconduct inconsequential. In the same interview Milo admitted that his motives were political when he declined last fall to discipline commanders who, he conceded, "maybe could have prevented this event by preparing enough forces." Milo explained:

The decision ... was based on the fact that clear incitement was taking place at the time, especially outside the borders of Israel, incitement that referred to a massacre, a deliberate massacre of Arabs on the Temple Mount. At the time, I thought that if any conclusions were pronounced against officers of the police [the ones referred to in the Zamir report], it would have been tantamount to an admission of responsibility for intentional killing on the Temple Mount. This is why we did not do it and I am not sorry about it.

Thus, instead of asserting that police will at all times be held accountable for behavior that deviates from their rules of conduct, Milo dangerously hinted that excessive force will be forgiven if it occurs in response to a supposed provocation or in a politically charged context.

Middle East Watch has been following the investigations of the incident at the Sanctuary as part of its monitoring of accountability for human rights abuses by Israeli security forces in the occupied territories. Middle East Watch believes that a government committed to curtailing human rights violations must have a credible system for investigating and punishing abuses. In its 1990 report *The Israeli Army and the Intifada: Policies that Contribute to Killings*, Middle East Watch criticized the Israel Defense Force for failing to vigorously investigate killings attributed to its own forces, and to mete out appropriate punishments to soldiers who use excessive force. While the troops involved in the incident at the Sanctuary were police and Border Police rather than IDF soldiers, the state's response to the killings that day suggest similar inadequacies.

II. The Confrontation: Sequence of Events

The brief account below of the clash relies on the Kama report. That account is not necessarily authoritative; many of the day's events remain in dispute, as attorney Avigdor Feldman's closing arguments at the inquest make clear (see below). Nevertheless, on the basis of Judge Kama's report alone, the evidence of severe police misconduct is compelling.

Phase 1: The Buildup to Violence

Before the confrontation erupted at about 10:45am, there were numerous indications that October 8 was not to be an ordinary day at the Sanctuary.

A group of Jewish extremists known as the Temple Mount Faithful had announced their intention to enter the Sanctuary that day, which was the fourth day of the Jewish holiday of Succoth (Feast of the Tabernacles), in order to conduct a symbolic ceremony of "laying the cornerstone" of the Third Temple. Since its founding in the 1970s, the Temple Mount Faithful have organized numerous rallies and processions in the area of the Sanctuary, to demand its Judaization. They have often staged their events on Jewish holidays.

In the past, the police have generally permitted members of the group to enter the Sanctuary as individuals but banned them from holding any kind of ceremony or procession inside the Sanctuary. Nevertheless, news or rumors of their planned activities have often prompted Palestinian counter-demonstrations to "defend" the Muslim holy site, leading to clashes with the police. Such a clash erupted during the Succoth holiday of 1989.¹⁴

Mindful of past disturbances, the police again banned the Temple Mount Faithful from holding the stone-laying ceremony inside the Sanctuary that they had planned for October 8. Israel's High Court of Justice upheld the police decision on October 1. However, the group decided to hold a procession near the Sanctuary, as they have done in past years.

Police assured Islamic religious leaders that the Temple Mount Faithful would not be permitted to enter the Sanctuary. Nevertheless, the leaders called on Muslims, as they have done previously, to gather on the morning of October 8 to "defend" the holy places from the group. Such calls were made at the Friday prayers at al-Aqsa Mosque on October 5.

On the morning of the 8th, police detected an unusually heavy flow of Palestinians into the Sanctuary. According to the Kama report, senior officers again told religious leaders and officials at the Islamic holy sites that they would prevent the Temple Mount Faithful from entering the Sanctuary, even as individuals. Police supplemented the usual contingent of 45 Border Policemen at the Sanctuary with another 10 who were on call at the Lion's Gate, one of several gates to the Sanctuary.

An estimated 2000 to 3000 Palestinians had gathered in the Sanctuary. Below, 20,000-30,000 Jews were attending Succoth prayers at the Western Wall. At approximately 9:50, some 20 followers of the Temple Mount Faithful arrived at the square near the Western Wall, and set out a few minutes later with a police escort toward the Shiloah tunnel, located in the valley below the Sanctuary, for a ceremony there.

¹⁴ See Ian Lustick, "New Zealots Stoke the Battle over Jerusalem's Shrines," *Newsday*, **October 11, 1990.**

At about 10:45am, the tension in the Sanctuary erupted into violence. The catalyst remains in dispute. Once the violence got under way, the small police force stationed in the Sanctuary faced an angry mass of Palestinians who were screaming and "throwing stones and probably other objects" (see Part IID) at the policemen. The Palestinians began approaching a group of policemen stationed along a row of arched pillars near the upper part of the Western Wall. These policemen opened fire, primarily with rubber bullets,¹⁵ but also, according to Judge Kama, with live bullets that were fired into the air and at the legs of the demonstrators, and tear gas. Judge Kama writes, "I have no doubt, according to the evidence presented to me, that, already at this stage, there were casualties" and "at least one victim was killed."

Vastly outnumbered by the approaching demonstrators, the policemen retreated, and then withdrew through the Moghrabi Gate. Some went to warn the worshippers at the Western Wall to evacuate the plaza.

Phase 2: The Police Re-Group Outside the Sanctuary

After the troops retreated through the Moghrabi Gate, a decision was made by commanders to reenter the Sanctuary. Contrary to the impression that many people formed after the events, the decision was not made in response to stones raining down on Jewish worshippers at the Western Wall. At this time -- moments before 11:00am -- the Western Wall plaza had already been evacuated by worshippers. The decision was based on other considerations. Police were concerned that stones were being thrown over the wall at buses parked below. More important, notes Judge Kama, a policeman had radioed for help from the substation in the Sanctuary, saying that a mob was storming the station and barraging it with stones. Communication from the policeman then went dead. Police feared that he might be endangered and also that the rioters might get to the light arms that were locked in the substation. (It emerged later that the policeman had been escorted to safety and the weapons in the safe had not been touched, although a submachine gun that was in the substation disappeared, Judge Kama writes. Even had the fear about the stranded policeman been well-founded, the police's response, which left such a high number of Palestinians dead or injured from gunshot wounds, was clearly disproportionate.)

During the police's preparations for their reentry, Palestinians inside the Sanctuary continued to throw stones over the wall, toward the Wailing Wall plaza and the policemen stationed outside the Moghrabi Gate, while the policemen fired rubber bullets and tear gas into the Sanctuary, shooting through a grating and through a narrow opening in the gate. One policeman also fired rubber bullets from a window of the Mahkama building, which forms part of the western wall of the Sanctuary.

Phase 3: Re-Taking the Sanctuary and the Second Confrontation

At about 11:00am, Greater Jerusalem Area Police Commander Aryeh Bibi gave the order, and a force of policemen led by Commander Bibi and Border Police Superintendent Shlomo Ka'tabi stormed the Sanctuary, through the Moghrabi Gate and the Chain Gate, firing at Palestinians. Various units of the police, totaling some 75 to 100 men, operated in the Sanctuary, their gunfire continuing until 11:30am. It is during this stage that most of the casualties

¹⁵ The police at the Sanctuary used a particularly dangerous type of rubber bullet. Shaped like live ammunition, the bullets have a metal interior underneath a hard rubber coating. Some of the policemen testified that they were aware that shooting these bullets at the short range from which they fired them could be lethal.

were inflicted. Approximately 150 Palestinians were arrested in the Sanctuary, most of them during this phase.¹⁶

III. Judge Kama's Findings on Police Conduct

Judge Kama's mandate – to examine the cause of death – is reflected in the emphasis and details of his report. He was not called upon to examine every instance in which the open-fire regulations may have been violated, or to judge whether police commanders properly deployed or directed their forces.

Judge Kama's findings are further limited by the failure of police criminal investigators to collect evidence and eyewitness accounts immediately after the killings. The failure of police to identify which weapons were used by which policemen made it difficult to establish through ballistic tests a link between bullets in the bodies and the gunfire of individual policemen. Also, Judge Kama's decision not to order any autopsies compounded the difficulty of assembling the evidence needed to bring criminal charges against the policemen.

Nevertheless, Judge Kama's report provides *prima facie* evidence to support charges less serious than homicide against many of the policemen involved. A forceful case for prosecution of some of the policemen is made by Avigdor Feldman, an attorney who represented at the inquest the family of one of the shooting victims, Palestinian-Israeli Adnan Khalaf Jinadi. Building his argument on the factual record of the inquest, Feldman challenges Judge Kama's conclusion that the evidence is inadequate to bring charges. Some of Feldman's arguments are excerpted in Part IV.

Phase 1: The Buildup to Violence

Police erred in failing to take precautionary measures in anticipation of trouble that day, Kama reports. "They decided on the backup force only that morning when the commanders in the field realized that hundreds of Muslims were beginning to stream into the Temple Mount areas, which was unusual. The security forces knew very well in advance of the possibility of disturbances of public order that might break out that day."¹⁷

¹⁶ Police are allowed to open fire at a person who resists arrest, provided that the person is suspected of a felony and "there is no other way to arrest him or prevent his escape." However, this provision of the police regulations was not invoked by any of the officers at the inquest to justify their gunfire. The police open-fire regulations are printed in English in B'Tselem, *The Use of Firearms by the Security Forces in the Occupied Territories*, July 1990. Copies are available from Middle East Watch.

¹⁷ The Zamir Commission provides a more detailed critique of the poor planning:

The Jerusalem District headquarters and Border Police headquarters had no advance plans for gaining control of the Temple Mount area. It was not forecast that during routine days, a mob would gain control of the Temple Mount area or that police forces would have to regain control of the area. These facts influenced the operation of the forces...

The many events that took place in the Jerusalem District resulted in the fact that the district commander and officers of his staff were not present at headquarters, and this severely impeded its operation. The absence of a commander is justified as long as headquarters serve as a center of control over forces in the field.

Important information was relayed to the headquarters during the day. Had there been an authoritative duty officer present, the situation would have been different. Such circumstances would have facilitated a reevaluation of forces, a suitable deterrent force would have prevented the mob from attacking the border policemen who were stationed above the Western Wall, and such extensive use of live fire would have been prevented.

While Judge Kama says that the tension was predictable, he rejects the initial allegations of Israeli authorities that the conflagration resulted from a planned effort by Palestinian leaders to instigate a confrontation that would wrest attention back to the Palestinians during the Gulf crisis.¹⁸ He states, "I accept the claim made by Muslim leaders, and by those who took part in the events of that day, that there was no need for advance planning or organizing...." Rather, "Word of the possible arrival of the Temple Mount Faithful sufficed to cause the various groups to organize."

Judge Kama, however, does find evidence that youths had prepared stones in advance and threw some stones at the police force before the police responded. He also says that sermons delivered at the Sanctuary that morning "inflamed passions" [שלהוב יצרים]. But he describes these sermons as calling on Muslims to defend the mosques and holy places. He explicitly rejects the Zamir Commission's account of the loudspeakers broadcasting "violent and threatening calls" such as "Jihad" and "Slaughter the Jews."

Overall, Kama's analysis of what ignited the violence attributes less premeditation to the Palestinian side than does the Zamir report. He speculates that the full-scale violence erupted in a "highly stressful atmosphere" only after "a tear gas grenade accidentally fell and was probably tossed away and fell close to a gathering of a group of girls who were standing near the Dome of the Rock."

Once the full-scale violence began, the police opened fire when confronting a "real and serious danger" from stone-throwing youths who were as close as five or six meters away. Judge Kama reports that other objects were "probably" thrown at police, although he states that he was not presented with evidence to show the various objects that policemen claimed had been thrown at them.¹⁹

Phase 2: The Police Re-Group Outside the Sanctuary

Judge Kama accepts the decision made by police commanders that it was necessary to re-enter the Sanctuary after withdrawing. However, he severely criticizes the planning of the assault, which, he makes clear, almost certainly contributed to the high number of casualties.

Judge Kama questions the decision to send in the same policemen who had just retreated from the earlier confrontation. Some had inhaled tear gas fumes, which hindered their ability to function. Also, their supply of rubber bullets and tear gas was nearly exhausted, leaving them primarily with lethal ammunition for the next stage. "Most important of all," Judge Kama writes, "the forces in the field acted with no communication with headquarters that could direct their actions." According to Attorney Feldman, evidence introduced at the inquest reveals that appropriate

¹⁸ For example, on the day of the clash, Prime Minister Yitzhak Shamir called the incident an organized attempt "to exploit the atmosphere of hysteria and fundamentalist extremism emanating from Baghdad to start a fire in Jerusalem." *New York Times*, October 9, 1990. The following day, Yohanan Bein, at the time Israel's ambassador to the United Nations, referred to "a premeditated ambush," adding that "these disturbances were exactly what they needed, and that's why they initiated them, clearly planned beforehand to bring the Palestinian issue back to the front pages." *New York Times*, October 10, 1990. Avi Pazner, a senior aide to Shamir, said a couple of days later that Israel had information that the melee was carefully planned, probably with the involvement of the Palestine Liberation Organization. "We believe this was a well-planned operation, planned days in advance. We have good sources of information. When we say this, it is not just something in the air. The Prime Minister did not go out lightly when he said that." *New York Times*, October 13, 1990.

¹⁹ The Zamir Commission, by contrast, found that "enormous amounts of rocks, construction materials, and metal objects were thrown at Israeli policemen."

ammunition was available nearby, and that police commanders on the scene were probably aware of this, or could have learned this fact had they checked with headquarters.

Judge Kama also criticizes four policemen who, before reentering the Sanctuary, shot rubber bullets and tear gas through a narrow opening in the Moghrabi Gate, under circumstances in which it "was impossible to see the direction of fire and, at the same time, it is doubtful that they were in real danger." The firing, by Yona Doron, Tidhar Lavi, Frank Elbaz, and Alharizi Oren, "was done in full sight of the officers who stood waiting to regroup, and it appears that every one of those who stood near the door of the gate did whatever he felt like." Kama also singles out Doron for going up to a second-floor window of the Mahkama building and firing rubber bullets at Palestinians from there.

Phase 3: Re-Taking the Sanctuary and the Second Confrontation

Judge Kama found that the force reentering the Sanctuary became "carried away with firing, and from an analysis of the events it appears that the policemen were not at all stages of the events operating in situations that were life-threatening....There were instances in which policemen got into truly threatening [situations] which required them to act as they did. However, there was no lack of cases in which there is doubt as to true dangers, or there was exaggeration on the part of one policeman or another in estimating the risk in which he stood."

On the basis of the soundtrack of videotapes of the incident, Judge Kama is persuaded that one of the policemen fired automatic rounds immediately after police reentered the Sanctuary. Firing automatic rounds is absolutely forbidden by police open-fire regulations, unless a commander has given explicit orders to do so. At the inquest, no one admitted having used automatic fire, and Judge Kama states that he could not identify the policeman who did, or whether he injured anyone or only fired into the air.

Judge Kama alludes to numerous suspicious actions by policemen during their reentry and the moments leading up to it. While it is not certain that offenses were committed in each case, these incidents deserve closer scrutiny. His account is worth quoting at length:

IIn the course of events before the police re-entered the Mount area, during the reentry ... and at other points in time, mainly during the advance of the Police's Unit for Restoring Public Order from the Lion's Gate to Solomon's Stables, incidents and confrontations took place between policemen and the congregated Muslims or disturbers of the peace. During these incidents and confrontations, firing occurred without the policemen being in truly life-endangering situations. This shooting was extraneous, preventable, and undoubtedly led to people being injured, although again I cannot confirm the death of any person resulting from it.

Yona Doron was involved in the shooting from the Mahkama building, when he opened fire from the window of a room on the second floor, and it is doubtful that he or others were in a life-endangering situation that made the shooting necessary. Sheikh al-Rifa'i, in his testimony, attributes three deaths to the shooting from the Mahkama building. But except for his testimony, I possess no other evidence indicating that people were killed by the shooting from the Mahkama building, who the shooter was, or who was killed. Even Yona Doron himself testifies that many people were injured from his shooting.

Accordingly, I will not be able to determine a connection between this shooting and peoples' death. However, there is no doubt that there was irregularity in the behavior of Yona Doron in this matter.

Furthermore, the Unit for Restoring Public Order, according to Border Police testimony from ... the force that

joined them, engaged in behavior that was unreasonable under the circumstances, although, again, I cannot from the evidence point to specific woundings that caused death. However, the very act of needless shooting by the police when their lives were not truly in danger, deviates from the rules. This especially refers to the matter of shooting rubber bullets from ranges shorter than 5 or 6 meters...

Regarding the conduct of policemen Doron Toledano and Frank Elbaz, during the confrontation in the second stage (i.e. the reentering of the Sanctuary), on the path between the gates from the Chain Gate onward, their version that they were firing when their lives were in danger is not in keeping with the testimonies of police officers who passed by during the second stage and did not see any danger in their way. The version of these two seems strange and exaggerated. However, if they did indeed shoot while positioned opposite disturbers of the peace at a distance of 8 to 10 meters, their behavior was reasonable. I cannot establish a finding that contradicts their version, and therefore Attorney Feldman's position on them is unacceptable to me. The same applies to the situation of Avinoam Yitzhaki, whose version seems very strange and exaggerated regarding the life-threatening danger he faced, at a time when Officer Rizeq (Ghanem, the morning shift commander for the Border Police), who stood by his side, was not in mortal danger at all. Therefore, I will not be able to establish a finding that contradicts (Yitzhaki's) version...

There remain a few "unknown" affairs regarding the behavior of two police officers and one Border Police officer. During a chase after disturbers of the peace, police officer Shahar Ayalon used a hunting rifle, with special rubber bullets. He describes three different events in which he was in life-threatening danger from stones thrown at him. This statement contrasts with other testimonies that there was no life danger during the police officers' chase. In any case ... in the evidence in the investigating judge's possession, there is nothing which establishes a finding to contradict his version.

The behavior of Border Police Officer Shimon Amor, who took initiatives of unclear necessity and without coordinating with the commanders in the field, causes astonishment but does not constitute reason to establish against him any finding relating to our concern (i.e., causing death).

I heard many testimonies regarding the shooting from the pistol of Superintendent Tzion Ezra through the opening of the Moghrabi Gate, and during the break-in. There are contradictions regarding the manner of this shooting between the two testimonies given by Superintendent Ezra himself... It is doubtful that the shooting from Tzion Ezra's pistol was necessary, and doubtful that he stood opposite 600 to 700 disturbers of the peace who were deterred by the two shots he fired into the air, as he said. However, the strange thing is -- and on this matter I accept the testimony of Commander Tobias -- that Superintendent Ezra indeed said to the group of officers in the vicinity of the Chief of Police and the Inspector-General that he had finished off the cartridge from his pistol, while he denied this in the testimony. It is not clear how he finished it (the cartridge) and at any rate, I will not be able to establish that from this shooting a person's death was caused.

IV. The Case for Prosecution

The Kama report makes clear that at least some of the 17 killings that occurred that day were avoidable, and that much of the police gunfire in the Sanctuary was both reckless and outside of life-threatening situations. At the same time, Judge Kama declines to order prosecutions or recommend steps against any of the security forces involved. In the view of Middle East Watch, this decision is unacceptable.

Whether or not one accepts Judge Kama's conclusion that the evidence gathered to date is insufficient to sustain charges of homicide, the factual record of the inquest provides what Middle East Watch believes to be clear *prima facie* evidence for lesser criminal charges against some of the individuals named in his report, and for, at the very least, disciplinary action against some of the commanders whose mishandling of the day's events contributed to the loss of life. For example, Judge Kama identifies Yona Doron as having opened fire from a window on the second

floor of the Mahkama building, at a time when "it is doubtful that he or others were in a life-endangering situation that made the shooting necessary." Doron himself testified that many people were injured from his shooting. This seems sufficient to bring assault charges against Doron.

It is disappointing that Judge Kama declined to order that charges be filed. This is especially the case given the standards that an investigating judge is supposed to use when deciding whether charges are merited. As Judge Kama himself acknowledges, "It is not necessary to have more than *prima facie* evidence or to have the amount of evidence that would be sufficient for a criminal conviction. The investigating judge is not at this point examining the weight of evidence, and is not determining the reliability of the witnesses."

Judge Kama describes several acts by individual policemen that seem to violate the rules of engagement of the Israeli National Police.²⁰ In general, these rules comport with international standards governing the behavior of law enforcement agents in situations of riot or crowd control, as codified in the 1979 U.N. Code of Conduct for Law Enforcement Officials, and elaborated on by the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.²¹ The Code of Conduct enshrines the notion that lethal force must not be used except when *proportional* to the harm faced, i.e., that it be reserved for situations in which lives are endangered, and that it be *necessary* to meet that threat to life, i.e., that no lesser means is adequate.

The Israeli Police rules state that "[t]he use of firearms will not be justified unless it is clear that no other means of force was available to ensure implementation of the mission and that the nature of that mission justified the use of this extreme means." All policemen must "behave with restraint to the farthest limit of human patience and common sense." The rules also make clear that individual policemen will be prosecuted according to objective standards of conduct set out in the rules and the law.

Charges against policemen would be based on statutes of Israel's penal law rather than directly on the open-fire regulations, which are a normative framework. Section 329(2) of the penal law, for example, defines the crime of aggravated assault with a lethal weapon. Police gunfire could be deemed criminal assault if it was carried out in violation of the open-fire regulations.

²⁰ See footnote **Error! Bookmark not defined.**

²¹ The Basic Code was adopted by the Eighth U.N. Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 1990.

Another possible charge is negligently endangering human life, under Article 338 of the penal law. Judge Kama raises the question of whether the evidence is sufficient to bring this charge against some of the policemen, then leaves the decision in the hands of the district attorney.

Attorney Feldman asked Judge Kama to charge policemen with the more serious offense of aggravated assault with a lethal weapon (Article 329(2)), which does not require a showing that an individual policeman caused the death or injury of a particular demonstrator. The offense carries a punishment of up to 20 years imprisonment.

Judge Kama rejected Feldman's suggestion, saying he lacks the evidence to show "the mental basis and material facts relating to the person who injured a certain other person and caused him severe injury with the degree of intentionality [required by the statute]." Feldman countered that a large body of Israeli case law shows that to prove this offense was committed it is not necessary to show specific intent by direct evidence. Intent can be shown by circumstantial evidence, such as shooting into a crowd with live ammunition.

Policemen accused of using excessive force have a number of grounds on which they might defend their actions, including the alleged need to defend their own lives and the lives of their colleagues. In Middle East Watch's view, the prospect of such arguments being made should not, however, preclude the bringing of charges. As the open-fire rules state, "even if the policeman thinks that the circumstances warranted the use of firearms, legal proceedings may ensue, and he must be ready to justify his action in court."

Police Commanders

The responsibility of commanders is less clearly spelled out in Judge Kama's report, since its focus was to examine the cause of death. However, the report does describe incidents in which the behavior of commanders contributed to the use of excessive force. For example, policemen fired through the Moghrabi Gate in full sight of the officers who stood by preparing the reentry, "and it appears that every one of those who stood near the door of the gate did whatever he felt like." Commander Bibi then ordered the assault to begin even though the troops "did not have sufficient ammunition, and what they had was not fit for events such as this one." This "affected [i.e., precipitated] the beginning of the use of live bullets at the next stage."

Attorney Feldman's arguments at the inquest flesh out the case against some of the policemen and officers involved, drawing on the factual record of the case:

In the first place we have in question a force which by this point has gone through no small trauma of a violent encounter with thousands of rioters, the anger, the feeling of humiliation and perhaps the will to revenge still present among them; but even worse, in the first stage this force exhausted its supply of tear gas and rubber bullets in confronting the rioters, and now all that remained for them to use was live fire.

It is difficult to exaggerate the cardinal significance of this fact in the events that unfolded from this situation. Every confrontation with rioters, including ones that did not endanger life, would lead to only one response: live fire. These Border Police were unable to choose the means, to calibrate their response to the magnitude of the threat, and in any violent clash, they would respond with live fire causing death or severe injury.

Feldman singles out Commander Bibi, whom he accuses of knowingly ordering his men into a situation where they would have to use live ammunition inappropriately, with the attendant likelihood of serious injury:

From the onset, [Officer] Rizeq [Ghanem] has said in his testimony, he heard from Bibi that "in a life-endangering situation, when you have no choice, and you have no means, and they come closer and endanger your life, you have no choice but to shoot at the legs, in the direction of the legs."

Rizeq explicitly points out in his testimony the difficulty he faced when the police with whom he entered had all, or most of them, been with him during the first stage inside the Temple Mount, and while there had used up all of their gas and rubber bullets. In answer to the question, "Were you aware of the problem?" he answers in the affirmative. And in answer to the question, "In order to solve this problem did you go to Bibi and tell him, 'my policemen hardly have any rubber and gas,?' " he also answers in the affirmative.

On page 179 of the *protocol*, he affirms the things which appear in his name in the [Police's] operational investigation [report] : "I faced the Commander of the Greater Jerusalem area, General Bibi, and I asked him, if they break in [to the Temple Mount] and the supply of gas and rubber bullets, which is already very small, runs out following the events in the first stage, what should we do? The area commander's answer appears in the report, in quotation marks, "to injure them in the legs."

Rizeq was aware of the danger bound in such an order, which together with the fact that the police were not equipped with means other than live fire, was likely to cause unjustified firing. Therefore, he said that he refrained from issuing this order "so as to avoid causing the police to shoot, which would have caused chaos to break out." But he did not dismiss the possibility that Bibi gave this order to other policemen...

The rapid spread of Bibi's order among the policemen lacking alternative means can be learned, for example, from the testimony of Menachem Hiliyah (p. 91, session of December 3, 1990): "I heard from the guys who were there. I heard them say that he [Bibi] gave an order that only by firing toward the legs would we get control of the situation, and that's it." This witness as well used all the rubber and gas that he had in the Temple Mount area. And he says that "our policemen said that Bibi gave an order to shoot at the legs." And when asked what he understood from this he answered, "I understood that in order to control the Temple Mount you need -- there is no other way because gas and rubber did not faze them at all."

See also the testimony of Tidhar Levy who relates that afterwards he heard from the guys that Bibi had said to shoot at the legs or something like that.

See also the testimony of Nuri Efraim, p. 105: He heard Rizeq tell an officer from the "blues" [the regular police]: Using this gas does not help at all, and the grenades come back to us, and look at what a flood of stones comes from there." And he quotes the response of the officer who, according to all indications, is Bibi: "He replied that if there is no choice we will break into the gate, and begin to use live fire towards the legs of the rioters...."

On December 18, Commander Bibi testified at the inquest, and his version is to a large extent the opposite of what he said on p.4, that he called to the police to stock up on rubber and gas, and, on p.10, that he told the police to stock up on rubber, and emphasized that the use of live fire was only when there was an immediate life danger. In addition, he affirms that he did not check whether they stocked up on rubber and gas.

This does not raise or lower [the chances] that Bibi indeed said that shooting towards the legs is for life-threatening situations. Most of the versions near the time of the incident (mainly Rizeq's operational investigation mentioned above) tend to suppositions that do not preclude that the firing was in response to life-endangering situations. But the essence of what Bibi said is that he knew that the Border Police were entering a dangerous, violent, unstable place, with live fire at their disposal only, and he did not stop them.

It transpires that in the nearby Mahkama building there was a large supply of rubber bullets and gas, and during the period of preparing it was certainly possible to equip the Border Police, whose supplies had run out. See the testimony of Muhlas Abu Janeb, December 2, 1990, p. 76, which states that in the Mahkama there is a storage place for rubber bullets.

Additionally, it turns out that fresh, properly-supplied Border Police arrived, and they could have been sent at the head of the force to break in.

In our opinion, there is *prima facie* evidence against General Bibi that indicate he did something or did not prevent something from being done that enabled the Border Police to commit a crime of causing severe injury with shooting instruments, or advised Border Policemen to commit the crime of causing severe injury.

In light of the evidence against Commander Bibi that Feldman presents here, it is astonishing that Bibi was promoted on November 12 to full commander, with an increase in salary. Neither he nor any of the commanders involved in the events at the Sanctuary have faced charges or disciplinary measures.

A Negligent Investigation by Police Hampered the Chances for Prosecution

One facet of the affair inadequately addressed in Judge Kama's report is the police's failure to conduct a timely and thorough criminal investigation at the scene of the incident. Again, Attorney Feldman makes a strong case that the negligence of the police investigators hampered the prospects of any subsequent inquiry, including Judge Kama's, to determine responsibility for the deaths that day. He writes:

The police, for the most part senior members such as the Chief Superintendent and the Chief of Police, did not think that this was an incident requiring a criminal investigation, namely, rapid-as-possible collection of evidence and signs in the area, and a proper investigation of those involved. This, in our opinion, constitutes negligence, belittling of human life lost during the event, and a lack of will to carry out an investigation whose results would be likely to indicate guilt on the part of policemen.

The most glaring act of negligence committed by police investigators was the failure to seal off the site and examine it as soon as possible after the incident. Standard investigation procedures call for sealing off a scene and the prompt collection and preservation of evidence.²² As Feldman points out, the on-site investigation did not take place until ten days later, after the Sanctuary had been cleaned, bullet shells had been collected, and it was no longer possible to register or locate many eyewitnesses.

Another act of negligence that hampered the investigation was the failure of the police to collect the guns used in the shooting, a routine step that would have helped to determine which gun had been used by which policeman.²³ By the time Judge Kama had begun his inquiry, the value of a ballistics analysis was sharply reduced, since identification of the guns that had fired the lethal shots could no longer be tied to individual policemen.

²² See, for example, the "Model Protocol for a Legal Investigation of Extra-Legal, Arbitrary and Summary Executions," ("Minnesota Protocol"), U.N. Centre for Social Development and Humanitarian Affairs, *Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions*, U.N. Doc. ST/DSDHA/12, U.N. Sales No. E.91.IV.1, p. 16 (1991).

²³ *Op. cit.* Minnesota Protocol, p. 17. It is the policy of the IDF Criminal Investigation Division to collect the guns of soldiers after a shooting incident in the West Bank or the Gaza Strip, if there is a reasonable chance that it will contribute to the evidence needed in the investigation, according to Captain Yuval Horn, an aide to the chief prosecutor of the Israel Defense Force (IDF). Interview in Tel Aviv with Middle East Watch, July 28, 1991.

Autopsies, another routine step in investigations of shooting deaths, were not performed on any of the persons killed in the Sanctuary. Palestinians hastily buried their bodies, and Judge Kama declined to order their exhumation, saying, "In the circumstances of this special case, removing the corpse from the grave would not add anything to the investigation of reasons for death, and at this point there is no justification for it." In fact, if police had determined which guns had been used by which policemen, it is very likely that the autopsies would have provided useful forensic evidence (e.g., on the type of bullet, the distance of the gun, whether the bullet entered in the front or back, and at what angle).

The issue of autopsies in cases involving Palestinians killed by security forces is highly complex. For a variety of reasons, families or young activists tend to seize the bodies of the victims and bury them promptly, before officials can perform autopsies.²⁴ However, in some controversial cases, Palestinian families have consented to allowing the authorities to conduct autopsies or exhumations, when they were able to appoint an independent doctor to observe.

In the Temple Mount/Haram al-Sharif case, the absence of autopsies, and the failure to promptly seal off and examine the scene and to determine who used which gun, add up to a wholly inadequate criminal investigation. These types of problems also hamper the IDF's investigations of killings by soldiers in the West Bank and Gaza Strip, as shown in Middle East Watch's *The Israeli Army and the Intifada*.

Feldman writes that, as a result of the inadequate police probe into the events at the Sanctuary,

[W]e lack the basic elements for a criminal investigation, and are left searching for sufficient evidence from second-hand sources, from the testimony of those who are suspect, and from the testimony of others who were involved in crimes of disturbing the peace that occurred at the site and who, themselves, foresaw that they too might be judged in connection with these incidents.

²⁴ See pp. 130-131 of *The Israeli Army and the Intifada*.

Notwithstanding these shortcomings, the Attorney General will find, as Israeli legal affairs columnist Moshe Negby wrote, "a lot of material in the [Kamal] report justifying, and even compelling, criminal and disciplinary action for lighter offenses: illegal use of weapons, breaking the rules of engagement, and wrongful behavior."²⁵

²⁵ **"There Is Enough Evidence for Criminal and Disciplinary Proceedings,"** *Hadashot*, July 19, 1991.

A failure to prosecute would follow a disturbing pattern in Israel's response to allegations of misconduct by its security forces: truth-telling but without accountability. Although allegations of grave abuses are not often seriously probed by authorities, Israel has on occasion conducted vigorous and self-critical investigations of major incidents. However, even in these cases, those who were implicated are punished lightly if at all.

In 1987, the government-appointed Landau Commission investigated the practices of the General Security Service (Shin Bet), and found that its agents routinely used physical force when interrogating Palestinian security suspects, and then just as routinely lied about it when the defendants challenged their confessions in court. Yet the commission did not recommend any prosecutions for perjury, and there were none.

In 1982, after Phalangists massacred Palestinians in the Sabra and Shatila refugee camps near Beirut, the government-appointed Kahan Commission pinned indirect but heavy responsibility on Defense Minister Arik Sharon and Chief-of-Staff Rafael Eitan. Sharon was forced to resign, but was immediately given another ministerial post and today is a serious aspirant to the premiership. Eitan stayed on as Chief-of-Staff and is now Minister of Agriculture. No one was prosecuted.

Judge Kama's inquest into the deaths at the Sanctuary represents a great leap in credibility from the Zamir Commission. Like the Kahan and Landau commissions, Judge Kama's inquest is evidence of Israel's willingness to probe and expose wrongdoing by its agents. Regrettably, it also reveals the lack of will -- so far -- of authorities to prosecute those responsible for serious human rights abuses.

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Middle East Watch was created in 1989 to monitor human rights practices in the Middle East and North Africa and to promote respect for internationally recognized standards. The chairman of Middle East Watch is Gary Sick, the vice chairs are Lisa Anderson and Bruce Rabb, the executive director is Andrew Whitley, the research director is Eric Goldstein, the associate director is Virginia N. Sherry, the senior researcher is Aziz Abu Hamad, and the associate is Christina Derry.

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