

Fact Sheet on Israeli Military Justice¹

1. Introduction. During the Senate Armed Services Committee Hearing on June 4, 2013, witnesses suggested that the United States military mirror the Israeli military justice system and eliminate military commanders' jurisdiction over serious crimes such as sexual assault.² One senator noted that in the last 5 years the Israeli Military Advocate General (MAG) officers have prosecuted several high profile cases, and that concurrently, reports of sexual assault and harassment offenses have increased by 80%.³ In the Israeli Military Justice System, MAGs have always prosecuted courts-martial and oversee disciplinary hearings conducted by commanders.⁴

2. The Israeli System.

a. The Israeli Defense Forces (IDF) active duty strength is approximately 176,500 and reserve personnel is approximately 445,000.⁵ Women comprise 33% of the IDF (approximately 58,833 service members), including 51% of IDF officers, 15% of technical personnel, and 3% of IDF combat soldiers.⁶ By contrast, approximately 15% of active DoD personnel (214,098 service members) are women.⁷

b. Military service in Israel is compulsory, involves a large portion of the population, and the Military Justice Law (MJL), 5715-1955 provides the legal framework.⁸

¹ This document reflects the personal opinion of the author and does not represent the views of George Washington University or the Law School. This fact sheet was written with the assistance of Julie Dickerson, a 2015 J.D. candidate.

² Senate Armed Services Committee, *Oversight Hearing to Receive Testimony on Pending Legislation Regarding Sexual Assaults in the Military*, (June 4, 2013) (statement of Senator Gillibrand at 49), <http://www.armed-services.senate.gov/Transcripts/2013/06%20June/13-44%20-%206-4-13.pdf>.

³ *Id.* See also Noam Barkan, *IDF: Rise in Sexual Harassment Complaints*, ynetnews.com (Aug. 5, 2012), <http://www.ynetnews.com/articles/0,7340,L-4264554,00.html>.

⁴ Major General Menachem Finkelstein and Yifat Tomar, *The Israel Military Legal System – Overview of the Current Situation and a Glimpse into the Future*, 52 A.F. L. REV. 137, 146 (2002).

⁵ *Israel*, The Institute for National Security at 11 (2012), [http://www.inss.org.il/cdn.reblaze.com/upload/\(FILE\)1336472780.pdf](http://www.inss.org.il/cdn.reblaze.com/upload/(FILE)1336472780.pdf).

⁶ *More female officers in more positions in the IDF*, IDF Spokesperson (Nov. 30, 2011), <http://www.idf.il/1086-14000-EN/Dover.aspx>.

⁷ *Statistics on Women in the Military*, Women in the Military Service For America Memorial Foundation. Inc. (Rev. Nov. 30, 2011), <http://www.womensmemorial.org/PDFs/StatsonWIM.pdf>.

⁸ Finkelstein, *supra* note 4, at 137-38.

The MJL is a “separate and complete code, the need for which arises out of the uniqueness of military service.”⁹

c. The MJL divides powers between the military judicial system and the MAG’s office.¹⁰ MAGs operate independently within the military. MAGs are legal advisors to IDF commanders and conduct courts-martial.¹¹ When acting in their advisory capacity, MAGs do not fall within that commander’s chain of command. The commander cannot determine the MAG’s salary or impact the MAG’s promotion opportunities.

d. A MAG acts not only as legal counsel to the military commanders but also enforces penal laws; a MAG may file a charge sheet, order a preliminary investigation, and arraign soldiers for both military offenses and offenses committed under the penal laws of the State of Israel.¹² A MAG is, however, subordinate to the Attorney General in terms of arraignment.¹³ MAGs also supervise disciplinary proceedings¹⁴ in which the commander decides guilt or innocence and imposes a sentence.¹⁵ MAGs review disciplinary hearing documentation and may “amend the judgment, quash it, or return it to the disciplinary officer.”¹⁶

e. IDF commanders also have some legal powers. Each jurisdictional district (Northern Command, Central Command, Southern Command and Field Corps HQ, the Home Front Command, the Air Force, the Navy, and the General Staff) is headed by a district chief “who may intervene and influence legal processes in the military.”¹⁷ The

⁹ *Id.* at 139.

¹⁰ *Id.* at 138.

¹¹ Professor Amos Guiora telephone call with Julie Dickerson on 16 July 2013, is the source for the information in the remainder of this paragraph [hereinafter Guiora Phone Call].

¹² See Finkelstein, *supra* note 4, at 140-41.

¹³ HCJ 4723/96, *Avivit Atiyah v. Attorney General*, 51(3) P.D. 714 (holding the MAG must accept the Attorney General’s interpretation of legal provisions and that the Attorney General may intervene in “special interest” matters that which exceed the realm of military law, acceptable norms, or general policy).

¹⁴ Amendments to disciplinary law went into effect in January 2009 that broadened the power of non-commissioned and commissioned officers, enabling them to submit certain complaints. Additionally, “the degree of punishment for specific offenses and the ranks of officers entitled to preside over a variety of cases were revised.” *Legal Supervision of Disciplinary Hearings*, IDF MAG Corps, <http://www.law.idf.il/647-2351-en/Patzar.aspx>.

¹⁵ See Finkelstein, *supra* note 4, at 143.

¹⁶ *Legal Supervision of Disciplinary Hearings*, *supra* note 14.

¹⁷ See Finkelstein, *supra* note 4, at 145.

district chief may (1) order the Chief Military Prosecutor to file an appeal against a court-martial judgment, (2) with the consent of a military advocate, order the quashing of a charge sheet, and (3) confirm or mitigate any court-martial imposed sentence.¹⁸

f. Military Justice Law (MJL) provides for adjudication by military courts – which may impose long-term penalties – or disciplinary proceedings – which are conducted by commanders and serve to provide discipline in the field through lighter sentences.¹⁹ The MJL establishes courts-martial (courts of first instance) and the Military Court of Appeals.²⁰ The Military Court system has five courts of first instance: a District Court Martial, a Naval Court Martial, a Special Court Martial, a Field Court Martial, and a Traffic Court Martial;²¹ special courts exist for cases relating to officers with the rank of lieutenant colonel and above and death penalty cases.²² Courts of first instance and disciplinary proceedings may be appealed to the Military Court of Appeals and next to the Supreme Court, though an appeal to the Supreme Court rarely occurs.²³ Similarly, a MAG's decision can be petitioned in the High Court of Justice.²⁴ An initial court-martial panel usually consists of three judges.²⁵ All judges have equal votes, but they serve different functions.²⁶ One judge is a lawyer who instructs the others in the law, and the remaining judges are field commanders who represent the voice of the “non-lawyer” or the soldiers on the ground.²⁷

¹⁸ *Id.* at 148-49.

¹⁹ Global Legal Research Center, *Military Justice: Adjudication of Sexual Offenses: Australia, Canada, Germany, Israel, United Kingdom*, The Law Library of Congress, July 2013, at 42-44 [hereinafter 2013 Congress Report].

²⁰ *Id.*

²¹ *Id.* at 45.

²² *Military Court System*, IDF MAG Corps, <http://www.law.idf.il/647-2350-en/Patzar.aspx>; 2013 Congress Report, *supra* note 19, at 42.

²³ Only 6 cases have been granted leave to appeal since 1986 when the MJL was amended to provide an option to appeal by leave. See Finkelstein, *supra* note 4, at 164.

²⁴ *Military Court System*, IDF MAG Corps, <http://www.law.idf.il/647-2350-en/Patzar.aspx>.

²⁵ See Finkelstein, *supra* note 4, at 164.

²⁶ Guiora Phone Call, *supra* note 11.

²⁷ *Id.*

g. The IDF Military Police comprise an independent unit not subordinate to military commands. They carry out criminal investigations and transfer evidence to the MAGs who then evaluate the evidence gathered and decide whether to submit an indictment.²⁸

h. Victims of sexual assault or harassment can choose to report either within the unit or outside the unit.²⁹ If a victim reports within the unit, commanders must inform the MAG of the complainant's allegations.³⁰ The decision "whether to adjudicate sex offenses in disciplinary proceedings can only be made by the military advocate [MAG] and not by commanders [and] . . . complainants are also entitled to file a civil complaint against their alleged perpetrators."³¹ "Lighter" sex offenses can be adjudicated in disciplinary proceedings by adjudication officers (AOs) who have "either a legal education or special training in handling sexual harassment cases at the IDF School of Military Justice."³² The MAG selects the AOs from a comprehensive database for each proceeding.³³

3. Analysis of Increases in Reports of Sexual Harassment in Israel.

a. There is not necessarily any reason to believe there is less sexual abuse in the Israeli Defense Force (IDF) than in the Department of Defense. "A 2003 study by the [IDF] itself found that 80 percent of women conscripts were exposed to sexual harassment in the course of their service."³⁴ In a different study, the "Advisor to the Chief of Staff on Women's Affairs for the IDF . . . found that one in seven female soldiers had been the victims of sexual harassment."³⁵ Without knowing the details of the surveys' methodologies, such as manner of questioning, content of questions, sample size, etc., it is impossible to assess the reliability of these extrapolations.

²⁸ *Indictment Process*, IDFT MAG Corps, <http://www.law.idf.il/647-2350-en/Patzar.aspx>.

²⁹ IDF Spokesman, telephone call with Julie Dickerson, 8 July 2013.

³⁰ Guiora Phone Call, *supra* note 11. Complaints of sexual harassment and non-violent sex crimes are also sent to the military police and MAG officers. *Id.*

³¹ 2013 Congress Report, *supra* note 19, at 50.

³² *Id.* at 43.

³³ *Id.*

³⁴ Rela Mazali, *Israel's arms around sexualized, racialized clients*, Jewish Peace News Blog (Mar. 15, 2009), http://jewishpeacenews.blogspot.com/2009_03_01_archive.html (linking to a report in the Hebrew language).

³⁵ Yael Slater, *Enhancing Equality between men and women in the Euromed Region Situation Analysis 2009 Israel*, ADVA Center 28 (citing 5th Periodic Report Concerning The Implementation of The International Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), Ministry of Justice and Ministry of Foreign Affairs, State of Israel, 2009), http://www.adva.org/uploaded/EuroMed%20Report_Final%2004-11-09%20WEBSITE.pdf.

b. The IDF Women’s Affairs Office reported that in 2007-2009 four categories of complaints were received in that office: 56% were physical harassment; 28% were verbal harassment; 13% were peeping; and 3% or 15 were rape.³⁶ In 2012, 3% of that year’s 500 reports were, “instances of rape, attempted rape, or sodomy, and half of the cases were of a physical nature. This is a small decrease from 2011.”³⁷ Reports of verbal abuse, peeping, and physical harassment, investigations of physical harassment (but not non-touching harassment), and indictments are depicted in the following table.³⁸

Military Sex Offense Reports and Indictments in Israel							
	2007	2008	2009	2010	2011	2012	Average
Reports	318	363	445	483	583	500	442
Investigations	94	103	131	143	144		123
% of Reports Investigated	30%	28%	27%	29%	25%		28%
Indictments		28	26	20	14	27	23
% of Reports Resulting in Indictments		8%	6%	4%	2%	5%	5%
% of Investigations Resulting in Indictments		27%	20%	14%	10%		19%

c. At the Senate Armed Services Committee hearing, a senator accurately explained that Israel, the UK, Australia and Germany have taken the serious crimes out

³⁶ Dana Wiler Polak, *Few sexually harassed female IDF soldiers report abuse*, Haaretz (June 9, 2010, 1:43 AM) (received reports in 2007-2009), <http://www.haaretz.com/print-edition/news/few-sexually-harassed-female-idf-soldiers-report-abuse-1.294998>.

³⁷ Yoav Zitun, *IDF launches provocative campaign against sexual harassment*, ynetnews.com (Feb. 10, 2013), <http://www.ynetnews.com/articles/0,7340,L-4343278,00.html>.

³⁸ Polak, *supra* note 36; Noam Barkan, *supra* note 3 (providing the number of reports in 2011 and the number of investigations in 2007 and 2011); Gili Cohen, *Indictments for Sex Crimes in IDF Doubled in 2012*, Haaretz (June 15, 2013, 5:43 AM), <http://www.haaretz.com/news/national/indictments-for-sex-crimes-in-idf-doubled-in-2012-1.529845> (listing indictments from 2008-2012). The number of sexual harassment complaints is of similar magnitude to the 390 reports in 1998, 436 in 1999, 373 in 2000, 372 in 2001, 217 in 2002, and 386 in 2003. United Nations Convention on the Elimination of All Forms of Discrimination against Women, June 2, 2005, *Fourth periodic report of States parties—Israel*, 48, U.N. Doc. CEDAW/C/ISR/4, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N05/373/19/PDF/N0537319.pdf?OpenElement>; United Nations Convention on the Elimination of All Forms of Discrimination against Women, Mar. 24, 2010, *Fifth periodic report of States parties Israel*, 76-77, U.N. Doc. CEDAW/C/ISR/5, http://www.iwraw-ap.org/resources/pdf/48_official_documents/Israel5.pdf (providing the following sexual harassment reports for 2004 to 2007 as follows: 358 in 2004; 346 in 2005; 345 in 2006; and 318 in 2007, and sexual harassment rates from surveys showing a rise in rates from 14% in 2002 to 21% in 2006); 2013 Congress Report, *supra* note 19, at 53 (citing Noam Barkan, *Rise in Reporting of Sexual Harassment in IDF*, Yediot Acharonot, Aug. 5, 2012, at 8 (in Hebrew), <http://www.meida.org.il/wpcontent/uploads/2012/09/sexual-harassment-IDF.pdf>).

of the chain of command. However, the rationale for that change was inaccurately described as follows:

[not all] commanders are objective. Not every single commander necessarily wants women in the force. Not every single commander believes what a sexual assault is. Not every single commander can distinguish between a slap on the ass and a rape because they merge all of these crimes together. So my point to you is[,] this has been done before by our allies to great effect, and in fact, in Israel, in the last 5 years because they have prosecuted high-level cases, you know what has increased by 80 percent? Reporting.³⁹

First, in the United Kingdom the transfer of authority from the convening authority to military lawyers was designed to protect the rights of the accused and ensure the structural independence of courts-martial.⁴⁰ The transfer was not made to enhance justice for victims, increase prosecutions of sex crimes, or done because convening authorities did not understand which crimes were serious offenses or practiced gender-based prejudice.⁴¹ Second, Israel's recent increase in reports of physical harassment, verbal harassment, and peeping, was not due to reducing the authority of commanders or convening authorities. In Israel, the fundamentals of the current system establishing the authority of the MAG were created by the Military Justice Law (MJL), which came into force on January 1, 1956.⁴²

The prosecution of some high profile, non-military sex crimes may have caused more victims to come forward and report offenses; however, the numbers of reported sex offenses has varied previously.⁴³ The year 2011 was the five-year-high for reporting sexual harassment with 583 reports, and that same year was the five-year-low for military sex offense indictments with only 14 military indictments. More importantly, the reported serious sex crimes that have the highest priority for deterrence and punishment have not increased over those same five years, as in 2008, there were 28 indictments of sex

³⁹ Senate Armed Services Committee Oversight Hearing, *supra* note 2, at 49.

⁴⁰ *Morris v. the United Kingdom*, (2002) 34 EHRR 1253, [2002] ECHR 38784/97 at ¶ 60 (citing *Findlay v. the United Kingdom* (judgment of Feb. 25, 1997, *Reports of Judgments and Decisions* 1997-I), <http://www.bailii.org/eu/cases/ECHR/2002/162.html>). See also *Grieves v. the United Kingdom*, (2003) 39 EHRR 52, [2003] ECHR 57067/00; Michael D. Conway, *Thirty-Ninth Kenneth J. Hodson Lecture in Criminal Law*, 213 Mil. L. Rev. 212, 224 (Fall 2012), [https://www.jagcnet.army.mil/DOCLIBS/MILITARYLAWREVIEW.NSF/20a66345129fe3d885256e5b00571830/256fb1f93504c34785257b0c006b99d4/\\$FILE/By%20Major%20General%20Michael%20D.%20Conway.pdf](https://www.jagcnet.army.mil/DOCLIBS/MILITARYLAWREVIEW.NSF/20a66345129fe3d885256e5b00571830/256fb1f93504c34785257b0c006b99d4/$FILE/By%20Major%20General%20Michael%20D.%20Conway.pdf).

⁴¹ *Id.*

⁴² See Finkelstein, *supra* note 4, at 138.

⁴³ *Id.*

crimes, and in 2012, there were 27 indictments of sex crimes. For 2011 and 2012, there were 15 reports of the most serious sex offenses of rape, attempted rape, or sodomy.

The IDF Manpower Directorate review, however, indicates that the rise in complaints could be a result of: (1) a rise in sexual harassment and assault incidents, (2) a rise in awareness about sexual harassment and assault after an IDF campaign focusing on the issue, or (3) IDF instructions to commanders and soldiers to immediately report sexual harassment and assault.⁴⁴ Amos Guiora, a University of Utah law professor and former IDF MAG, attributes some of the increased reporting to “recent high profile prosecutions” along with the balance of judicial power that Israel established between MAGs and commanders.⁴⁵

4. Analysis of U.S. and Israeli Prosecution of Serious Sex Offenses.

a. In FY 2012, the active duty strength of the U.S. Department of Defense (DoD) was 1,388,028 or 7.86 times as large as the Israeli active duty forces.⁴⁶ In FY 2012, 302 DoD military personnel were tried by courts-martial for sexual assault offenses, and 238

⁴⁴ Barkan, *supra* note 3. See also Alex Seitz-wald, *Answer to military's sexual assault problem may be overseas*, Salon (June 5, 2013, 2:31 PM), http://www.salon.com/2013/06/05/answer_to_militarys_sexual_assault_problem_may_be_overseas/ (noting the IDF has increased its attention on sexual assault).

⁴⁵ *Id.* See also Emily L. Hauser, *Opening Up About Sexual Assault in Israel*, The Daily Beast (June 29, 2013), <http://www.thedailybeast.com/articles/2013/06/20/opening-up-about-sexual-assault-in-israel.html> (noting that indictments for sex crimes in Israel's military doubled in 2012, potentially in relation to several high profile cases that brought attention to the issue); Emily L. Hauser, *Opening up About Sexual Assault in Israel*, The Daily Beast (June 20, 2013) (indicating a rise in reports of sex crimes in Israel attributed to high-profile civilian defendants and stating “Former President Moshe Katsav is currently serving a seven-year prison term for raping, sexually abusing and harassing three women; ex-Justice Minister Haim Ramon was convicted of sexual harassment; influential media figure Emmanuel Rosen was recently accused by 10 female colleagues of obsessive harassment and date rape”), <http://www.thedailybeast.com/articles/2013/06/20/opening-up-about-sexual-assault-in-israel.html>; Cohen, *supra* note 38 (describing a high profile military case publicized in September 2012 as follows, “[A]t the Israel Air Force's preparatory school ('Hatechni') in Be'er Sheva. . . . [t]hree instructors at the school were arrested on charges of rape, consensual but prohibited sexual relations with a minor and sexual abuse. The victims were all female cadets at the school. . . . In the end, two instructors were indicted on charges of having committed sexual offenses against female cadets during the time they served as instructors at the school. In a plea bargain, one of the instructors was sentenced to ten months in prison and the other was sentenced to six months of community service in a military context.”). However, the case cited in Cohen's article was publicized too recently to cause the spike in reports of sexual harassment.

⁴⁶ On September 30, 2012, the total population on active duty was 1,388,028. DoD Personnel and Procurement Statistics, *Military Personnel Statistics*, <http://siadapp.dmdc.osd.mil/personnel/MILITARY/miltop.htm> (click “Total DoD - December 31, 2012 (DMDC data)).

(79%) were convicted.⁴⁷ Without data reflecting how many indictments in 2011 or 2012 led to Israeli convictions, it is difficult to make an accurate comparison. However, even if all of the Israeli indictments in 2012 were convictions, the rate per thousand of DoD personnel convicted by courts-martial for sexual assault offenses was .17 (238/1,388,000) compared to the .15 (27/176,500), who were indicted in Israel in 2012.

b. The Israeli active duty population is 176,500 or 4 times as large as the active duty population of Fort Hood. Yet Fort Hood completed about the same number of military sex offense prosecutions as the entire Israeli Defense Force (Fort Hood tried 26 sex offense courts-martial in FY 2012; Israel averaged 23 indictments from 2008 to 2012 with 27 indictments in FY 2012—statistics on completed trials in Israel are not available). If the goal is to prosecute more sex offenses, the Israeli system seems not to be the model for DoD to emulate.

⁴⁷ Department of Defense, *1 Annual Sexual Assault Report 73* (2012), http://www.sapr.mil/public/docs/reports/FY12_DoD_SAPRO_Annual_Report_on_Sexual_Assault-VOLUME_ONE.pdf.