

The Public Commission to Examine the Maritime Incident of 31 May 2010

The Turkel Commission

SUMMARY OF SECOND REPORT

Israel's Mechanisms for Examining and Investigating Complaints and Claims of Violations of the Laws of Armed Conflict According to International Law

February 2013

1. The Government of Israel charged the Commission with examining — apart from the matters addressed in the Commission's First Report — 'whether the mechanism for examining and investigating complaints and claims raised in relation to violations of the laws of armed conflict... conforms with the obligations of the State of Israel under the rules of international law'.
2. The Commission's Report reviews the rules of international law and the prevailing trends in this context in other countries, and accordingly formulates recommendations aimed to improve the mechanisms in Israel, and to ensure that they conform to international law. Naturally, the Report focuses especially on the military examination and investigation mechanisms, but it also assesses mechanisms of other security branches and of senior decision-makers in the military and civilian authorities.
3. The following members were appointed to the Commission: Supreme Court Justice (ret.) Jacob Turkel, chairman; General (ret.) Amos Horev; Ambassador Reuven Merhav; and Prof. Miguel Deutch.

In addition, the following foreign experts were appointed to act as observers: Lord David Trimble of Ireland, a Nobel Peace Prize winner and formerly First Minister of Northern Ireland, and Brigadier-General (ret.) Kenneth Watkin, former

Judge Advocate General of the Canadian Forces. Brigadier-General Watkin resigned as a foreign observer on the Commission in April 2011 because of a previous undertaking. Timothy McCormack, a Professor of Law at the Melbourne Law School, and the Special Adviser on International Humanitarian Law to the Prosecutor of the International Criminal Court in The Hague, was appointed in his place.

4. Several world-renowned experts assisted in the writing of this Report, including Prof. Claus Kreß, the director of the Institute for International Peace and Security Law at the University of Cologne, and Gabriella Blum, the Rita E. Hauser Professor of Human Rights and Humanitarian Law at Harvard University, who both agreed with the legal analysis in this Report and advised the Commission in formulating its recommendations. Prof. Michael Schmitt assisted the Commission until September 2011 when he was appointed as Chair of the International Law Department at the United States Naval War College.

5. Alongside the expert advisors, the Commission's work was assisted by a legal staff from Israel and abroad, many of whom have advanced degrees specializing in international law. The Commission's Coordinator, Advocate Hoshea Gottlieb, expertly and efficiently managed the compiling of this Report as well as coordinating contacts with the advisers, experts and professional and administrative staff.

THE COMMISSION'S METHODOLOGY

6. The Commission assembled the relevant information and materials it needed in various ways, *inter alia*, by collecting oral and written testimonies from several sources: government figures; representatives of human rights organizations; and experts in the field of international law. In order to obtain more direct knowledge of how the examination and investigation processes are actually followed in practice the Commission also examined a sample of files of examinations and investigations carried out by the IDF.

Additionally, the Commission conducted a comparative survey of the examination and investigation mechanisms of six countries — the United States, Canada, Australia, the United Kingdom, Germany and the Netherlands. These countries have sophisticated systems of investigating violations of the laws of armed

conflict and prosecuting them in criminal or disciplinary proceedings. For the purpose of carrying out the surveys, experts were chosen from each of the six countries, some of which have practical experience in senior positions in the military justice systems they reviewed. The experts prepared comprehensive reports based on a questionnaire compiled by the Commission.

THE STRUCTURE OF THE REPORT

7. This Report contains five chapters. Chapter A outlines the normative framework that governs the examination and investigation of complaints and claims regarding violations of the laws of armed conflict. The Commission found that according to the rules of international humanitarian law, international human rights law and international criminal law, there is a duty to conduct an investigation whenever there is a reasonable suspicion of the commission of a war crime. Such an investigation is usually a criminal investigation, but it may take other forms (such as a commission of inquiry). When the information about an incident is only partial or circumstantial, and particularly when there has been an exceptional incident, such as unanticipated civilian casualties, the Commission found that there is a duty to conduct a ‘fact-finding assessment’. A fact-finding assessment is a preliminary assessment to ascertain the circumstances of an event and to collect sufficient information that can assist the relevant authorities in deciding whether there is a need for an investigation. Obviously, if the fact-finding assessment reveals circumstances that give rise to a reasonable suspicion of a war crime then a subsequent investigation is required.

The provisions of international humanitarian law applicable to an armed conflict indicate that the death or injury of an individual does not, of itself, raise a reasonable suspicion for the commission of a war crime. In contrast, where the forces are not engaged in actual combat operations, but rather in law enforcement activities, such as maintaining public order, the death or serious injury of an individual caused by the security forces gives rise, in itself, to an obligation to immediately commence an investigation.

Irrespective of the type of investigation, it should be conducted in accordance with the general principles for an ‘effective investigation’: independence; impartiality;

effectiveness and thoroughness; promptness; and transparency. The implementation of the general principles may vary according to the specific context.

Additionally, the Commission found that in order to ensure compliance with and implementation of the laws of armed conflict, there is a legal duty to conduct an examination into all suspected violations of the laws of armed conflict that do not reach the threshold of a war crime.

8. Chapter B is a summary of the comparative survey carried out by the Commission into the examination and investigation mechanisms of the six countries. Here the Commission addressed, *inter alia*, the practices in the countries surveyed concerning the reporting duties imposed on soldiers and commanders, the thresholds for carrying out an investigation, the conditions for carrying out a fact-finding assessment, and the methods employed in the examinations and investigations. The Commission found that in recent years, most of the countries surveyed have initiated institutional reforms to their examination and investigation systems. One of the main trends that can be identified is an emphasis on the independence of the investigation bodies as demonstrated by their separation from the chain of command or by a move towards external oversight and review.

9. Chapter C outlines the examination and investigation mechanisms in Israel. The Chapter presents the normative framework in Israel that gives rise to the duty to investigate violations and the provisions that define the relevant violations, i.e., what are the offenses involving violations of the laws of armed conflict that are recognized by Israeli domestic law. The Chapter's main focus is the Israeli mechanisms for complaints raised against members of the IDF, police, Israel Security Agency (ISA – also known as the Shin Bet) interrogators, prison wardens and the civilian echelon. It also discusses the institutions that oversee and review the conduct of these mechanisms. Within this context, the Chapter presents the procedures for reporting suspected incidents, the grounds for opening an examination and an investigation as well as the methods used for carrying out such examinations and investigations.

10. Chapter D considers whether the mechanisms in Israel that examine and investigate complaints and claims of violations of the laws of armed conflict (Chapter C) are consistent with Israel's obligations under international law (Chapter A), in

comparison to the trends that can be seen from the practices of the countries that were surveyed (Chapter B). When formulating the recommendations, the Commission took into account the fact that States have broad discretion when selecting tools and mechanisms to fulfill their obligations under international law, allowing them to take into account their distinct constitutional and legal institutions. Therefore, when the Commission is of the view that there is room to change practices in the Israeli examination and investigation mechanisms it does not necessarily indicate flaws in the past, but rather it signifies the Commission's aspiration to pave a way towards best practice in this field in the future. The Commission formulated eighteen recommendations that will be summarized below.

11. Chapter E addresses the specific question of the compliance of the examination and investigation mechanisms in the maritime incident of 31 May 2010 with the rules of international law. The Chapter reviews the examination and investigation activities carried out by the various mechanisms in Israel into the maritime incident, and considers some of the issues relating to these mechanisms and their investigation of the incident, in light of the rules of international law as analyzed in this Report. Despite the extraordinary nature of the maritime incident, most of the problems identified in the analysis of the examination and investigation processes conducted into the maritime incident were not unique. This Chapter is thus an example of the application of the principles determined in this Report to a specific incident.

SUMMARY OF THE CONCLUSIONS AND RECOMMENDATIONS

12. Ultimately, the Commission held that the examination and investigation mechanisms in Israel for complaints and claims of violations of the laws of armed conflict generally comply with Israel's obligations under international law. Notwithstanding, the Commission is of the opinion that in several of the areas examined there are grounds for improving the examination and investigation mechanisms and for changing the accepted policy. The Commission is also of the opinion that certain accepted practices, which are appropriate in themselves, should be enshrined in express written guidelines that are made publicly available. The Commission's position is that the implementation of the recommendations will

promote the efficiency of Israel's examination and investigation mechanisms so that they will reflect best practice.

A brief summary of the recommendations and conclusions reached by the Commission is as follows:

Recommendation No. 1: 'War Crimes' Legislation

The Ministry of Justice should initiate legislation for all international criminal law offenses that do not have a corresponding domestic offense in Israeli criminal law.

Moreover, the Commission regards as important the specific inclusion of international 'war crimes' norms in Israeli domestic legislation.

Recommendation No. 2: Responsibility of Military Commanders and Civilian Superiors

Legislation should be enacted to impose direct criminal liability on military commanders and civilian superiors for offenses committed by their subordinates, where the former did not take all reasonable measures to prevent the commission of offenses or did not act to bring the matter to the attention of the competent authorities when they became aware of the offenses after the event.

Recommendation No. 3: Reporting Duties

The 2005 Reporting Procedure for incidents in which Palestinian civilians were injured, determined by the Chief of Staff, following an undertaking to the High Court of Justice, has not been implemented. The Reporting Procedure should be incorporated into the Supreme Command Orders and shall apply to every incident involving the IDF or forces for which the IDF is responsible. The Reporting Procedure should be implemented and sanctions should be imposed on commanders who do not comply with it.

The Reporting Procedure should require documentation of the scene of an incident. This obligation includes seizing all exhibits and documents that may assist the examination and investigation, and storing the exhibits in conditions that will best preserve them for proper examination at a later date.

Recommendation No. 4: Grounds Giving Rise to an Obligation to Examine and Investigate

The Commission found that the IDF's 'investigation policy' following the death of a person during combat operations is consistent with Israel's obligations under international law. This policy should be properly enshrined in the appropriate provisions.

In order to expedite the assessment of complaints, upon receipt of initial reports the Military Prosecution should classify them according to the legal framework of each incident, namely whether the incident occurred during combat operations and is therefore subject to the rules regulating hostilities, or whether it is any other incident subject to law enforcement norms.

Recommendation No. 5: Fact-Finding Assessment

An operational debriefing is not designed for deciding whether to begin an investigation. A mechanism should be established for carrying out a fact-finding assessment, which should form the basis for the Military Advocate General's (MAG) decision as to whether an investigation is necessary. For this purpose, a special team shall be established in the IDF with expertise in the theatres of military operations, international law and investigations. The function of the team will be to provide the MAG with as much information as possible, within a period of time stipulated in procedures, in order to enable the MAG to decide whether it is necessary to begin an investigation.

The fact-finding assessment should include, insofar as possible, the questioning of complainants and additional witnesses that are not military personnel.

Recommendation No. 6: The Decision on Whether to Open an Investigation

Procedures should establish a time frame of a few weeks during which the MAG decides whether to begin an investigation on the basis of the material in his possession.

The MAG's authority to order an investigation should not be made conditional upon consulting the commanding officer responsible for the unit involved in the incident, whose rank is, at least, Major-General, but the MAG should be allowed to consult any commander as he sees fit.

Every decision of the MAG not to open an investigation should state the reasons for the decision.

At the end of an examination process and at the end of a criminal investigation, irrespective of the outcome, the MAG should consider referring the relevant material to the commanding officers.

Recommendation No. 7: Independence of the MAG

The fact that the MAG is subordinate to the authority of the Attorney-General in professional matters is consistent with the principle of independence as established in international law. However, legislation and organizational arrangements are required in order to safeguard this subordination:

The MAG should be appointed by the Minister of Defense, upon the recommendation of a public professional committee. In order to institutionalize the professional subordination of the MAG to the

Attorney-General, the latter should be the chairman or a member of the public committee.

The MAG's term of office should be fixed, like that of the Attorney-General, at one term of six years without any possibility of extension. The MAG should also be given a fixed rank.

Recommendation No. 8: The Military Advocate-General's 'Dual Hat'

In order to prevent any appearance of partiality due to the MAG's dual hat — as head of the Military Prosecution and as the chief legal advisor to the military — the status and independence of the Chief Military Prosecutor (CMP) should be strengthened.

The CMP should be appointed by the Minister of Defense, upon the recommendation of a committee chaired by the MAG. The CMP's term of office and rank should be determined in advance.

Recommendation No. 9: The Investigations of the Military Police Criminal Investigation Division

A Department for Operational Matters should be established in the Military Police Criminal Investigation Division to work with the MAG Corps for Operational Matters with bases in the areas where the incidents under investigation occur. The investigators should include persons that are fluent in Arabic.

Recommendation No. 10: Establishing the Investigation Time Frame

The MAG, in coordination with the Attorney-General, should set a maximum period of time between the decision to begin an investigation and the decision to adopt legal or disciplinary measures or to close the case.

The MAG should publish, at least once a year, statistical data on the period of time taken to handle cases.

Recommendation No. 11: Transparency of Proceedings

The arrangements provided in the Rights of Victims of Crime Law, 5761-2001, relating to the receipt of information on criminal proceedings should also be applied, *mutatis mutandis*, to persons injured by law enforcement operations of the security forces that are investigated by the Military Police Criminal Investigation Division.

The MAG Corps should implement a strict documentation procedure for all examination and investigation actions carried out in a file and for all decisions made, especially in cases involving investigations of alleged violations of the laws of armed conflict.

Recommendation No. 12: Oversight of the Legal Advice given by the MAG Corps

In order to strengthen the Attorney-General in exercising his oversight powers over the legal advice given by the MAG, a unit specializing in the laws of armed conflict should be established in the Advice and Legislation Department at the Ministry of Justice.

Recommendation No. 13: Individual and Systemic Review of the Military Prosecution System

Legislation should provide a procedure to appeal decisions of the MAG to the Attorney-General. This legislation should determine the period of time for filing an appeal and for the Attorney-General to make a decision.

When the Complaints Commission for the Public Prosecution is established, it should be authorized to review all the branches of the Military Prosecution, including monitoring the bodies of the IDF that conduct examinations and investigations, in order to ensure that the MAG's regulations and policy are being implemented *de facto*.

Recommendation No. 14: The Handling of Complaints against Police Officers

The examination and investigation of complaints against police officers operating under IDF command should be carried out by the IDF, rather than by the Israel Police or by the Police Internal Investigation Department at the Ministry of Justice.

Recommendation No. 15: The Handling of Complaints against Israel Security Agency Interrogators

The role of the ISA Interrogatee Complaints Comptroller should be transferred from the ISA to the Police Internal Investigation Department at the Ministry of Justice.

All ISA interrogations should be fully videotaped, in accordance with rules that will be determined by the Attorney-General in coordination with the head of the ISA.

Recommendation No. 16: The Handling of Complaints against Prison Wardens

The head of the Police Investigations and Intelligence Department should ensure that during the training of the police investigators that are responsible for investigating prison wardens, proper emphasis is placed on learning the relevant rules of international law.

Recommendation No. 17: The Handling of Complaints against the Civilian Echelon

The Commission found that the system of investigating senior decision makers by commissions of inquiry and examination, which is well established in Israel, satisfies Israel's obligations under international law to investigate acts, decisions or omissions that give rise to a suspicion of serious violations of the laws of armed conflict.

Recommendation No. 18: Implementation of the Commission's Recommendations

The MAG should publish a comprehensive and updated handbook for the examination and investigation mechanisms in the IDF. The handbook should lay down guidelines for the examination and investigation mechanisms with regard to the handling of complaints and claims of violations of the laws of armed conflict. The MAG's guidelines should incorporate the guidelines and procedures that will be formulated pursuant to the recommendations of this Report. The handbook should be available to the public.

The Commission recommends that the Prime Minister should appoint an independent implementation team that will monitor the implementation of the recommendations in this Report and report periodically to the Prime Minister.

The Commission's Conclusions regarding the Investigation of the Maritime Incident of 31 May 2010

Although all aspects of the incident were ultimately investigated, the Commission saw fit to point out several structural problems revealed during the investigation and that demonstrate the importance of the recommendations in this Report:

The Commission pointed to the fact that there is no civilian body that coordinates all aspects of the activities of the security forces from the perspective of international law and strengthened its recommendation to establish a unit specializing in the laws of armed conflict in the Advice and Legislation Department at the Ministry of Justice (see above, Recommendation No. 12).

The Commission determined that the MAG's decision not to open a criminal investigation immediately after the maritime incident was consistent with the laws of armed conflict (see above, Recommendation No. 4). Notwithstanding, the adoption of a policy that requires investigations into significant and unusual incidents should be considered, even though there is no legal obligation to investigate such incidents.

There is a need for an organized system of documenting the scene of an incident by establishing, implementing and enforcing written procedures (see also above, Recommendation No. 3).

The Commission found support for its recommendation regarding the difficulty in relying on an operational debriefing in making a decision about whether to open an investigation, and that in cases where there is only partial or circumstantial information about the circumstances of an incident, a fact-finding assessment team that will focus on the legal aspects of an incident should be established (see above, Recommendation No. 5).

CLOSING REMARKS

13. This Second Report concludes the Commission's work of considering the mechanisms and methods of examining and investigating complaints and claims of violations of the laws of armed conflict. The Commission now completed the task that the Government of Israel had entrusted to it. The Commission hopes that both reports will make a contribution not merely to Israeli law and society, but to the whole community of nations that cherish the rule of law.