



**Team for the Review and Implementation of the Second
Report of the Public Commission for the Examination of the
Maritime Incident of May 31st 2010 Regarding Israel's
Mechanisms for Examining and Investigating Complaints
and Claims of Violations of the Law of Armed Conflict
According to International Law**

Report

August 2015

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Introduction

1. On June 14th 2010, following the maritime incident that occurred on May 31st 2010, the Israeli government decided to appoint an independent public commission of inquiry concerning the incident, headed by retired Supreme Court Justice Jacob Turkel (hereinafter: “**the Turkel Commission**”).¹
2. In section 4 of the government's resolution regarding the establishment of the Turkel Commission, the Commission was asked to examine various aspects of the maritime incident of May 31st 2010. In addition, in section 5 of the government's resolution, the commission was requested to further examine “whether the mechanism for examining and investigating complaints and claims raised regarding violations of the Law of Armed Conflict, as conducted in Israel generally, and as implemented with regard to the present incident, conforms with the obligations of the State of Israel under the rules of international law.”²
3. In January 2011, the first part of the Commission’s report, which dealt with the maritime event itself, was published. In February 2013, the second part of the Turkel Commission Report, which sought to examine the existing mechanisms in Israel for addressing allegations of violations of the Law of Armed Conflict, as provided in section 5 of the government's resolution, was published (hereinafter: “**the second report of the Turkel Commission**”).³
4. In the second report, the Turkel Commission found that the “examination and investigation mechanisms In Israel of complaints and claims of violations of international humanitarian law and the methods they practice, generally comply with

¹ Resolution 1796 of the 32nd government "Appointment of an independent public commission, headed by retired Supreme Court Justice Jacob Turkel, for the examination of the maritime incident of May 31st 2010" (June 14th 2010) (hereinafter: **the Government's resolution on the appointment of the Commission**). For further information on the maritime event and the appointment of the Commission, see: Public Commission to Examine the Maritime Incident of May 31st 2010 (The Turkel Commission), **Report Part One**, paragraphs 1-4 (5771), www.turkel-committee.gov.il/files/wordocs//1989200211hebrew.pdf (hereinafter: **the first report of the Turkel Commission**). Appointed as members of the commission were: the late Ambassador Professor Shabtai Rosen, Major General (res.) Amos Horev, Ambassador Reuven Merhav and Professor Miguel Deutch. In addition, two foreign experts were appointed to the commission, serving as observers: Lord David Trimble and Brigadier General (res.) Kenneth Watkin. Due to the retirement of the latter upon his appointment to a senior academic position in the United States, the Israeli government appointed Professor Timothy McCormack as a foreign observer instead of Brigadier-General Watkin.

² The government's resolution on the appointment of the Commission, *supra* note 1.

³ The public commission for the examination of the maritime incident of May 31st 2010 (the Turkel Commission), **Report Part Two – Israel's mechanisms for Examining and Investigating Complaints and Claims of Violations of the Laws of Armed Conflict according to International Law** (5773), <http://www.turkel-committee.gov.il/files/newDoc3/The%20Turkel%20Report%20for%20website%20-%20hebrew.pdf>, (hereinafter: **the second report of the Turkel Commission**).

the obligations of the State of Israel under the rules of international law.”⁴ At the same time, the Commission was of the opinion that in some areas there was room for amendments or changes in the existing mechanisms or accepted policies or for the explicit anchoring of certain practices. Accordingly, the Commission composed eighteen recommendations in various fields, detailed in the Commission’s second report, relating mainly to the IDF, the Ministry of Justice, the Israeli Security Agency (“ISA”), the Israel Police and the Israel Prison Service (“IPS”). The Turkel Commission emphasized that where the Commission saw a need for amendments or changes to be introduced, this did not necessarily indicate fundamental flaws, but rather was “a blueprint for optimal improvement.”⁵

5. Upon receipt of the second report of the Turkel Commission the Prime Minister announced his intention to establish a professional team to study the report thoroughly, examine the need for adjustments and improvements in different areas, and offer concrete ways to act in the matter.⁶ Accordingly, on January 5th 2014 the Israeli government adopted Resolution 1143 on “The appointment of a team to review and implement the Second Report of the Public Commission to Examine the Maritime Incident of May 31st 2010 (regarding the examination and investigation in Israel of complaints and claims of violations of the Law of Armed Conflict under international law)”⁷ (hereinafter: “**the Team**” or “**the Implementation Team**”).
6. As members of the Team were appointed: Dr. Joseph Ciechanover, chairman; Brigadier General Herzl (Herzi) Halevi, Command & Staff College commander at the time, who was appointed in the course of the team’s work to Head of the Intelligence Directorate and promoted to Major General, member; Brigadier General (res.) Rachel Dolev, representative of the Military Advocate General's Corps, member; Dr. Roy Schondorf, Deputy Attorney General (International Law), member; Mr. Raz Nizri, Deputy Attorney General (Criminal Law), member. The government’s resolution also determined that on issues relating to the ISA, the Legal Counsel for the ISA, Mr. Avi L., and the head of the ISA Interrogations Division, N., would replace Brig. Gen. (res.)

⁴ *Id.*, at 46.

⁵ *Id.*

⁶ See the Prime Minister Office website, “Prime Minister Netanyahu received the second report of the Turkel Commission” (February 6th 2013), www.pmo.gov.il/MediaCenter/Events/Pages/eventturkel060213.aspx.

⁷ Resolution 1143 of the 33rd Government, “Appointment of the Team for the Review and Implementation of the Second Report of the Public Commission for the Examination of the Maritime Incident of May 31st 2010 (Regarding Israel's Mechanisms for Examining and Investigating Complaints and Allegations Concerning Claims of Violations of the Laws of Armed Conflict under According to International Law)” (January 5th 2014) (hereinafter: “**the Government's Resolution on the Appointment of the Implementation Team**”), www.pmo.gov.il/Secretary/GovDecisions/2014/Pages/dec1143.aspx.

Dolev, and that on issues relating to the police and IPS, representatives of the Ministry of Public Security, Police and Prison Services would be invited to the Team's meetings. Appointed as observers to the Team were the Legal Counsel for the Ministry of Foreign Affairs, the Legal Counsel for the Ministry of Defense and the Legal Counsel for the National Security Council. Adv. Dr. Galit Ragan was appointed as Team Coordinator, and upon her going on maternity leave, she was replaced by Adv. Tal Werner-Kling.

7. The government resolution of January 5th 2014 provided that any government agency concerned would cooperate fully with the Team and would provide the information and documents required by the Team to perform its duties (section D of the resolution).

The Team's Work

8. The Implementation Team held a series of meetings between the months of January 2014 and July 2015. Where required, team meetings were attended by other representatives of the Ministry of Justice, the IDF, ISA and Israel Police to examine with the Team the planned or proposed means of implementation of the various recommendations. These participants included representatives of the Military Advocate General's Corps – Major General Dan Efroni, Military Advocate General (hereinafter: “MAG”); Lt. Col. Ronen Hirsch, the Military Advocate for Operational Affairs and Lt. Col. Adoram Rigler who replaced him; Major Harel Weinberg, Deputy Military Advocate for Operational Affairs; Major Roni Katzir, Assistant to the Military Advocate General and Major Yotam Har-Zion who replaced him; representatives of the Ministry of Justice – Adv. Shai Nitzan, State Attorney; Adv. Rachel Matar, Senior Section Head (Criminal) and Supervisor of the Interrogatee Complaints Comptroller (MAVTAN) at the State Attorney's Office; Adv. Uri Carmel, Head of the Police Internal Investigations Department; Adv. Anat Asif Gil, Supervisor, Department of Legislation and Legal Counsel; and Adv. Jana Modzgvishvily, the Interrogatee Complaints Comptroller for the ISA; and representatives of the Israel Police – Brigadier General Shaul Gordon, the Legal Counsel for the Israel Police; Chief Superintendent Rafi Noah, Assistant Head of Investigations for the Samaria and Judea District; Superintendent Avshalom Ahrak, National Citizen Service Center Officer; Superintendent Yaron Binyamini, Investigations Department Officer; Superintendent Dana Chernobelsky, Investigations Intelligence and Technology Department Officer/Legal Counsel; and Commander Meital Mizrachi, Assistant Legal Counsel. In addition, the Team members reviewed written material submitted by the “B'Tselem” and “Yesh Din” organizations.
9. As can be seen in the government's resolution dated January 5th 2014, the Team's task

is focused on the practical aspects of implementing the recommendations of the Turkel Commission, which were formulated after much diligence, hearing of testimony from government officials, academics and civil society organizations and the examination of extensive materials.

10. The Team's goal, therefore, was to implement, as much as possible, the Turkel Commission's recommendations to the letter. This was indeed done in most cases, as described below. After a thorough examination of the material, when it seemed that there were difficulties in implementing the recommendations to the letter, the Team strove to formulate or suggest alternative measures, which it believes will give expression to the rationale underlying the recommendations of the Turkel Commission, while addressing the difficulties presented.
11. We see fit to note that in many cases, particularly on issues related to the IDF in general and the Military Advocate General's Corps in particular, the implementation work of the Turkel report's recommendations began even before the Implementation Team began working, and during the Team's deliberations. Some of the arrangements discussed and formulated by the Implementation Team have also been applied already in practice prior to the publication of this report.
12. With respect to specific recommendations, the relevant bodies presented an outline for implementation, which we believe adequately addresses the recommendations of the Turkel Commission; however, at the same time they noted that for the purpose of full implementation in practice of the outline presented (in particular in relation to compliance with prescribed time frames, as will be detailed in the body of the report below), the allocation of resources beyond the resources available to them today shall be required. The Team itself did not see fit to address, within the framework of its mandate, the issue of the allocation of resources. This requires a professional examination and a thorough understanding of the subject by the relevant budgetary bodies. Therefore, the Team's recommendation is that the budget requirements of the aforementioned entities will be presented as soon as possible to the relevant budgetary bodies and to the extent required, suitable budgets be allocated to enable the full implementation of the recommendations.
13. We see fit to emphasize that the report is considered to be over but not done with. The Team took great effort to address the various issues at stake, but there are several issues which still require a lot of work. Out of a desire not to delay the submission of this report, we present it now to the government. With respect to some of the recommendations, the work has not yet been completed. With respect to these

recommendations, we noted in the report the courses of action required and we are confident that the bodies will work to implement the recommendations as soon as possible in accordance with the outline we have set.

14. The structure of the report is as follows: following are the recommendations of the second report of the Turkel Commission in their original order. With respect to each recommendation, the contents of the recommendation will be described in brief as well as the manner in which it has been implemented thus far. Where the implementation of the recommendation is not yet complete or, alternatively, where the Team found it necessary to recommend measures that will enable the implementation of the recommendation, this too shall be detailed.
15. To ensure the full implementation of the recommendations of the Implementation Team, we recommend that the government appoint a body to monitor the full implementation of the recommendations and within a reasonable timetable.
16. The Team would like to thank the distinguished observers and team coordinators. In particular we would like to note the cooperation with the Attorney General, Yehuda Weinstein, the Military Advocate General, Major General Dan Efroni, the Legal Counsel for the ISA, Adv. Avi L. and the Legal Counsel for the Ministry of Foreign Affairs, Adv. Ehud Keinan. We thank Dr. Galit Ragan, who accompanied the Team in its early stages, and special thanks to the team coordinator, Adv. Tal Werner-Kling, for her important contribution to the Team's work, both with regard to coordination and her involvement in determining the Team's decisions, as well as in editing the material.

Implementation of the Recommendations

Recommendation no. 1 – “war crimes” legislation

17. The Turkel Commission stated on this subject that “the rules of international humanitarian law require countries to enact legislation enabling effective penal sanctions of anyone committing a war crime or instructing its execution. This requirement refers to the investigation of acts that are suspected of constituting 'serious violations' of international humanitarian law.”⁸ As to whether there is need for domestic legislation of offenses defining war crimes, the Commission was of the opinion that in order to comply with the requirements of international law, “translation” of conduct constituting a war crime into an offense that already exists in domestic law is sufficient, provided that the domestic offense reflects the gravity of the offense under international law.⁹
18. Therefore, the Turkel Commission recommended that the Ministry of Justice initiate legislation wherever there is a deficiency relating to international prohibitions that does not have a “regular” equivalent in Israeli Penal Law, and to complete it by means of Israeli criminal legislation. Furthermore, the Commission stated that action should be taken to ensure that the absolute prohibition in international law against torture and ill-treatment is properly absorbed into Israeli law. The Commission noted that it attaches great importance to the explicit reception into Israeli law of international norms regarding war crimes also due to its normative value, beyond its practical value.

The Implementation Team’s recommendation

19. This issue of legislation that will express the existing norms of international law, including the prohibition of torture and ill-treatment, was discussed numerous times by the Implementation Team.
20. The Implementation Team was informed that prior to the submission of the second report of the Turkel Commission, a professional team was established by the Attorney General, made up of officials from the Ministry of Justice and the Military Advocate General's Corps, who worked on the comprehensive mapping of the definitions of serious international crimes and their compatibility with provisions of Israeli Penal Law. The team has prepared a detailed document that reflects the mapping and comparison it had made. The Team’s work revealed that there is extensive correlation between accepted definitions of crimes of genocide, crimes against humanity and war

⁸ The second report of the Turkel Commission, *supra* note 3, at 304.

⁹ *Id.*, at 306.

crimes in international law and Israeli law. However, in a number of cases, the offenses for which an indictment can be served in Israel are not the same offenses enshrined in international law. Following the recommendations of the Turkel Commission and the discussions held by the Implementation Team, a series of meetings was held, chaired by the Attorney General and the Deputies to the Attorney General (Criminal and International), to discuss the question of the anchoring of serious international crimes in Israeli law.

21. As indicated to the Implementation Team, the Attorney General decided that legislation absorbing serious international crimes into Israeli law is to be promoted. Accordingly, the Attorney General instructed to formulate draft bills on two issues: one, anchoring the offense of torture in the Israeli Penal Law, and second is the enactment of crimes against humanity legislation in Israeli law. The crime of torture that shall be defined is expected to set a ban, along the lines of the crime of torture in the Convention against Torture, which includes causing pain or suffering, whether physical or mental, by a public official in order to extract information or a confession from someone, blackmail him, and such similar purposes that will be defined by the law. The draft for the crimes against humanity bill is expected to determine offenses which constitute crimes against humanity, in accordance with customary international law. Among these offenses are crimes of murder, torture, rape and other serious conducts, when committed as part of a widespread or systematic policy. It should be noted that under the emerging model, which is still under internal review, some offenses will not be defined as independent offenses, but will be included in the draft by reference to the existing offenses prescribed in the Penal Law or other offenses in the draft with aggravating circumstances.

The Implementation Team recommends that the Ministry of Justice act soon to continue promoting legislation to anchor the offense of torture in the Penal Law and legislation pertaining to crimes against humanity. The Team also recommends the continued consideration of the need for further legislative amendments with respect to war crimes.

Recommendation no. 2 – the responsibility of military commanders and civilian superiors

22. The Turkel Commission found that the rules of humanitarian international law impose special responsibility on military commanders and civilian superiors for crimes

committed by their subordinates.¹⁰ This responsibility includes the obligation to take appropriate measures to prevent violations and initiate command, disciplinary or criminal proceedings against violators.¹¹

23. Therefore, the Commission recommended that provisions be made in the law, which will impose on commanders and civilian superiors direct criminal responsibility for crimes committed by their subordinates, in the event they failed to take all reasonable measures to prevent the crimes or did not take steps to bring those responsible to justice when they learned of the offenses after the fact.¹²

The Implementation Team's recommendation

24. The Implementation Team learned that this issue was examined by the Ministry of Justice and the Military Advocate General's Corps, while comparing international law and Israeli law as well as examining the current law in other jurisdictions worldwide. This initial examination revealed that there are tools in Israeli law that allow imposing criminal liability on military commanders and civilian superiors under certain circumstances. Adjustments to legislation in this area raise legal questions pertaining to basic principles of criminal law in Israel. The complexity of the issue can also be drawn from the variety of different models adopted in other countries to regulate the issue. In view of the complexity of the issue, the Attorney General decided that the question of the explicit anchoring of the responsibility of military commanders and civilian superiors in Israeli law would continue to be examined by the relevant parties before being decided.
25. Whereas until the completion of the Implementation Team's work the examination of the matter has not yet been completed, we recommend the continued handling of this matter, as instructed by the Attorney General, led by the Ministry of Justice in cooperation with the Military Advocate General's Corps and the other relevant bodies, so as to determine as soon as possible the principles that will express in the legislation the responsibility of military commanders and civilian superiors.
26. Finally, it should be noted that in addition to the criminal tools, there are in Israeli law administrative tools, such as commissions of inquiry or examination, as described below regarding recommendation no. 17.

Recommendation no. 3 – reporting duties in the IDF

27. The Turkel Commission noted the general obligation imposed on military commanders

¹⁰ *Id.*, at 308.

¹¹ *Id.*

¹² *Id.*, at 310.

to prevent violations of humanitarian international law and to report them, as well as to ensure the adoption of appropriate measures in response to suspicions of violations of the rules.¹³ The IDF's duty to report suspected violations was established in Article 225 of the Military Justice Law, 5715 – 1955 (hereinafter: “**the Military Justice Law**”).¹⁴ In addition, in 2005 the Chief of General Staff adopted the “Reporting Procedure for Incidents in which Palestinian Civilians were Injured,” as specified in the Turkel report.¹⁵

28. While the Commission felt that the content of the Reporting Procedure is consistent with the duties of the State of Israel under international law, the material presented to the Turkel Commission indicated that in practice, the Reporting Procedure was not implemented. Military commanders usually did not fill in the preliminary report form and the relevant scenes were not documented. Therefore, the Turkel Commission recommended as follows:

- a. **Mandatory reporting** – the Reporting Procedure should be incorporated into the Supreme Command Orders, the procedure should be assimilated by all IDF units and sanctions should be imposed on commanders who do not comply with its provisions.¹⁶ Moreover, with respect to the procedure's contents, the scope of the procedure should be broadened beyond incidents during which a person not involved in combat was killed or injured, so that it should apply to every incident involving the IDF or forces for which the IDF is responsible, that raises concern with respect to violation of international humanitarian law.¹⁷
- b. **Documentation of the scene** – the Commission underlined the importance of documenting the scene of the incident shortly thereafter. In particular, the Commission pointed out that this duty includes the seizing of any exhibit and any possible documentation that may help the examination and investigation, including the storing of exhibits under conditions that will allow, to the extent possible, their examination later on.¹⁸

The Implementation Team's recommendation

a. Assimilating reporting procedures

29. In the course of its discussions, the Implementation Team stressed the great importance

¹³ *Id.*, at 311.

¹⁴ The Military Justice Law, 5715 – 1955, LA 189 (hereinafter: **the Military Justice Law**).

¹⁵ The second report of the Turkel Commission, *supra* note 3, at 313.

¹⁶ *Id.*, at 315.

¹⁷ *Id.*

¹⁸ *Id.*, at 316.

of complying with the reporting requirement and the rigorous execution of the Reporting Procedure. Taking into account the position voiced by the Team, representatives of the Military Advocate General's Corps informed the Implementation Team that on July 28th 2014 a new operational standing order of the Operations Division came into force, entitled “Providing a preliminary report and debrief to the Military Advocate General's Corps” (hereinafter: “**the Order of the Operations Division on Reporting**”) that was distributed in early August 2014 throughout the IDF.¹⁹ This order determines the events to which the reporting requirement applies, the method of providing the report and the relevant timeframes. In addition, the order sets the outline for monitoring the status of the various reports and their handling.

30. It should be noted that the Order of the Operations Division on Reporting expands the previous Reporting Procedure in the following aspects:

a) **The scope of the reports**

- 1) The scope of the reports that are to be transferred to the Military Advocate General's Corps under the Order of the Operations Division on Reporting is significantly wider than was set out in the Reporting Procedure so that in times of emergency and combat the forces are required to report in the following cases:
 - i. An event where there is a reasonable suspicion of serious cases of violations of Israeli law or serious violations of the rules of international law, including deliberate targeting of civilians, of *hors de combat* and those with special protections; injury to a person on a sexual basis; deliberate targeting, causing irreversible damage to civilian property, not for operational purposes, including looting; and the use of weapons in serious violation of the rules of use.
 - ii. An event in which civilians were killed on a large scale; physical injury was caused to UN personnel or peacekeeping forces; physical injury was caused to media personnel; or injury to sensitive sites, including medical facilities, religious buildings and UN facilities, even if there is no suspicion of violation of the law in their respect.
 - iii. An event that the commander believes may have broad public implications.

¹⁹ **Order of the Operations Division – the Operations Branch 4.7** “Providing a preliminary report and debrief to the Military Advocate General's Corps” (June 9th 2014) (hereinafter: “**the Order of the Operations Division on Reporting**”)

- iv. Any unusual incident that occurred during combat. Reporting on such an event will be carried out at the cessation of combat.
- 2) The Order of the Operations Division on Reporting states that in addition to the aforementioned events, there is a duty to routinely report the following incidents, allegedly caused as a result of IDF operations:
- i. A person's death.
 - ii. Serious injury of a person.
 - iii. Inadvertent damage to property on a large scale or of significant value.
 - v. Use of unreasonable force against a person during an arrest.
- 3) In addition, there is a duty to report also in cases of complaints alleging prohibited activities on the part of IDF soldiers, made by civil social organizations directly to the IDF.
- b) **Applicability of the Order** – the order is to apply with respect to all the IDF's combat arenas, both in routine, in emergencies and in times of combat.
 - c) **Claims of involvement of IDF forces** – unlike in the past, the Order requires reporting on events as stated above, even in cases where the IDF has no inside information, according to which the event was caused by its forces, but also on events with respect to which it has been alleged (but not yet confirmed), that the incident was caused by IDF forces.
 - d) **The timing of the report** – the Order of the Operations Division on Reporting states that the report will be given within 12 hours. In the Team discussions, representatives of the Military Advocate General's Corps told the Team that their experience in the wake of Operation “Protective Edge” shows that this time frame is unrealistic. Therefore, we recommend, with the concurrence of the Military Advocate General's Corps, that it is changed so that the report will be given no later than 48 hours from the time of the event or the time of receipt of the complaint, as applicable.
 - e) **The reporting route** – pursuant to the Order of the Operations Division on Reporting, the entity responsible for transferring the reports to the Chief of General Staff, Chief of Operations Directorate and the Military Advocate General is the war room of the High Command Post (MITZPE), where all of the reports from all the IDF war rooms are concentrated. The concentration of all the

information related to reports in one place shall raise awareness to the reporting requirements and will enable professionalism in identifying unusual events and reporting them.

31. The provisions of the Order of the Operations Division on Reporting states that within one week from receipt of the report, the Military Advocate General's Corps will decide whether there is need to open a criminal investigation, if there is need to review the operational debriefing or if there is no need for further handling of the report. In the event that the Military Advocate General decided that there is a need to review the operational debriefing, he shall turn directly to the Operations Directorate requesting to receive it for review. The full debrief will be sent to the Military Advocate General's Corps for review within a period not exceeding 21 days from the date of the request.
32. The Team wishes to point out, in particular, the importance of assimilating the reporting procedures provided in the Order of the Operations Division on Reporting; the existence of effective monitoring mechanisms in the IDF on compliance with the procedure in full whenever relevant; and of enforcement against commanders who do not comply with the provisions of the procedure in full. Representatives of the Military Advocate General's Corps told the Team that the entity within the IDF in charge of implementing procedures for reporting and control concerning the execution of the Order is the Operations Directorate.
33. The Team recommends that the Military Advocate General employ strict enforcement measures in cases of non-compliance with the procedure on the part of commanders. In addition, the Team recommends that the reporting requirement apply to soldiers in relation to events involving police forces (such as the Border Police), and that a similar reporting requirement also apply to border police officers operating under the command of the IDF, and that the relevant procedures at the IDF and the police be amended as required to reflect the scope of the reporting requirement.

b. Documenting the scene

34. Like the Turkel Commission, the Implementation Team also ascribes importance to the documenting of the scene. Already today, there are provisions in the IDF related to documentation. First, the obligation to document the scene is rooted in the Order of the Operations Division on Reporting, stating that steps should be taken to document the relevant material in an unusual incident and its preservation, to the greatest extent possible,²⁰ in accordance with the provisions of the Operations Division– Training and Doctrine Order no. 4.7 titled “Operational documentation – creating, collecting and

²⁰ The Order of the Operations Division on Reporting, in section 19(h).

saving information generated in operations” (hereinafter: “**the Operations Division Order on Operations Documentation**”).²¹ In addition, the Order of the Operations Division on Reporting states that as part of the reporting obligation, it should be reported whether the scene was documented, how and by whom. The Order further states that the documented materials should be transferred to the Military Advocate General's Corps or the Military Police Criminal Investigation Division, at their request.

35. In light of the importance the Turkel Commission ascribed to the subject of documentation of the scene for the purpose of conducting an effective examination and investigation, we recommend that the relevant provisions in the IDF be updated as soon as possible to ensure effective documentation of the scene, except in cases where, due to operational reasons to be recorded, the scene cannot be documented immediately after the event. In particular, we recommend that the amended order clearly define the parties responsible in the IDF for documenting the scene. Furthermore, representatives of the Military Advocate General's Corps informed the Team that the entity at the IDF in charge of implementing the amended provisions and control regarding their implementation is the Operations Directorate. The Team recommends that with respect to a violation of this provision the Military Advocate General exercise a strict and effective enforcement policy.
36. In addition, the Military Police Criminal Investigation Division Commander Order no. 22 “Visiting the scene of a crime”, which was updated on May 21st 2013 (hereinafter: “the Military Police Criminal Investigation Division Commander Order”), dealing with the investigative documentation of the scene, should be amended so that emphasis is also placed on the scene of an incident that raises suspicion of a breach of the rules of international humanitarian law. The Team recommends that the revised order anchor the duty to document the scene by the Military Police Criminal Investigation Division. The Team recommends that this order come into force within three months from the date of approval of this report's recommendations by the government.

Recommendation no. 4 – Grounds giving rise to an obligation to examine and investigate

37. Recommendation no. 4 in the Turkel Commission Report deals with the investigation policy in the IDF. The Commission concluded that the investigation policy prevailing in the IDF, whereby a Military Police Criminal Investigation Division investigation is not opened immediately after the death of a person in the wake of IDF operations in an

²¹ The Operations Division – Training and Doctrine Order no. 4.7, “Operational documentation – creating, collecting and saving information generated in operations” (October 30th 2012).

event of “actual combat”, unless there is reasonable suspicion of an offense that requires investigation, is consistent with Israel's obligations according to international law. At the same time, the Commission stated that the authority to set such a policy should be defined explicitly in the appropriate orders.²²

38. The Commission further recommended that as soon as possible after the receipt of said preliminary reporting form, the Military Advocate General's Corps will classify the legal context of the event, *i.e.*, whether this is a case of “actual combat”, subject to the Law of Armed Conflict, or an event regulated by the norms of law enforcement.²³

The Implementation Team's recommendation

39. The Implementation Team believes that the authority of the Military Advocate General to determine the IDF's investigation policy finds expression primarily in Article 178 of the Military Justice Law, which statutorily regulates the status of the Military Advocate General. Article 178 of the Military Justice Law provides, *inter alia*, that the Military Advocate General is “adviser to the Chief of Staff and other military authorities on all matters of law and justice”; oversees the imposition of law in the army and disciplinary hearings; and that he may order a preliminary inquiry in any case where he believes an offense was committed which the military court is competent to hear. In addition, the article provides that the Military Advocate General will fulfill any other function imposed on him under law and according to army regulations. In our view these legislative provisions, which grant broad authority to the Military Advocate General with regard to enforcing law and order in the army, should be interpreted as also including the inherent authority to determine the investigations policy of the IDF. Therefore, we do not believe that there is a need for further anchoring of this authority in legislation.
40. In the course of its work, the Team reviewed the initiative taken by the IDF in preparing a draft amendment to High Command Order 2.0613, concerning “the Military Advocate General's Corps”, which “defines the roles of the Military Advocate General's Corps and complements the provisions of the Military Justice Law.”²⁴ Following the publication of the Turkel Report an explicit article enshrining the authority of the Military Advocate General to set such an investigation and prosecution policy was included in the draft. This proposal regulates the authority to determine the investigation policy in appropriate directives, and we can only recommend that it be

²² The second report of the Turkel Commission, *supra* note 3, at 316.

²³ *Id.*

²⁴ High Command Order 2.0613, “the Military Advocate General's Corps”, Article 1 (hereinafter: **High Command Order 2.0613**).

approved and come into effect as written within 30 days from the date of approval of this report's recommendations by the government. Furthermore, it is recommended that after such amendment enters into effect, the investigation policy – as will be determined at that time – shall be included in the guidelines of the Chief Military Prosecutor (hereinafter: “the **Chief Military Prosecutor**”) as the State Attorney’s enforcement policy is included in the State Attorney's guidelines.²⁵

41. Another aspect of recommendation no. 4, as mentioned above, is the recommendation of the Turkel Commission that the Military Advocate General's Corps will classify, shortly after receiving the complaint, the legal context of the incident, *i.e.*, whether this is a case of “actual combat” or a law enforcement incident. The information brought to the Implementation Team in this regard indicates that, in recent years, the classification of such an event has been done in practice as part of the ongoing work of Military Advocate for Operational Affairs, to the extent that the classification of the incident is required, as part of the initial decision-making with respect to the complaint.
42. The Team recommends that the obligation to classify the incident will be anchored in a Chief Military Prosecutor's guideline, and that this guideline determines that the classification shall be made within seven days from the time the Military Advocate General's Corps learned of the incident, should such classification be necessary.

Recommendation no. 5 – Fact-finding assessment

43. Recommendation no. 5 of the Turkel Commission deals with “factual assessment.” According to the Commission, the purpose of the factual assessment is gathering information on which to base a decision if there is reasonable suspicion of the commitment of a war crime, and accordingly, whether to open a criminal investigation regarding a complaint or a specific event.²⁶ The factual assessment is to be carried out with professionalism, expertise, and promptly, so that it facilitates a potential investigation and does not hinder it.²⁷
44. The Turkel Commission found that the Military Advocate General uses the operational debriefing in fulfilling his duty to make a factual assessment. The operational debriefing is an inquiry conducted in the IDF concerning an incident that occurred during an operation, conducted as soon as possible after the occurrence of the event and

²⁵ See the instructions of the State Attorney on “The Prosecution Policy in Decisions of Prosecution – according to Types of Offenses” at the State Attorney's Office website: <http://index.justice.gov.il/Units/Advocacy/HanchayotPM/Pages/PM2.aspx>.

²⁶ The second report of the Turkel Commission, *supra* note 3, at 317.

²⁷ *Id.*

according to military orders.²⁸ As part of the operational debriefing, the commander conducting the operational debriefing must gather facts and verify them, identify the findings that are important with regard to the debriefed activity, and draw conclusions. Based on these conclusions a lessons-learning process is undertaken by the IDF, whose goal is their application and integration. The Turkel Commission addressed a number of difficulties this practice raises. For example, the Commission noted that the use of the operational debriefing might unreasonably delay the decision to open an investigation. In addition, the Commission noted that the debriefing is not focused on questions of criminality, and hence it does not adequately fulfill the purpose of the “factual assessment”.²⁹

45. In view of the foregoing, the Turkel Commission reached the conclusion that the objective of the operational debriefing is to serve, first and foremost, the army's operational needs.³⁰ Thus, the Commission recommended the establishment of a separate mechanism for “conducting a factual assessment”, which will allow to conduct a fast and professional factual assessment that helps a potential investigation and does not hinder it.³¹
46. The Commission further recommended that in cases where the Military Advocate General decides, following the preliminary report,³² that he needs more information to determine if there is reasonable suspicion of criminal activity, he shall instruct a special team that shall be set up for this purpose (“factual assessment team”) to examine the circumstances of the incident. Members of the team will have operational expertise, expertise in international law and in the field of investigations. The team’s mission will be to provide, within a period to be stipulated in procedures, complete information to the extent possible, which will allow the Military Advocate General to decide whether to open an investigation.
47. The Commission emphasized, along with the above, that this recommendation does not prevent the Military Advocate General from reviewing the operational debriefing.

The Implementation Team’s recommendation

48. Already in the course of the Implementation Team’s deliberations, the Team recommended to the IDF to take steps to establish as soon as possible a permanent mechanism within the IDF for the purpose described in the second report of the Turkel

²⁸ *Id.*, at 285-286; the status of the operational debriefing and the manner it is conducted in, are regulated in the Military Justice Law in Article 539a (a).

²⁹ See the second report of the Turkel Commission, *supra* note 3, at 320.

³⁰ *Id.*

³¹ *Id.*

³² See section 27 above.

Commission, which would first and foremost serve the strategic and operational objectives of the IDF and would be responsible for the factual assessment.

49. In the course of the Implementation Team's work, during Operation "Protective Edge" that took place in the summer of 2014, representatives of the Military Advocate General's Corps updated the Team that in view of recommendation no. 5 of the Turkel Commission and said recommendation made by the Team, a General Staff Mechanism for Fact Finding Assessments was established, subordinate to the Chief of General Staff, which will help the Military Advocate General conduct the factual assessment.³³ The Military Advocate General's Corps officials further updated the Implementation Team that the General Staff Mechanism for Fact Finding Assessments that was established is headed by a senior officer with the rank of Major General, and a senior reserve officer, an expert in international law, was appointed as a member to the mechanism to assist the Head of the General Staff Mechanism for Fact Finding Assessments in his work. In addition, the members of the assessment teams that make up the permanent mechanism are primarily senior officers in reserve and regular service, possessing operational expertise in a range of military areas (artillery, intelligence, air, *etc.*), as well as members with professional experience in the field of investigations. All the officers and members in the mechanism were outside the chain of command during Operation "Protective Edge" and all of the mechanism teams are provided with ongoing legal advice from legal officers in the Military Advocate General's Corps, who have expertise and experience in international law. The Team was further made to understand that if necessary the Military Advocate General could order the examination teams to gather additional information required so as to get a fuller factual understanding of a particular incident, that the assessment teams were instructed to complete their work within a short time in order to ensure prompt and effective examinations, and were instructed to collect data and material from external persons, including Israeli and non-Israeli citizens.
50. We recommend that whenever an investigation of an event that raises suspicion of a violation of the rules of international humanitarian law is needed, the Head of the permanent mechanism will form, at the recommendation of the Military Advocate General and the order of the Chief of General Staff, an assessment team (hereinafter: "**the Assessment Team**"), whose role is to conduct an independent and effective inquiry into the incident, including collecting a variety of factual information about it,

³³ For more details on the establishment of the General Staff mechanism by the IDF, see the notice of the Military Advocate General "Examination and Investigation of exceptional incidents that occurred in the course of Operation "Protective Edge" (2014), <http://www.law.idf.il/261-6858-en/Patzar.aspx?pos=23>.

which includes raw materials such as videos, operation logs and recordings of communications and gathering testimonies.

51. The Implementation Team believes that the permanent mechanism and assessment teams acting on its behalf must operate in accordance with the principles set out in recommendation no. 5 of the Turkel Commission, and conduct independent, effective, impartial, thorough and prompt assessments. To ensure the above, the Team believes that a senior officer in the reserves or standing army should be appointed as at the head of the mechanism, and place at his disposal regular staff that will be in charge, among other things, of identifying appropriate reservists and training them. The permanent mechanism must consist of a staff of reservists and regular army officers and officials with expertise in various military professions, legal officers and individuals with experience in investigations. A precondition for membership in the mechanism should be the absence of a connection with the relevant chain of command of the debriefed incident and non-involvement of all concerned in the examined activity. In addition, the regular and reserve personnel in the mechanism must undergo professional training in investigations and in the field of international law. We further recommend that the mechanism be provided regularly with legal advice by the Military Advocate General's Corps, so as to answer questions of law, including international law that will arise in the course of its work.
52. In order to ensure the factual assessment also provides a basis for making a decision about future action, including the opening of an investigation in appropriate cases, we recommend that before starting work, the members of the permanent mechanism and the assessment teams acting on its behalf receive a debrief from the Military Advocate General or his representatives about the facts necessary for the Military Advocate General to make a decision. The head of the mechanism will take steps to send his findings to the Chief of General Staff or a person appointed by him, and to the Military Advocate General, within 30 days of the issue being given to the mechanism for examination. We further recommend that the Chief of General Staff or his deputy be authorized to extend this time period, for reasons to be recorded, by periods that shall not exceed 45 days each. In addition, the Military Advocate General will review the findings collected by the assessment teams and their conclusions, and in the event he finds that he requires more information in order to arrive at a decision on whether to open an investigation, he may direct the assessment team accordingly and require it to address his comments within a period not exceeding 30 days. The findings of the mechanism will be confidential under Article 539a of the Military Justice Law as these findings also serve in drawing operational conclusions. The confidentiality ensures the

cooperation of officers and soldiers, in a manner enabling to obtain the fullest factual understanding of a particular incident possible.

53. In addition, we note that the Military Advocate General has other tools that allow him to complete the factual assessment in favor of making a decision regarding the opening of an investigation, such as his authority in the Military Justice Law to appoint an investigating officer, as defined in the General Staff Order 33.0304 concerning the “Military Police Criminal Investigation Division Investigation and Examination”,³⁴ or a commission of inquiry as defined in High Command Order 2.0715 concerning “A commission of inquiry – the obligation to appoint, powers and procedures”;³⁵ and the command operational debrief, which also allows the Military Advocate General to obtain relevant factual information such as observation photographs, operational documentation, operations logs, preliminary report and more.

Recommendation no. 6 – the decision whether to open an investigation

54. Recommendation no. 6 of the Turkel Commission is composed of three sub-recommendations, described below along with the recommendation of the Implementation Team:

a. The time frame for a decision regarding the opening of an investigation and the obligation to consult with a Major-General

55. The Turkel Commission stated that one of the principles required for an effective investigation is the principle of promptness, which in addition to its mere existence, strengthens the principle of effectiveness and thoroughness.³⁶ Therefore, the Commission concluded that the decision to open an investigation must meet the requirement of promptness.³⁷ Accordingly, the Commission recommended that a timeframe of a few weeks be set in procedures, in the course of which the Military Advocate General will decide whether to open an investigation.³⁸
56. Among other things, the Commission addressed the directive requiring the Military Advocate General to consult with the commanding officer (Major General) responsible for the unit involved in the incident. The Turkel Commission recommended, with the aim to streamline and shorten the procedures, to cancel the duty of consultation with

³⁴ General Staff Order 33.0304 concerning the “Military Police Criminal Investigation Division Investigation and Examination” (hereinafter: **General Staff Order 33.0304**).

³⁵ High Command Order 2.0715 “A commission of inquiry – the obligation to appoint, powers and procedures” (hereinafter: **High Command Order 2.0715**).

³⁶ The Second Report of the Turkel Commission, *supra* note 3, at 321.

³⁷ *Id.*

³⁸ *Id.*, at 322.

the Major General, and leave the Military Advocate General with the discretion to consult with any commander at any rank as it sees fit before making a decision on the opening of a criminal investigation.³⁹

The Implementation Team's recommendation

a) **The timeframe for a decision regarding the opening of an investigation**

57. As part of the Team's work, particular attention was given to the issue of the timeframe for handling cases relating to claims regarding IDF soldiers' operational activity (both in the context of recommendation no. 6 and in the context of recommendation no. 10). The representatives of the Military Advocate General's Corps presented to the Team at length the manner in which complaints regarding the activity of IDF forces' during operational activity are addressed, and described the various work processes in this respect.
58. It should be noted that representatives of the Military Advocate General's Corps expressed great willingness to shorten the timeframe for deciding on whether to open an investigation. At the same time, they elaborated on the difficulty in shortening the timeframe for the handling of these cases, given the resources currently available to the Military Advocate General's Corps.
59. It was decided that the IDF shall formulate a guideline by the Chief Military Prosecutor, which will set forth the timeframes for opening an investigation in case of a complaint regarding the outcome of IDF operational activity, and a draft of this guideline concerning "The examination of allegations regarding operational activity of IDF soldiers" was presented to the Implementation Team by representatives of the Military Advocate General's Corps (hereinafter: "**the Chief Military Prosecutor's Guideline Draft**"). We recommend that the Chief Military Prosecutor's Guideline Draft be approved and enter into effect no later than three months from the date of approval of this report's recommendations by the government. As a general rule, a final decision on how to handle a complaint will be made by the Military Advocate General's Corps within a period of **up to fourteen weeks from the date of receipt of the complaint**. In exceptional cases, with the approval of the Military Advocate General and for reasons that will be recorded, it shall be possible to extend this period by up to fourteen additional weeks.
60. The Team discussed the implementation of this recommendation with respect to the examination of events that occurred during times of emergency and in combat, and

³⁹ *Id.* See also: General Staff Order 33.0304, *supra* note 34, in section 60.

concluded that in such cases, the above time period for making a final decision on how to handle the complaint shall be counted from the time of the cessation of combat. As a rule, the Team recommends that complaints relating to exceptional events that occurred during times of emergency and in combat be handled, whenever possible, according to the above timetable. However, we believe that there are circumstances when the Military Advocate General or the Chief Military Prosecutor should be allowed to determine that due to the volume of complaints, the nature and type of emergency or combat event, a unique and separate timeframe is required. This timeframe should be as similar as possible to the timeframe applied routinely when investigating complaints and must be published within 60 days from the cessation of combat. This is for the following reasons: first, in times of intense fighting, the number of complaints of violations of the rules of international humanitarian law may be significantly greater than during routine times (even if this routine often includes events of a combat nature), in a manner that will require adjustments of the timeframe described above in order to properly handle an unusually large number of complaints and conduct an effective investigation. Second, these are investigations that are often complex in nature, in part because of the extent of combat and the large number of forces involved.

61. The Team recommends that in combat events, followed by an unusually large number of complaints, the Military Advocate General will be able to extend, for reasons to be recorded, the dates mentioned above, for periods of up to 90 days each.

b) The obligation to consult with a Major General

62. The Military Advocate General, Chief of General Staff and Minister of Defense impressed upon us the importance of the consultation with a Major-General, both from the perspective of the operational elements in the IDF, as well as from that of the Military Advocate General; this, when the Military Advocate General wishes to open a criminal investigation on the basis of what is first and foremost a command tool (the debrief).⁴⁰ We believe that indeed the existing consultation mechanism can contribute to a fruitful professional dialogue between the command entities and the military legal officers, and that its annulment could harm this discourse.

63. However, in view of the concern expressed by the Turkel Commission that the obligation to consult may result in a delay in making a decision regarding the opening of an investigation, we recommend that Article 539a(b)(4)(b) of the Military Justice Law be amended to require that the consultation take place within 15 days from the

⁴⁰ In respect of the nature of the operational debrief, see also: the second report of the Turkel Commission, *supra* note 3 above, at 320.

time of the Military Advocate General's request to consult with the Major-General, after determining *prima facie* that the debrief raises suspicion of an offense that justifies a criminal investigation. Limiting the amount of time available to the Military Advocate General and the relevant Major-General to hold consultations, in addition to limiting the total time available to the Military Advocate General's Corps to make a decision on opening a criminal investigation (which, as noted above, may not exceed 14 weeks in the absence of exceptional circumstances), will provide a response to the concern pointed out by the Turkel Commission regarding an unjustified delay regarding the decision on opening a criminal investigation.

64. We find it necessary to reiterate that to begin with, the above consultation mechanism applies only in cases where the Military Advocate General wishes to open a criminal investigation on the basis of the findings of an operational debrief. It should be noted in this respect that according to the investigation policy in practice today in the IDF, a criminal investigation is opened immediately with respect to claims that *prima facie* raise suspicion of a criminal offense (e.g. allegations of looting or the beating of a detainee). In addition, the death of a person in the wake of IDF activity in the West Bank will also lead to the immediate opening of a criminal investigation, except in cases tantamount to events of "actual combat".⁴¹ It should be noted that the Military Advocate General's discretion as to whether to open an investigation is independent, and consultation with the Major General does not impair this independence.

b. Providing reasoning for the Military Advocate General's decision regarding the opening of an investigation

65. According to Israeli law, the Military Advocate General must provide reasoning for his decisions by virtue of being an administrative body. However, the Turkel Commission found, based on a sample review of files it conducted, that decisions on opening an investigation were not reasoned enough. Therefore, the Commission recommended that the decision of the Military Advocate General not to open an investigation be reasoned due to the public and legal importance of the matter.⁴² The reasoning is also essential to enable those concerned to appeal the Military Advocate General's decisions and examine them.

The Implementation Team's recommendation

66. We recommend that any decision made by the authorized entities in the Military Advocate General's Corps with respect to a complaint in which allegations were raised

⁴¹ *Id.*, at 316.

⁴² *Id.*, at 323.

regarding operational activity of IDF soldiers be reasoned in real-time in detail and be documented in the prosecution's files. This is relevant in particular to a decision concerning the handling of a complaint and a decision not to open a criminal investigation or not to prosecute.

67. It should be noted that representatives of the Military Advocate General's Corps told us that this has been the practice in recent years. In any event, a provision that implements this recommendation was also included in the Chief Military Prosecutor's Guideline Draft mentioned above. As stated, the Implementation Team recommends that the Chief Military Prosecutor's Guideline be approved and enter into effect no later than within three months from the date of approval of this report's recommendations by the government.

C. Submitting material to the commanding ranks

68. The Turkel Commission determined that in appropriate cases, the Military Advocate General should refer relevant material to the commanding ranks at the conclusion of the examination process, regardless of whether the case was closed or not, to allow the consideration of taking command steps.⁴³

The Implementation Team's recommendation

69. We recommend that upon conclusion of the handling of a complaint or at the conclusion of a Military Police Criminal Investigation Division investigation, regardless of whether or not it was decided to conclude the handling of the complaint without an investigation or to close the case, the Military Advocate for Operational Affairs examine whether it is appropriate to transfer the investigation file or part thereof to the operational elements. This is so that they can extract any necessary operational lessons, and consider whether command measures are required in addition to the recommendation in the memorandum of opinion of the Military Advocate for Operational Affairs, in order to enforce compliance with military orders and the rules of international law. It should be noted that the representatives of the Military Advocate General's Corps updated us that this has been the practice in recent years and that in any event the Chief Military Prosecutor's Guideline Draft includes a provision concerning reporting to commanders, which implements this recommendation.

Recommendation no. 7 – the independence of the Military Advocate General

70. The Turkel Commission determined that the mere existence of a military justice

⁴³ *Id.*

system, does not, in and of itself, contradict the principle of independence enshrined in international law, necessary for conducting an effective investigation. However, in order to comply with the requirement of independence, investigating a reasonable suspicion of a “serious violation” of international humanitarian law within the military justice system must be conducted outside the chain of command.⁴⁴

71. The Commission further stated that the independence of a military justice system is assessed, *inter alia*, according to the procedures for appointing the Military Advocate General at the head of that system, his tenure – including the authority to extend it – as well as the determination of rank.⁴⁵

a. The legal status of the Military Advocate General

72. The Turkel Commission determined that the Military Advocate General’s professional subordination to the Attorney General, consistent with the requirement for independence in international law, is not sufficiently institutionalized, and there is need for legislation and organizational arrangements to ensure this subordination.⁴⁶

The Implementation Team’s recommendation

73. It should be noted that even prior to the publication of the Turkel Commission report, the position of the Military Advocate General enjoyed statutory anchoring in the Military Justice Law.⁴⁷ In addition, military orders expressly state that despite the command subordination of the Military Advocate General to the Chief of General Staff and his belonging to the General Staff High Command, “he is subject to no authority but the law”.⁴⁸ Moreover, in 1997 the Supreme Court sitting as the High Court of Justice rendered a ruling in the matter of **Avivit Attiya**.⁴⁹ In the ruling concerning the Attiya Case it was determined that the opinion of the Military Advocate General determined the legal situation in terms of the military authorities, but that like all executive systems, the Military Advocate General was also subject to the professional guidance of the Attorney General and to his legal opinion. Since then, this ruling constitutes binding case-law which the Military Advocate General's Corps follows.

⁴⁴ *Id.*, at 325.

⁴⁵ *Id.*, at 326.

⁴⁶ *Id.*, at 327.

⁴⁷ Article 178 of the Military Justice Law and section 39 above. It should be noted that in this the status of the Military Advocate General differs from the status of the legal counsels to government ministries, which are not arranged in legislation but in the directive of the Attorney General, see: “The legal counsels to government ministries”, **the Attorney General's Directive 9.100 (5762)**.

⁴⁸ See High Command Order 2.0613, *supra* note 24, Article 9(a); High Command Order 2.0201 “the Professional Staff at the General Staff Headquarters”, Article 7(a)(7) (hereinafter: **High Command Order 2.0201**) and the second report of the Turkel Commission, *supra* note 3, at 243.

⁴⁹ High Court of Justice 4723/96 *Attiya v. the Attorney General et al.*, Supreme Court Rulings NA(3) 714 (hereinafter: “**the Attiya Case**”).

74. In light of the legal framework described above, both in respect of the Military Advocate General's status and responsibilities and with respect to the fact that like all executive systems, he too is subject to the professional guidance of the Attorney General and his legal opinion, the Implementation Team believed that the Turkel Commission's recommendation should be expressed through a new directive of the Attorney General (concurrent with another new directive regulating the review by the Attorney General of certain decisions of the Military Advocate General, which will be discussed in connection with recommendation no. 13 (a) below).
75. The Team's intention was that the legal status of the Military Advocate General and of the instances in which the Military Advocate General is guided by the Attorney General will be defined, taking into consideration the Turkel Commission's recommendations.
76. Accordingly, the Ministry of Justice drafted a new directive of the Attorney General, which was presented to the Team, aimed at clarifying the relationship between the military justice system headed by the Military Advocate General and the general legal system headed by the Attorney General. The guideline also clarifies the independent legal status of the Military Advocate General and the framework for professional guidance provided by the Attorney General to the Military Advocate General. The directive further refers to the guidelines established regarding the Attorney General's involvement in the decisions of the Military Advocate General. The said directive was published in April 2015.⁵⁰

b. The appointment of the Military Advocate General

77. To ensure the independence of the Military Advocate General from his superiors in the military hierarchy, the Turkel Commission recommended changing the manner in which the Military Advocate General is appointed so that the appointment is made by the Minister of Defense, but based on the recommendation of a public-professional committee, similar in composition to the committee that makes a recommendation regarding the appointment of the Attorney General.⁵¹ It was further recommended that the Attorney General be the chairman or a member of the public-professional committee.⁵²

The Implementation Team's recommendation

78. In the course of the discussions of the Implementation Team, the feasibility of the

⁵⁰ "The Military Advocate General", **the Attorney General's Directive 9.1002 (5760)**.

⁵¹ The second report of the Turkel Commission, *supra* note 3, at 327.

⁵² *Id.*

proposed mechanism was examined, given the unique characteristics of the role of the Military Advocate General, who, as noted in section 73 above, although not subject professionally to the Chief of General Staff, is a senior officer among the professional staff of the General Staff Headquarters subordinate in terms of command to the Chief of Staff.

79. The Team's recommendation is that the Military Advocate General be appointed by the Minister of Defense based on the recommendation of the Chief of Staff, and with the consent of the Attorney General. To do so, Article 177 of the Military Justice Law, which regulates the appointment of the Military Advocate General, must be amended so that this appointment process of the Military Advocate General is set in legislation.

c. The Military Advocate General's tenure and rank

80. The Turkel Commission recommended setting the tenure of the Military Advocate General at one term of six years (like that of the Attorney General), that may not be extended, and determining a fixed rank for the Military Advocate General.⁵³

The Implementation Team's recommendation

81. We believe that the Military Advocate General's rank should be that of Major General, reflecting the central position of the Military Advocate General in the army, taking into consideration the fact that since 2002 the Military Advocate Generals were promoted to the rank of Major General during their term of office, and that any change to a lower rank is liable to be interpreted as a devaluation in the system's appreciation of the role and status of the Military Advocate General. In cases where at the time of his appointment the Military Advocate General bears the rank of Colonel, he will be promoted with his appointment to the rank of Brigadier General and after a predetermined period (and in any event no later than in the middle of his term), he will be promoted to the rank of Major General.
82. We recommend that the tenure of the Military Advocate General be four years without the possibility to further extend it. This time frame is consistent with customary practice regarding appointments in the IDF.
83. The Team further recommends that in order to ensure the Military Advocate General's independence from the command ranks, like his appointment process, the termination of the appointment of the Military Advocate General will be made by the Minister of Defense with the consent of the Attorney General. The Team recommends that the Ministry of Justice and the Military Advocate General's Corps examine the need for

⁵³ *Id.*

anchoring in legislation the process for terminating the Military Advocate General's service, as well as his tenure and rank.

Recommendation no. 8 – the Military Advocate General's "dual hat" and the status of the Chief Military Prosecutor

84. The Turkel Commission noted that the principle of impartiality during investigations was intended to ensure that the investigation would be conducted objectively and without bias.⁵⁴ As opposed to the principle of independence, the issue of impartiality pertains to the performance of the investigator, including the appearance of his performance. The Commission held that the dual role of the Military Advocate General as head of both the army's prosecution system and its legal counsel system creates concern of the appearance of bias. In order to avoid this, the Turkel Commission recommended taking two measures: strengthening the status and independence of the Chief Military Prosecutor, in a manner similar to the status of the State Attorney, and regulation by law of the appeal process before the Attorney General regarding decisions of the Military Advocate General (recommendation no. 13 (a)). Accordingly, the Commission recommended that the Chief Military Prosecutor be appointed by the Minister of Defense, based on the recommendation of a committee headed by the Military Advocate General, and that his tenure and rank be determined in advance.⁵⁵

The Implementation Team's recommendation

85. In order to strengthen the status and independence of the Chief Military Prosecutor, we recommend adding a new provision to the High Command Order concerning the Military Advocate General's Corps, which expresses, among other things, the Chief Military Prosecutor's professional independence in exercising his powers as enforcer of the law.

86. In accordance with this recommendation, representatives of the Military Advocate General updated the Team that a provision shall be added to the said High Command Order, stipulating as follows:

“The Chief Military Prosecutor is in charge of implementing the values of the rule of law, order and justice in the IDF and in the territories held by it through law enforcement with respect to those subject to military jurisdiction. The Chief Military Prosecutor is the commander of all military advocates and military prosecutors, and has overall responsibility for their professional work. In

⁵⁴ The second report of the Turkel Commission, *supra* note 3, at 328.

⁵⁵ *Id.*, at 330.

exercising his powers as enforcer of law, the Chief Military Prosecutor operates independently in accordance with the policy outlined by the Military Advocate General and his decisions.”⁵⁶

87. The Team recommends that the amendment of the High Command Order be carried out within three months from the date of approval of this report's recommendations by the government.
88. As to the appointment process of the Chief Military Prosecutor, following the dialogue the Team held on this issue with representatives of the defense establishment, the Team was updated on June 18th 2014 that the defense establishment had decided to change the manner in which the Chief Military Prosecutor is appointed, so that he is appointed by the Minister of Defense, based on the recommendation of a committee headed by the Military Advocate General.
89. The Team was informed that the rank of the Chief Military Prosecutor is fixed (Colonel) and is enshrined as such in the Military Advocate General's Corps Order.⁵⁷ Incidentally, it shall be noted that the Chief Military Prosecutor's rank is equivalent to that of the Chief Military Defender (hereinafter: “**the Chief Military Defender**”). We ascribe great importance to the fact that the ranks of the Chief Military Prosecutor and the Chief Military Defender are identical so as not to harm the position of the Chief Military Defender.⁵⁸ Therefore, this arrangement, whereby the rank of the Chief Military Prosecutor and the Chief Military Defender is that of colonel, is acceptable to us.
90. As for the tenure of the Chief Military Prosecutor, since he is an officer with the rank of colonel and the position of the Chief Military Prosecutor may not necessarily be his last position in the Military Advocate General's Corps in particular or in the military system in general, his tenure may be affected by the tenure of other officers in the Military Advocate General's Corps (such as the Military Advocate General, his deputy or corresponding heads of departments) or outside it.⁵⁹ Under these circumstances, we believe that determining a strict tenure for the post of Chief Military Prosecutor may create practical difficulties both in the appointment of other officers in the Military

⁵⁶ High Command Order 2.0613, *supra* note 24.

⁵⁷ Organization Ordinance 628 “the Organization Ordinance of the Military Advocate General's Corps' Headquarters” (October 22nd 2014) (hereinafter: **the Organization Ordinance of the Military Advocacy General**).

⁵⁸ Parenthetically we shall note that according to the Organization Ordinance of the Military Advocate General's Corps, the Deputy Military Advocate General, who fulfills the role of the Military Advocate General in the absence of the latter, is an officer with the rank of colonel.

⁵⁹ Thus, for example, in the past, officers with the rank of colonel from the Military Advocate General's Corps were appointed to positions in units such as: Soldiers' Ombudsman, the Office of the Chief Censor and even to military attachés offices overseas.

Advocate General and with respect to the possibilities that the Chief Military Prosecutor will have available to him when seeking to continue his military service after completion of his tenure. These reasons justify, in our opinion, leaving some flexibility in determining the length of tenure of the Chief Military Prosecutor by the IDF and the Military Advocate General's Corps, and we recommend setting the tenure of the Chief Military Prosecutor at four years with the possibility of extension for a period not exceeding one year. Any shortening of the term of office of the Chief Military Prosecutor will be conditional on the consent and approval of the Minister of Defense, except in the event of termination of service due to criminal, disciplinary or command proceedings.

Recommendation no. 9 – Military Police Criminal Investigation Division for Operational Matters

91. The Turkel Commission found that one of the requirements arising from the principle of effectiveness and thoroughness is that investigations be conducted professionally.⁶⁰ Therefore, the Commission recommended the establishment of a body for operational matters within the Military Police Criminal Investigation Division, similar to such a body that exists in the military prosecution, which constitutes a dedicated body with expertise in investigating complaints of violations of the rules of international humanitarian law.⁶¹ The Commission recommended that investigators in this body undergo appropriate training, and that there will be Arabic speakers among them. It was also recommended that the bases of the Military Police Criminal Investigation Division for Operational Matters be deployed in areas where the events under investigation occur.

The Implementation Team's recommendation

92. We recommend that the military authorities establish a specialized unit within the Military Police Criminal Investigation Division for the investigation of operational incidents. It is proposed that this unit be set up within four months from the date of approval of this report's recommendations by the government.
93. Representatives of the Military Advocate General's Corps updated the Team that the military has adopted this recommendation and begun taking the initial steps required to establish the unit. The authorized entities in the military also provided instructions regarding the allocation of appropriate resources. The establishment of the unit, the professional training of its personnel, its operation, powers and functions must find

⁶⁰ The second report of the Turkel Commission, *supra* note 3 above, at 330.

⁶¹ *Id.*

expression in an IDF High Command Order or in any other suitable form decided on by the Military Advocate General.

Recommendation no. 10 – establishing a timeframe for a criminal investigation

94. The Turkel Commission noted that at present Israeli law does not limit the time allotted for a criminal investigation, although there is a directive of the Attorney General intended to shorten the duration of criminal proceedings until the filing of an indictment in the civil court system.⁶² In light of the above, the Turkel Commission came to the conclusion that the Military Advocate General must determine, in coordination with the Attorney General, the maximum time between the decision to open an investigation, and a decision on how to handle the case: initiating legal or disciplinary proceedings or closing the case.⁶³ The Commission also recommended that the Military Advocate General publish, at least once a year, statistical data on the duration of the handling of cases.

The Implementation Team's recommendation

95. This issue of determining the overall time frame for the handling of cases relating to the examination of claims regarding IDF activity in operational events was discussed in detail by the Team with IDF representatives. Accordingly, the Implementation Team recommended that the Chief Military Prosecutor publish a directive within three months from the date of approval of this report's recommendations by the government. The directive will determine that the duration of an investigation into a case concerning alleged violations of the rules of international humanitarian law will be limited to nine months from the date of opening the investigation. The Commander of the Military Police Criminal Investigation Division will be given the authority to extend the investigation's timeframe by three additional months based on a reasoned written decision documented in the case file. The timeframe for a decision by a prosecutor in the case will be set at nine months from the date of receiving the investigation file. In cases classified by the Military Advocate for Operational Matters as "complex" cases – for example, investigating incidents of death and serious injury – a prosecutor's decision will be made regarding the case within a period not exceeding one year from the date of receiving the case file.

96. The Chief Military Prosecutor may extend the time periods described above regarding the Military Advocate General's Corps for a period not exceeding an additional three

⁶² The second report of the Turkel Commission, *supra* note 3, at 332.

⁶³ *Id.*

months, based on a reasoned written decision documented in the prosecution file. An additional extension beyond this period, including a further extension of the Military Police Criminal Investigation Division investigation, will require the Military Advocate General's approval by way of a reasoned decision, which will be documented also in the prosecution's file, and for a period not exceeding three months.

97. With respect to statistical data, we recommend that the Chief Military Prosecutor Directive determine that statistical data on the duration of handling operational files will be published once a year as part of the annual report of the Military Advocate General's Corps.
98. The Team sees fit to emphasize the need to establish a timetable for handling cases involving allegations concerning IDF activities in operational incidents. In this respect the Military Prosecution presented a timetable which the prosecution and investigation authorities are required to abide by, with the aim of effectively handling these cases. The intention is that the handling of these cases shall be completed, as a rule, after no more than eighteen months from the date of opening investigations and in complex cases within one year and nine months. Moreover, representatives of the Military Advocate General's Corps emphasized that an extension beyond these times will not be granted easily and routinely but will require substantial and detailed justification, and that the implementation of this timetable requires the allocation of adequate resources to the Military Prosecution and the Military Police Criminal Investigation Division, and we can only recommend that these resources indeed be granted.

Recommendation no. 11 – transparency of proceedings

99. The Turkel Commission determined that the principle of transparency has two aspects: the first is designed to ensure the rights of victims of crime and the second ensures scrutiny of the investigation and prosecution mechanisms.⁶⁴

a. The rights of victims of crime

100. The provisions of the Rights of Victims of Crime Law, 5761 – 2001 (hereinafter: “**the Rights of Victims of Crime Law**”) regulating the rights of victims of crime to access information about a criminal proceeding, do not apply to offenses investigated by the Military Police Criminal Investigation Division.⁶⁵ In light of the importance of the principle of transparency, the Turkel Commission recommended applying the arrangements set out in the Rights of Victims of Crime Law to receive information regarding criminal legal proceedings, *mutatis mutandis*, to those harmed by the law

⁶⁴ *Id.*, at 333.

⁶⁵ The Rights of Victims of Crime Law, 5761 – 2001, LA 1782, in Article 2.

enforcement actions of the security forces, investigated by the Military Police Criminal Investigation Division.⁶⁶

b. Documentation in the file

101. Regarding the second aspect of the principle of transparency, which allows scrutiny of the investigation and prosecution mechanisms in the Military Advocate General's Corps, the Turkel Commission found that in some of the files of the Military Advocate General's Corps that it examined, the documentation of actions was very concise. The Turkel Commission recommended that the Military Advocate General's Corps deploy a rigorous documentation process, especially in cases of investigations regarding violations of the rules of international humanitarian law.⁶⁷

The Implementation Team's recommendation

a. The rights of victims of crime

102. The Team was of the opinion that even though the Rights of Victims of Crime Law does not apply to investigations carried out by the Military Police Criminal Investigation Division, in order to give expression to the principle of transparency, victims of crime should be allowed to receive information in accordance with the principles of the Law. Therefore, the Team recommended determining that the principles of the Law relating to the updating of victims of crime be anchored in the Chief Military Prosecutor directives regarding investigations carried out by the Military Police Criminal Investigation Division, *mutatis mutandis*.
103. Representatives of the Military Advocate General's Corps told the Implementation Team that in practice the Military Advocate General's Corps already operates in the spirit of the recommendation, and that information on the handling of the case is given to the complainants and actions in the investigation case are well documented. However, and in view of recommendation no. 11 above of the Turkel Commission and the recommendation of the Implementation Team, the Military Advocate General's Corps decided to dedicate a chapter in the Chief Military Prosecutor's Guideline Draft to regulating the manner in which information shall be conveyed to victims in operational cases. According to the Guideline Draft presented to the Team, a person who is not a resident of an enemy state, who was injured or whose property was directly damaged from an event which is the subject of an investigation, as well as a first-degree relative of a person who died as a result of such an event or his guardian, shall be entitled to receive information about the investigation after signing an

⁶⁶ The second report of the Turkel Commission, *supra* note 3, at 333.

⁶⁷ *Id.*

information request form. The aforementioned form will be available in Hebrew, Arabic or English, according to the preference of the applicant. The Draft stipulates that the applicant will receive information at each of the following stages in handling a complaint: a) the opening of an investigation or a decision not to open an investigation; b) the decision of the military prosecutor in the case, including the applicant's right to review the indictment, if filed; c) the dates of the hearings in military court, if an indictment is filed; d) the verdict or decision in a disciplinary proceeding; e) the sentence; f) and a decision on filing an appeal. Representatives of the Military Advocate General's Corps further stated that even when an investigation of the Military Police Criminal Investigation Division was not conducted, and the decision of the Military Advocate General on the handling of the case is based on other information, including the results of the General Staff investigation or fact-finding assessment mechanism, the Military Advocate General's decision is given to the injured party who initially contacted the Military Advocate General's Corps, along with the main findings of the investigation. Moreover, in order to realize the principle of transparency, in cases of public interest, the Military Advocate General also takes steps to publish a notice in his behalf about the incident.

104. As noted, the Implementation Team recommends that the Chief Military Prosecutor's Guideline be published no later than three months from the date of approval of this report's recommendations by the government. The Team further believes that the process of updating victims on the Military Advocate General's decision in cases where no investigation was conducted by the Military Police Criminal Investigation Division should be anchored in appropriate provisions, to be released to the public.

c. Documentation in the file

105. Another component of recommendation no. 11 is an accurate and detailed documentation in the case-files of the manner in which complaints were handled. We recommend that the Chief Military Prosecutor's Guidelines be published, requiring a process of rigorous and detailed documentation, especially in cases of claims regarding violations of the rules of international humanitarian law.
106. Representatives of the Military Advocate General's Corps updated the Team that the Chief Military Prosecutor's Guideline Draft includes an express provision according to which any significant decision taken in relation to a complaint be explained fully and will be documented in the case-file; this, with an emphasis on decisions regarding the handling of the complaint and the closing of the case or the criminal investigation. We can only repeat our recommendation that the Chief Military Prosecutor's Guideline

enter into force no later than three months from the date of approval of this report's recommendations by the government.

Recommendation no. 12 – oversight of the legal advice given by the Military Advocate General's Corps

107. The Turkel Commission report states that in order to strengthen the capacity of the Attorney General to exercise his supervisory powers over the Military Advocate General, it is recommended that a unit be set up within the Legal Counsel and Legislation Department at the Ministry of Justice that shall specialize in international humanitarian law.⁶⁸ This, after the Turkel Commission found that advice in the field of international humanitarian law is decentralized and spread out over various bodies in the civil system and there is no single body within the Ministry of Justice that coordinates the legal handling of the matter. The Commission recommended conducting administrative work to formulate an outline, positions and suitable training for this unit, as well as the establishment of a permanent communication channel between the bodies dealing with this issue and the new unit that is to be established.

The Implementation Team's recommendation

108. The Implementation Team recommends the implementation of the Turkel Commission's recommendation as is. It was made clear during the Team's discussions that this recommendation is acceptable within the Ministry of Justice. The Ministry of Justice further updated that on the professional level, the intent is for legal advice on issues noted in the Turkel report to be provided in an integrated manner by a cluster (a team of lawyers specializing in the field of international humanitarian law) to be set up under the responsibility of the Deputy Attorney General (International Law) and by the security cluster that operates under the responsibility of the Deputy Attorney General (Legal Counsel). It was further explained that ideally, legal counsel pertaining to these issues should encompass both domestic Israeli law and its interpretation by the Supreme Court, as well as international law, and that an internal organizational review is being conducted at the Ministry of Justice in order to decide on the structure of the unit within the Legal Counsel and Legislation Department, and as a result the relevant human resource aspects as well.

109. The Implementation Team recommends that this unit be set up as soon as possible, to enable optimal oversight in the areas of international humanitarian law.

110. In addition, the Ministry of Justice updated that work is being carried out to

⁶⁸ *Id.*, at 335-336.

institutionalize the interaction between legal counsel within the Ministry of Justice and the Department of International Law in the Military Advocate General's Corps, and that in the future work will be undertaken to institutionalize the interaction with other relevant legal bodies such as the Legal Counsel for Judea and Samaria and the Legal Counsel for the Ministry of Defense. The Implementation Team recommends completing this staff work as soon as possible.

Recommendation no. 13 – individual and systemic review of the military prosecution

a. Individual review – appeal to the Attorney General

111. The Turkel Commission referred to the determination of Israel's Supreme Court that “[t]he Attorney General is entitled to intervene, and even instruct the Military Advocate General on how to conduct himself with respect to decisions that in the Attorney General's opinion are of special interest to the public or where he finds that their implications go beyond the military framework. The intervention of the Attorney General in these matters is performed within the framework of his role as the person who bears ultimate responsibility for the various prosecution authorities and the legal bodies in the executive branch.”⁶⁹
112. Accordingly, the Turkel Commission recommended setting in legislation an appeals process before the Attorney General regarding the Military Advocate General's decisions, and that this proposed legislation will also determine timeframes for filing an appeal and making a decision in the matter.⁷⁰

b. Systemic review – the Commission for Inspection of the State Prosecution

113. The Turkel Commission recommended that the Commission for Inspection of the State Prosecution and Legal Representatives to the courts (hereinafter: “**the Commission**”) (which was called “the Prosecution's Ombudsman” in the Turkel report), once established, be authorized to review all branches of the military prosecution as well and monitor the military bodies conducting examinations and investigations, in order to verify that the Military Advocate General's procedures and policies are applied in practice.⁷¹

The Implementation Team's recommendation

a. Individual review – appeal to the Attorney General

⁶⁹ **The Attiya Case**, *supra* note 49, paragraph 11 of the ruling of Judge D. Beinisch.

⁷⁰ The second report of the Turkel Commission, *supra* note 3, at 339.

⁷¹ *Id.*, at 340.

114. As recommended by the Turkel Commission, the Implementation Team believes that it is appropriate to anchor the procedure for appealing decisions of the Military Advocate General before the Attorney General. The Attorney General suggested that this be done in the form of an Attorney General Guideline, which will prescribe the review process of the Military Advocate General's decisions in certain cases defined in the guideline. This is similar to the existing review process with respect to fatal accidents cases.⁷² We find this position acceptable.
115. In the course of the Team's work, representatives of the Attorney General presented before the Team a draft of the Attorney General's Guideline, which was later approved and published in April 2015. It is titled "Review of decisions of the Military Advocate General regarding incidents involving the death of an individual in the course of Israel Defense Forces operational activity, when serious violations of customary international law are alleged".⁷³ It was designed to formalize the review process by the Attorney General of decisions of the Military Advocate General in cases concerning claims of serious violations of the rules of international humanitarian law.
116. This guideline will enable review by the Attorney General over decisions of the Military Advocate General related to deaths that occurred during operational activity, with respect to which a claim is made concerning a serious violation of the rules of international law.

b. Systemic review – the Commission for Inspection of the State Prosecution

117. The Team discussed the recommendation of the Turkel Commission to apply the jurisdiction of the Commission to the military prosecution bodies as well. This is a new commission established at the Ministry of Justice, which began its activity on April 1st 2014. The role of the Commission is to initiate systematic review of the conduct of the bodies under its purview and examine individual complaints submitted to it.⁷⁴ The bodies reviewed by the Commission are the various prosecution units, the prosecutors of the Israel Police prosecution, lawyers authorized by the Attorney General to act on behalf of the State and the lawyers who received power of attorney from the Attorney General for purpose of representation. As for the police prosecution, it was determined

⁷² See: "Fatal Accidents in the IDF – Appeal to the Attorney General against a Decision of the Military Advocate General to Close an Investigation File", **Attorney General Guideline** 4.5000 (5741); and the second report of the Turkel Commission, *supra* note 3, at 337.

⁷³ "The review of decisions of the Military Advocate General regarding incidents involving the death of an individual in the course of Israel Defense Forces operational activity, when serious violations of customary international law are alleged", **Attorney General Guideline** 4.5003 (5775).

⁷⁴ For more information see the address "The Commission for Inspection of the State Prosecution and Legal Representatives to the Courts", index.justice.gov.il/Units/Commission/Pages/CommissionerSpeech.aspx.

at the time of the establishment of the Commission that it would begin exercising its powers with respect to this body only six months following its inception and no later than 12 months after its establishment.⁷⁵ In the course of its work, the Implementation Team was updated that the Commission was authorized to review the police prosecution starting on January 1st 2015.

118. Given the determination in advance that the work of the Commission would be gradual, we recommend that after a period of one year from the date of application of the Commission's powers to the police prosecution, *i.e.*, starting January 1st 2016, the authority of the Commission will be expanded so that it also apply to the activity of the military prosecution with respect to cases involving claims of violation of the Law of Armed Conflict, while making the appropriate arrangements between the Commission and the Military Advocate General's Corps for exercising the Commission's review of the military prosecution.

Recommendation no. 14 – handling complaints against police officers

119. In certain circumstances, Border Police officers (hereinafter: “**the Border Police**”) operate under the command of the IDF in Judea and Samaria and side by side with IDF forces.⁷⁶ The Turkel Commission stated that upon receipt of a complaint or information regarding a shooting incident in the West Bank involving both IDF Forces and Border Police, sometimes the organizational affiliation of the person carrying out the individual act cannot be determined, *i.e.*: whether it was IDF soldiers or Border Police officers, or if IDF soldiers and Border Police officers acted in concert. This issue affects the identity of the investigating body.⁷⁷
120. The investigators of the Police Internal Investigation Department (hereinafter: “**the PIID**”) at the Ministry of Justice investigate complaints filed against police officers, including complaints of violations of international humanitarian law. This rule has a central exception, which is shooting incidents by Border Police officers in Judea and Samaria, that were investigated by the Criminal Investigations Department of the Judea and Samaria District of the Israel Police (hereinafter: “**J&S Investigations Department**”) at the time of writing of the second report of the Turkel Commission. The entity responsible for investigating IDF soldiers is the Military Police Criminal Investigation Division.
121. The Turkel Commission noted that the investigation of police officers by police

⁷⁵ *Id.*

⁷⁶ The second report of the Turkel Commission, *supra* note 3, at 249.

⁷⁷ *Id.*, at 341 – 342.

officers impairs, at the very least, the appearance of the independence of the investigation.⁷⁸ It further stated that the handling by two different investigative bodies of incidents involving the IDF and Border Police forces sometimes affects the speed of the investigation because of the uncertainty as to which entity has the authority to investigate the incident.⁷⁹ The Commission noted that for these investigations to comply with the principles of effectiveness and thoroughness, the investigators must be professional, experienced and equipped with the appropriate means to carry out the investigations.⁸⁰ Apart from the difficulty posed by the aforementioned splitting of the handling of complaints between two separate investigative bodies, the Commission noted that the material presented before it revealed difficulties in the conduct of investigations by the J&S Investigations Department.⁸¹

122. Accordingly, the Commission recommended that when suspicions are raised concerning violations of the rules of international humanitarian law, following police action carried out under the command of the IDF in the West Bank, it is appropriate that these allegations will be examined and investigated by the IDF and not by the police.

The Implementation Team's recommendation

123. In the background it should be noted that, as stated above, within the framework of recommendation no. 9, the Implementation Team decided on the establishment of the Military Police Criminal Investigation Division for Operational Matters, whose investigators will undergo special training in the field of international law and will specialize in operational investigations.
124. The issue of the body investigating the Israeli police in general and shooting incidents that occurred in Judea and Samaria involving the police in particular, has been discussed for several years at the Ministry of Justice, as is also apparent from the Turkel Commission report. With the establishment of the PIID in 1992 the handling of most of the investigations of police officers was transferred to it, but the handling of such shooting incidents remained in the hands of the police, and specifically in the hands of the J&S Investigations Department. In 2007, the State Prosecutor at the time decided to cancel this arrangement and return the handling of complaints against police officers concerning shooting incidents to the PIID in a gradual process that was to be completed by the beginning of 2009. Later on, for various reasons, it was decided not

⁷⁸ *Id.*, at 341.

⁷⁹ *Id.*, at 342.

⁸⁰ *Id.*.

⁸¹ *Id.*

to implement this decision, except with respect to certain types of cases. Thus, the responsibility for investigating shootings remained in practice with the J&S Investigations Department.

125. The Implementation Team believes that since on the one hand there are a few isolated cases per year of shooting incidents during joint activity of IDF soldiers and Border Police officers, and on the other hand the implementation of the said recommendation would require legislative amendments, applying new and different norms to border police officers than what is the practice in the police force, and employing a new and additional punitive system in their respect, it is fitting that the investigation of such cases be made in accordance with the outline set out below:
126. In operational events involving Border Police officers or other police officers, when acting under the command of the IDF, the PIID investigators will be in charge of carrying out the investigation regarding the police officers. In incidents involving only police officers the investigation will be carried out from the onset by PIID and PIID attorneys will make the decision on whether to prosecute. In incidents involving soldiers and police officers alike, there will be a joint investigation team of military investigators and PIID investigators. If it appears *prima facie* that the main suspicion concerns soldiers, a Military Police Criminal Investigation Division investigator will head the joint investigation team and the team will be guided by the Military Advocate for Operational Affairs in the Military Advocate General's Corps. If it appears *prima facie* that the main suspicion concerns police officers, a PIID investigator will head the joint investigation team and the team will be guided by PIID advocates. In the event that a dispute arises between the Military Advocate General's Corps and the PIID concerning the question of whether the main suspicion is directed against soldiers or police officers, a dialogue on this subject will be conducted between the Chief Military Prosecutor and the Deputy State Attorney (Criminal Law). Upon completion of the investigation, the case will be transferred to the Military Advocate General's Corps for decisions concerning the soldiers involved in the incident and to the PIID for decisions concerning the police officers involved in the incident. The decisions will be coordinated between the Military Advocate General's Corps and the PIID.
127. The Implementation Team believes that this outline addresses the various issues raised by the Turkel Commission, and the difficulties that might arise from the implementation of recommendation no. 14 verbatim, including the difficulty of having police officers investigated by members of the Military Police Criminal Investigation Division, questions regarding the legal system applicable to the Border Police officers involved in shooting incidents in Judea and Samaria and the judicial tribunal before

whom they shall stand trial and the necessary legislative amendments. Using the above outline, the investigation of allegations of violations of the Law of Armed Conflict by Border Police officers will be entrusted to skilled investigators and properly trained personnel, who are not police officers, and full coordination will exist between the Military Police Criminal Investigation Division and the PIID in order to avoid unnecessary delays due to the need to coordinate between the various investigative bodies. In addition, this solution requires only an organizational change, and can be carried out relatively quickly and efficiently. Complainants who wish to complain with respect to shooting incidents that occurred in Judea and Samaria will be directed to the Military Police Criminal Investigation Division, which will check who the investigating body handling the complaint is and update the applicant as to the identity of this body.

128. As part of the Implementation Team's work, the outline described above was discussed with the relevant parties at the IDF, the Police and the Ministry of Justice, and received the approval of the Attorney General. In light of the above, we recommend that the Ministry of Justice immediately take the necessary steps to provide professional and rapid training to DIP investigators with appropriate experience suited for this task with the aim of implementing the outline described above as soon as possible.

Recommendation no. 15 – handling complaints against ISA interrogators

a. Transferring the role of the Interrogatee Complaints Comptroller to the Ministry of Justice

129. In 1992, a special investigative mechanism was established to examine the claims of interogatees by the ISA against their interrogators by the Interrogatee Complaints Comptroller (hereinafter: “**the Interrogatee Complaints Comptroller**” or “**MAVTAN**”).⁸² Until 2013 the MAVTAN was a senior ISA employee who had never worked in the Investigations Department, and who was accredited as a disciplinary investigator. The MAVTAN would investigate complaints of interogatees and send his findings to the “Interrogatee Complaints Comptroller Supervisor”, a senior attorney at the State Attorney's office, who would then formulate a recommendation regarding the need for opening a criminal investigation. The authority to conduct criminal investigations in such cases was and still lies with the PIID.

130. As noted in the second report of the Turkel Commission,⁸³ in 2010, the Attorney General decided that the MAVTAN would no longer be an ISA employee but rather an

⁸² The second report of the Turkel Commission, *supra* note 3, at 343.

⁸³ *Id.*, at 344.

employee of the Ministry of Justice. The Turkel Commission also recommended transferring the MAVTAN to the Ministry of Justice and subordinating the MAVTAN to the PIID.⁸⁴

The Implementation Team's recommendation

131. Following the decision of the Attorney General described above, in 2013 Col. (res.) Jana Modzgyrshvily was appointed as the MAVTAN. She is an employee of the Ministry of Justice and not an ISA employee, who served for many years in prosecutorial roles in the Military Prosecution, including as Chief Military Prosecutor. The MAVTAN is subject to the Interrogatee Complaints Comptroller Supervisor, who is a senior lawyer at the State Attorney's Office, who reports to the State Attorney (similar to the PIID Director).
132. The Team was presented with various reasons that justify leaving the MAVTAN's professional subordination to the Interrogatee Complaints Comptroller Supervisor, rather than to the PIID Director. Investigations of the MAVTAN, because they are related to the security field, require special expertise. The Interrogatee Complaints Comptroller Supervisor is a senior lawyer with expertise on the subject of security offenses and investigations, and therefore, there is an advantage in her being the entity that examines the findings of the Interrogatee Complaints Comptroller and her recommendations.
133. In view of the above, the transfer of the position of the MAVTAN to the Ministry of Justice severed, in practice, the organizational tie between the MAVTAN and the ISA. In addition, the professional qualifications and experience of the MAVTAN are expected to address the deficiencies indicated by the Commission in relation to investigations conducted in the past by the MAVTAN. We believe that subjecting the MAVTAN to the Interrogatee Complaints Comptroller Supervisor is the best professional solution, and therefore it is recommended to keep the current state intact – namely subordination of the MAVTAN to the Interrogatee Complaints Comptroller Supervisor at the State's Attorney Office.

b. Documenting ISA interrogations

134. The Turkel Commission determined that documenting ISA interrogations can strengthen the thoroughness and effectiveness of the MAVTAN's investigations,⁸⁵ and recommended a complete video recording of the interrogation, according to rules to be prescribed by the Attorney General in coordination with the Head of the ISA.

⁸⁴ *Id.*, at 345.

⁸⁵ *Id.*, at 346.

The Implementation Team’s recommendation

135. Today, the Criminal Procedure Law (Investigation of Suspects), 5762–2002⁸⁶ imposes an obligation to audio or video record police investigations. However, a temporary provision in the law, which has been extended several times, most recently in June 2015 for 18 additional months,⁸⁷ states that the documentation obligation will not apply to a police investigation of a suspect relating to a security offense, and that the provisions of the law do not apply to interrogations by the ISA at all. The explanatory notes attached to the most recent bill extending the temporary order in 2015 explained that under the special circumstances of a security investigation, such documentation can substantially impair the quality of the interrogation and the ability to investigate security offenses, thereby substantially impairing the ability to frustrate terrorist threats.⁸⁸ These rationales, which were written with respect to police investigations, are naturally also true with respect to ISA interrogations, as these are investigations of an intelligence–gathering and preventative nature.
136. Despite the fact that ISA investigations are mainly of a preventative nature, at times they are combined with investigations conducted by the police into security offenses.⁸⁹ As a result, at times, the ISA investigation materials may also be used as evidence in criminal proceedings. Thus, for example, a memorandum prepared by the ISA interrogator during the interrogation may be submitted to the court (and the interrogator himself may also be required to give testimony). The written memorandum constitutes investigative material for all intents and purposes, provided for the review of the defendant and his counsel in accordance with the provisions of Article 74 of the Criminal Procedure Law [Consolidated Version], 5742 – 1982.⁹⁰
137. In this situation, a visual record of the ISA interrogation, if exists, will in all likelihood also be requested in the course of providing investigative materials to the defendant in a

⁸⁶ LA 5762, at 1855.

⁸⁷ The Criminal Procedure Law (Investigation of Suspects) (Amendment no. 7), LA 5775 – 2015, at 192 (published on June 30th 2015).

⁸⁸ Bill for the Criminal Procedure Law (Investigation of Suspects) (Amendment no. 7) (Extension of the effect of the temporary provision concerning the interrogation of suspects in security offenses), Bills, 5775 – 2015, at 918 (hereinafter: “**Explanatory notes for the bill to extend the effect of the temporary provision**”).

⁸⁹ *Id.*

⁹⁰ LA 5742 1043. Article 74 of this law prescribes in sub-section (a): “In the event that an indictment for a crime or misdemeanor was filed, the defendant and his counsel, as well as an individual defense counsel authorized for that purpose, or, with the consent of the prosecutor, the person that the defendant authorized for that purpose, are entitled to review at any reasonable time the investigation material and the list of the material collected or recorded by the investigating authority, with regard to the charge held by the prosecutor and copy it.” In sub-section (b) it is stated that “A defendant may request the court to which an indictment was filed, to order the prosecutor to allow him to review the material which he contends is investigative material and was not made available for his reviewing.”

criminal proceeding. According to the head of the ISA and his representatives, this may substantially harm the quality of ISA interrogations and consequently, the organization's threat-frustrating abilities. First and foremost, the exposure of visual documentation in a criminal proceeding, and thus exposure of specific ISA interrogation methods, could harm the effectiveness of these interrogations in the future. Past experience shows that often the interrogatees undergo training or preparation by terrorist organizations on how to behave during an interrogation based on information obtained from someone who had previously been interrogated. The existence of documentation will further instruct additional interrogatees on the methods of interrogation and therefore how to withstand these.⁹¹ Second, the existence of visual documentation and the interrogatees' knowledge that it may be exposed to the public will discourage interrogatees from divulging information for fear that their cooperation with the investigative authorities will be exposed through the documentation.

138. As an alternative to full visual documentation of interrogations, and in order to find a solution to the difficulty pointed out by the Turkel Commission, a solution was proposed, which will enable greater transparency of the work of the interrogators, increase the ability to supervise and monitor the conduct of ISA interrogations and even assist in combating false claims regarding the use of improper measures during interrogations.
139. The Team recommends that cameras be installed in all ISA interrogation rooms, which will broadcast regularly and via closed-circuit what is happening in the interrogation room in "real-time" to a control room. This room will be located in one of the ISA facilities where interrogations are not conducted. The control room will be accessible and available to a supervising entity on behalf of the Ministry of Justice at any time without giving prior notice, and will allow observation of the goings-on in the interrogation room, where an interrogation takes place at the time. The supervising entity will prepare a concise memorandum on what he saw, but no record will be kept of the video transmission. The interrogators will have no indication of when the supervising entity is watching them in the control room. In the event that the supervising entity believes that illegal means have been used during the interrogation, an immediate obligation to report the matter to the MAVTAN will arise. This outline is acceptable by the Head of the ISA and the Attorney General.

Recommendation no. 16 – handling complaints against wardens

⁹¹ See for example: the Explanatory notes for the bill to extend the effect of the temporary provision. *Supra* note 88.

140. The Turkel Commission noted that the National Prison Wardens Investigation Unit (NPWIU) in the Israel Police is responsible for the examination and investigation of allegations of criminal offenses by members of the Prison Service. Hence, this unit is responsible for handling complaints and alleged violations of the rules of international humanitarian law by prison wardens. Most NPWIU investigators are appointed to the position after training as police investigators and after service at the National Unit for International Investigations.⁹²
141. The Commission recommended with regard to the training of investigators that the head of Intelligence and Investigation Division of the Israel Police ensure that as part of the training of NPWIU investigators, a proper place is given to studying the relevant rules of international law, particularly the Convention against Torture, the United Nations Standard Minimum Rules for the Treatment of Prisoners, the UN Body of Principles for the Protection of all Persons under Any Form of Detention or Imprisonment and the Istanbul Protocol (Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment).⁹³

The Implementation Team's recommendation

142. The Team recommends the implementation of this recommendation of the Turkel Commission as is; that is, adding to the training program of NPWIU investigators content relating to international standards pertaining to the investigation of alleged violations of the rules of international humanitarian law by members of the Prison Service. The Team further recommends that the entities at the Legal Counsel and Legislation Department of the Ministry of Justice, responsible for human rights issues in international law, assist the Israel Police in formulating appropriate training content and regularly monitoring their updating.

Recommendation no. 17 – handling complaints against the civilian echelon

143. The Turkel Commission noted that when there is an obligation under international law to open an investigation, it does not have to necessarily be a criminal investigation, but must comply with the principle of “effective investigation”. One example is a commission of inquiry.⁹⁴ Such a commission of inquiry can be established by the government as a means to examine events of importance or of public interest, including

⁹² The second report of the Turkel Commission, *supra* note 3, at 346.

⁹³ *Id.*, at 347.

⁹⁴ *Id.*, at 347.

concerns regarding violations of international humanitarian law.⁹⁵

144. The Turkel Commission found that in Israel, other than the criminal examination and investigation process, the government establishes, as necessary and at its discretion (or the Knesset's State Control Committee under special circumstances) state commissions of inquiry. In addition, the government has the authority to order the establishment of government commissions of inquiry for events of particular importance. Some of the commissions described above, such as the Kahan Commission, which investigated the Israeli involvement in the atrocities that were perpetrated against the civilian population in the Sabra and Shatila Refugee Camps in Lebanon by a Lebanese Forces unit; the Winograd Commission to examine the events of the campaign in Lebanon in 2006 and the Turkel Commission for the Examination of the Maritime Incident of May 31st 2010, dealt with issues relating to violations of the rules of international humanitarian law.⁹⁶ It was also noted that commissions of inquiry are set up *ad hoc* to investigate unusual incidents, thus enabling the regular investigation mechanisms to invest their resources in routine events.
145. The Turkel Commission concluded that the method of investigations by commissions of inquiry and examination in practice in Israel complies with its obligations under international law to investigate acts, decisions or omissions that raise a suspicion of serious violations of the rules of international humanitarian law, and that the mechanism of commissions of inquiry and examination in Israel facilitates compliance with the principle of "effective investigation." The Commission further believed that according to the rules of international law and the customary practice in the countries surveyed by the Commission, the fact that the commission of inquiry is established by the government does not, in and of itself, impair the independence of the commission.
146. Therefore, the Turkel Commission recommended that the government make sure that the letter of appointment of the commission ensures that the commission will act independently and that its members will not be in a conflict of interest with the objects of investigation. The letter of appointment must ensure an effective and thorough investigation, both by appointing professional committee members with experience and knowledge in the commission's areas of operation, and by defining its powers, including providing access to all the evidence. The Commission further determined that when applicable, it is proposed to also determine a timeframe for submitting the conclusions of a commission of inquiry investigating suspected violations of the rules of international humanitarian law.

⁹⁵ *Id.*, at 348.

⁹⁶ *Id.*

The Implementation Team's recommendation

147. As the Turkel Commission itself notes, the Team believes that the existing mechanisms under Israeli law, and their application in practice, comply with recommendation no. 17. The Israeli commissions of inquiry are appointed in accordance with government decisions, decisions of the Knesset State Control Committee or the appointment by a minister of a commission to examine a particular topic or event which is under his purview.⁹⁷ One must ensure that the letters of appointment of the commission will ensure the independence and lack of conflict of interests of its members, as well as their professionalism. The Implementation Team believes that a commission of inquiry appointed as stated is an effective instrument for examining the conduct of government mechanisms and civilian officials with respect to whom allegations of serious violations of the rules of international humanitarian law are made.

Recommendation no. 18 – the implementation of the Turkel Commission's recommendations

a. Guidelines of the Military Advocate General

148. For the purpose of implementing its recommendations, the Turkel Commission recommended that, like the State Attorney Guidelines and the Attorney General Guidelines, the Military Advocate General shall also publish a comprehensive and updated handbook of guidelines pertaining to the examination and investigation mechanisms, which shall be opened to the public.⁹⁸ These guidelines will incorporate the guidance and procedures to be formulated as a result of the recommendations of the second report of the Turkel Commission, and may serve in the future as a chapter in a comprehensive military guide on Israel's obligations and practice pertaining to the implementation of the rules of international humanitarian law.

The Implementation Team's recommendation

149. The Military Advocate General's Corps informed us that it would be ready to prepare the said handbook after the staff work with respect to the implementation of all the recommendations is completed.

150. The Team recommends, therefore, that upon completion of the IDF staff work for the implementation of the recommendations of the second report of the Turkel Commission, the Military Advocate General publish a comprehensive guidelines

⁹⁷ The Commissions of Inquiry Law, 5729 – 1968, LA 548; the State Comptroller Law, 5718 – 1958, LA 248; the Government Law, 5761 – 2001, LA 1780.

⁹⁸ The second report of the Turkel Commission, *supra* note 3, at 350.

handbook concerning the mechanisms of investigation and examination of alleged violations of the rules of international humanitarian law.

b. The Implementation Team

151. The Turkel Commission recommended that the Prime Minister appoint an independent implementation team that would monitor the implementation of the report's recommendations and would periodically report to the Prime Minister.
152. As stated, following this recommendation, this Examination and Implementation Team was set up. Upon completion of this phase of our work and the submission of the report, we recommend the establishment of a small monitoring team, to monitor the implementation of the recommendations we made in this report and report back to the Prime Minister.

Summary

153. As a result of the State of Israel's commitment to the rule of law, the Israeli government granted authority to the Turkel Commission in 2010 to examine the examination and investigation mechanisms that exist in Israel with respect to alleged violations of the Law of Armed Conflict and their compatibility with the obligations of the State of Israel under international law.
154. The Turkel Commission issued a comprehensive report, which mapped out the rules of international law on the subject, examined the existing mechanisms in Israel as well as the existing mechanisms in various countries, and finally formulated 18 recommendations with respect to the mechanisms in Israel. The Turkel Commission noted that:

“States have broad discretion when selecting tools and mechanisms to fulfill their obligations under international law, in order to accommodate their distinct constitutional and legal institutions. Therefore, when the Commission is of the view that there is room to change a mode of operation of 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.”⁹⁹

155. Indeed, in the spirit of the words above, the State of Israel aspires to continually improve its mechanisms for examination and investigation. Significant progress has been made since the release of the Turkel report. The Implementation Team witnessed

⁹⁹ *Id.*, at 303.

continuous efforts among the relevant agencies to improve existing mechanisms and ongoing thorough staff-work to examine the Turkel report's recommendations and how to implement them in practice in the most efficient manner. As reflected by the Implementation Team's report, we are still in the midst of this process. Certain aspects of the optimization process have been concluded, as embodied by the recommendations whose implementation was completed by the publication of the Implementation Team's report, while with respect to the rest of the recommendations, the work will continue after the publication of this report. In this respect, the establishment of a small monitoring team, as mentioned above, will ensure the completion of the important and worthwhile process that has begun.