

Turkel Report's Standards for Investigating War Crimes and Other Breaches of International Law

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In May 2010, in the context of Israel's closure and maritime blockade of Gaza, the Israeli navy raided a flotilla carrying aid to Gaza. As a result of the raid, nine Turkish activists were killed, and many flotilla participants were injured, arrested, and/or detained.

In response to calls from the United Nations and various governments for an independent investigation of the events, Israel formed a domestic commission of inquiry in June 2010. Referred to as the "Turkel Commission", it was composed of Israelis and two international observers.² It was tasked with investigating the legality of the Israeli closure and maritime blockade of Gaza, and of the navy's raid on the flotilla. Subsequently, and ostensibly in response to allegations contained in the *Report of the UN Fact-Finding Mission on the Gaza Conflict* ("the Goldstone Report") and subsequent UN Independent Expert Committees to follow-up on domestic investigations, the Turkel Commission was also charged with determining more broadly whether Israeli investigations of claims of war crimes and breaches of international law conform to international law standards.

In February 2013, the Turkel Commission published its report on the latter issue, titled *Israel's Mechanisms for Examining and Investigating Complaints and Claims of Violations of the Laws of Armed Conflict According to International Law* ("the Turkel Report").³ This report, of over 400 pages, examines how the Israeli military, police, and Israel Security Agency investigate allegations of war crimes and breaches of international law. The Commission found Israel to be in compliance with international law standards, but also set out 18 recommendations to improve Israel's investigative systems.

In response to the report, Adalah, together with the Public Committee Against Torture in Israel (PCATI) and Physicians for Human Rights-Israel (PHR-I), [called on the Israeli government](#) to adopt and implement its recommendations, and on the international community to demand Israel's strict compliance with international norms regarding the investigation of alleged violations of human rights and international humanitarian law.

This commentary examines the substance of the Turkel Report in greater detail. It does so with reference to related reports, such as the *Report of the Secretary-General's Panel of Inquiry on the 31 May 2010 Flotilla Incident*⁴⁵ and a report on the incident by the Open Society Justice

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² Information about the members of the Turkel Commission is available at: <http://www.turkel-committee.com/content-38.html>

³ Turkel Commission, *Israel's Mechanisms for Examining and Investigating Complaints and Claims of Violations of the Laws of Armed Conflict According to International Law* ("Turkel Report"), February 2013, available at: <http://www.turkel-committee.gov.il/files/newDoc3/The%20Turkel%20Report%20for%20website.pdf>

⁴ See Adalah, PCATI, and PHR-I, "The Turkel Report: A preliminary analysis," 28 February 2013, available at: <http://www.stoptorture.org.il/files/PDF%20Adalah%20PCATI%20PHR%20Statement%20The%20Turkel%20Report%2028.2.2013.pdf>

⁵ *Report of the Secretary-General's Panel of Inquiry on the 31 May 2010 Flotilla Incident*, September 2011, available at: http://www.un.org/News/dh/infocus/middle_east/Gaza_Flotilla_Panel_Report.pdf

Initiative⁶ (“Justice Initiative”), which were available to the Turkel Commission (although it appears that the Turkel Commission did not rely on them).⁷ As noted above, while it is believed that the Turkel Report originated in response to allegations made in the Goldstone Report, the Turkel Report itself refers to the work of the UN Independent Experts Committees mandated “to monitor and assess any domestic, legal or other proceedings undertaken by the Government of Israel and the Palestinian side.”⁸

Obligation to investigate in international law

In determining the international law standards for the duty to investigate claims of war crimes and other breaches of international law, the Turkel Report assesses international humanitarian law (IHL), human rights law, international criminal law, and the law of state responsibility.⁹ It does not examine customary international law, although this body of law is also highly relevant to the inquiry. The Turkel Report examines how these legal regimes interact when mutually applicable. It finds that, in the context of armed conflict, IHL overrides and excludes international human rights law where both might apply, because IHL is the *lex specialis* of armed conflict.¹⁰ As a result, the Turkel Commission assesses the duty to investigate deaths of uninvolved civilians during armed conflict only from the perspective of IHL.

However, other experts have found that IHL and human rights law are simultaneously applicable in armed conflict. For example, the *Report of the United Nations Fact-Finding Mission on the Gaza Conflict*,¹¹ the *Report of the Secretary-General’s Panel of Inquiry on the 31 May 2010 Flotilla Incident*,¹² and the International Court of Justice¹³ have found that human rights law applies in armed conflict at the same time as IHL. The Justice Initiative also presumes that both human rights law and the law of war apply at the same time, and in its report assessed the duty to investigate from the perspective of both international humanitarian law and international human rights law.¹⁴

The Turkel Report also narrowly interprets the question of when the duty to investigate the deaths of uninvolved civilians during armed conflict arises. Specifically, the Turkel Report states that such a death:

does not in itself give rise to an immediate duty to investigate, *except* in a case where a ‘reasonable suspicion’ arises, or a ‘credible allegation’ is

⁶ Open Society Justice Initiative, *Comparative Analysis of Preliminary Investigation Systems in Respect to Alleged Violations of International Human Rights and/or Humanitarian Law*, (“Justice Initiative Report”) 10 August 2010, available at: <http://www.opensocietyfoundations.org/sites/default/files/comparative-analysis-20100810.pdf>

⁷ Turkel Report, p. 154 fn. 3 (stating that submissions it received on the systems in comparator countries were “helpful in many respects” but that the analysis in the Turkel Report “was prepared on the basis of reports by individual experts ... and does not rely on assertions in submissions presented to the Commission”).

⁸ See further, the two reports of the Committee of Independent Experts issued in 2010 and 2011, available at: http://www2.ohchr.org/english/bodies/hrcouncil/docs/15session/A.HRC.15.50_en.pdf, and http://www2.ohchr.org/english/bodies/hrcouncil/docs/16session/A.HRC.16.24_AUV.pdf

⁹ Turkel Report, p. 15 para. 70, p. 72 para. 20.

¹⁰ Turkel Report, p. 65 para. 12, p. 69 para. 14.

¹¹ *Report of the United Nations Fact-Finding Mission on the Gaza Conflict* (“Goldstone Report”), 25 September 2009, UN Doc. A/HRC/12/48, para. 295-296, available at: <http://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-48.pdf>

¹² See Appendix I paras. 60-64.

¹³ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, International Court of Justice (Advisory Opinion), 9 July 2004, para. 106.

¹⁴ Justice Initiative Report, p. 2.

made, that a war crime was committed. When the level of suspicion or the credibility of an allegation of a war crime has not been met and the information received is only partial or circumstantial, a fact-finding assessment must be conducted in order to clarify whether there is a need to investigate.¹⁵

The Turkel Report concludes that, “[w]ithout additional information establishing such a suspicion, there is no legal obligation to conduct an investigation.”¹⁶

This conclusion is more lenient than that reached by other experts. For example, the Justice Initiative concludes that “where an operation leads to the death or serious injury of civilians, *including but not limited to those where there is an explicit allegation of intentional killing*”, the incident must be reported immediately and investigated by an independent unit.¹⁷

The Turkel Report also sets out its interpretation of the elements of an “effective investigation”, which it lists as independence, impartiality, effectiveness and thoroughness, promptness, and transparency.¹⁸ Other experts highlight additional elements that the Turkel Report does not address independently. For example, the Justice Initiative includes as a separate element the “identification and punishment of perpetrators”,¹⁹ which the Turkel Report only lightly discusses within its given categories.²⁰

Comparative country experts’ conclusions

In January 2010, as part of the “Goldstone process”, the Israeli military issued a report comparing its investigations systems with those of armies in Australia, Canada, the U.K., and the U.S.²¹ Organizations including the Justice Initiative disagreed with these findings, and published conclusions drawn by their own experts on the investigations systems of these four countries. The Turkel Report also contains a detailed section about domestic military prosecutions in these countries, in which it adds Germany and the Netherlands.

Here, the Turkel Commission and the Justice Initiative reach largely similar conclusions. They are generally consistent concerning the definition of a “reportable incident” (i.e. one that must be reported through the chain of command and investigated),²² about the “promptness” with which the comparator countries require the initiation of an investigation,²³ and that these countries require investigations to be performed by units independent of the unit being investigated.²⁴

However, the Turkel Report’s experts reach some specific conclusions that differ from those of the Justice Initiative’s experts in important ways. For example, with regard to the U.S., the

¹⁵ Turkel Report, p. 110 para. 59 (emphasis added); see also p. 149 paras. 113-114.

¹⁶ Turkel Report, p. 149 para. 114.

¹⁷ “Justice Initiative Report”, para. 7 (emphasis added).

¹⁸ Turkel Report, p. 114 para. 63, p. 138 para. 95.

¹⁹ Justice Initiative Report, paras. 16-28.

²⁰ Turkel Report, p. 131 para. 84.

²¹ Israel Defence Forces, *Gaza Operation Investigations: An Update*, January 2010, available at: <http://www.jewishvirtuallibrary.org/jsourc/Peace/GazaOpReport0110.pdf>

²² Justice Initiative Report, para. 53, 89; Turkel Report, p. 204 para. 32, p. 253 paras. 76(1)(a)-(d), p. 263 para. 81(4)(a), p. 370-371 para. 20.

²³ Justice Initiative Report, para. 56, 61, 90; Turkel Report, p. 228 para. 50, 253 para. 76(1)(d), p. 257 para. 78(b), 371 para. 20.

²⁴ Justice Initiative Report, paras. 54, 57, 61, 94; Turkel Report, p. 259-260 para. 79(2)(a)-(d).

Justice Initiative's experts found that, upon receiving information of a "reportable incident", it must be promptly reported through the chain of command.²⁵ In response to a reportable incident, the U.S. Army's Criminal Investigation Division ("CID") undertakes a criminal investigation, while the unit commander undertakes a command investigation in parallel.²⁶ The Turkel Report adds a preliminary step that the unit commander must take before reporting any incident: when a commander receives information about a "reportable incident" that is alleged to have been committed by command personnel, the commander is required to conduct a *preliminary inquiry* to determine whether U.S. personnel were involved in or responsible for a reportable incident.²⁷

The Turkel Report implies that the commander must report the incident – thus prompting an Army CID investigation – and conduct a parallel command investigation *only after* the preliminary inquiry clarifies that U.S. personnel may in fact be involved in or responsible for a reportable incident.²⁸ This added step is significant because it supports the Turkel Commission's finding that there must be a "fact-finding assessment" before an investigation is initiated, where there is not already "reasonable suspicion" or a "credible allegation" that a war crime was committed.²⁹

Conclusion on the legality of the Israeli military's investigative procedures

The Turkel Report's overall conclusion is that "the examination and investigation mechanisms in Israel for complaints and claims of violations of international humanitarian law and the methods they practice, generally comply with the obligations of the State of Israel under the rules of international law."³⁰ The Goldstone Report, the Committee of Independent Experts and the Justice Initiative reached a different conclusion. For example, the Goldstone Report concluded that "there are serious doubts about the willingness of Israel to carry out genuine investigations in an impartial, independent, prompt and effective way as required by international law", and that "the Israeli system presents inherently discriminatory features that have proven to make the pursuit of justice for Palestinian victims very difficult."³¹ The Justice Initiative found that Israel's investigative procedures violate international law and taint the independence and effectiveness of any subsequent inquiry because the unit involved in the incident in question can conduct a preliminary inquiry of up to six months and collect evidence before the investigation is transferred.³²

While finding that Israel's investigative mechanisms comply with international law, the Turkel Report provides extensive "grounds for amending the examination and investigation mechanisms", "grounds for changing the accepted policy" in several areas, and the need to formalize accepted practices – but only as a "blueprint for optimal improvement", and not as the identification of "essential flaws".³³ It is hoped that Israel will implement these policies, and that this will bring its investigative systems into compliance with international law, including human rights law.

²⁵ Justice Initiative Report, para. 53

²⁶ Justice Initiative Report, paras. 55, 57, 61.

²⁷ Turkel Report, p. 206 para. 32(1).

²⁸ Turkel Report, p. 206 para. 32, p. 208 para. 33(2)(b). The Turkel Report states that "[t]here is no definitive guidance regarding the conduct of a 'preliminary inquiry' but it is typically very informal and conducted by the commander personally or by a member of the command." Turkel Report, p. 257 para. 78(a).

²⁹ Turkel Report, p. 110 para. 59 (emphasis added); see also p. 149 paras. 113-114.

³⁰ Turkel Report, p. 49 para. 29.

³¹ Goldstone Report, para. 1832.

³² Justice Initiative Report, para. 7.

³³ Turkel Report, p. 49 para. 29.