

Briefing Paper on The Turkel Report – Part II

Fatmeh El-Ajou
Adalah Attorney

May 2013

In June 2010, Israel established a public commission headed by retired Supreme Court Justice Jacob Turkel to examine the events of 31 May 2010, during which the Israeli navy intercepted and captured ships carrying humanitarian aid bound for Gaza. During the Gaza flotilla event, the Israeli navy killed nine Turkish citizens and wounded many others.¹ On 6 February 2013, the second part of the Turkel Commission's Report was published. It addressed the question of the compatibility of "Israel's mechanisms for examining and investigating complaints and claims of violations of the laws of armed conflict" with its obligations under international law.²

Despite the commission's finding that Israel's investigatory mechanisms generally comply with its international law obligations, it recommended 18 significant improvements, and, in some areas, reforms and substantial changes in established policy that testify to serious failures. If implemented, these recommendations would significantly improve the independence of investigative bodies, and the efficiency, pace and transparency of investigations. They would also promote accountability and thus greatly contribute to the advancement of the rule of law, the protection of human rights, and the cause of justice for Palestinian victims of the Israeli security forces.

Despite the detailed recommendations, however, the Turkel Commission refrained from determining clear-cut guidelines to rectify the failure of the investigative mechanisms: the investigation of suspicions of war crimes during an armed conflict.

The expansion of the Commission's mandate to include an examination of Israel's military investigative mechanisms was the result of harsh criticism Israel faced following the publication of the "Goldstone Report," the UN fact-finding mission report on the Gaza conflict, known as "Operation Cast Lead", during the period from 27 December 2008 and 18 January 2009.³

¹ In January 2011, the Turkel Commission published the first part of its report, which concludes that the Israeli navy commandos acted reasonably on the flotilla; Israel acted in accordance with international law; the IHH (Humanitarian Relief Foundation) activists were responsible for the serious violence on the Mavi Marmara vessel; and the imposition of a naval blockade on Gaza was carried out in conformity with international law. See Turkel Commission, *The Public Commission to Examine the Maritime Incident of 31 May 2010, Report Part One*, January 2010, available at: <http://www.turkel-committee.gov.il/files/wordocs/8808report-eng.pdf>. See Adalah's statement following the publication of Part 1 of the report: <http://www.adalah.org/eng/Articles/1182/Turkel-Committees-Conclusions-on-the-Gaza-and-on-UN>

² Turkel Commission, *Second Report: Israel's Mechanisms for Examining and Investigating Complaints and Claims of Violations of the Laws of Armed Conflict According to International Law*, February 2013, available at: <http://www.turkel-committee.gov.il/files/newDoc3/The%20Turkel%20Report%20for%20website.pdf>

³ *Report of the United Nations Fact-Finding Mission on the Gaza Conflict*, 25 September 2009, UN Doc. A/HRC/12/48, available at: <http://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-48.pdf>



During and following Cast Lead, Palestinian, Israeli and international human rights organizations, and several UN bodies called on Israeli and the Palestinians to investigate allegations of violations of international law. Israel claimed to be investigating the allegations itself, refused to cooperate with the committee, and rejected demands to establish an independent commission of inquiry. Even before the storm that followed the Goldstone Report had subsided, the navy captured the Mavi Marmara and there were further calls for an independent investigation committee. Thus, when the government decided to establish the Turkel Commission, it included the question of the compatibility of inquiry mechanisms in Israel with international law in its mandate.

Three years after the Flotilla events, in February 2013, the Commission published its findings. The Commission researched the issue in a serious manner and presented a comprehensive normative framework regarding the source of Israel's obligation to investigate under international and domestic law. However, it did not suggest clear rules and criteria to govern the examination of international humanitarian law (IHL) complaints to guide investigating bodies regarding the critical question of *when* the army must open a criminal investigation. The Commission was satisfied with the state's statement that cases of allegations of a breach of an absolute prohibition set forth in IHL, such as the ban on the use of human shields, would necessitate the opening of an investigation. Beyond this point, however, the Commission remained silent and did not offer any guidance.⁴ To illustrate this shortcoming, the following examples examine some of the claims made against Israel in relation to Cast Lead and estimate how/if the Commission's stand would enhance their investigation.

During and after Cast Lead, human rights organizations, including Adalah, raised serious claims regarding the conduct of the military operation and the attacks on civilians,⁵ which left approximately 1,500 Palestinians dead and over 5,000 injured. The killing and injury of civilians and the vast destruction of private property during Cast Lead were the direct result of Israel's policy of collective punishment against civilians in Gaza. This policy began with Israel's declaration of Gaza as an "enemy entity" in September 2007, following Hamas's takeover of Gaza, which blurred the distinction between civilians and civilian targets, and combatants and military targets. The impact of this declaration was explicitly demonstrated during the course of the military operation itself, the objective of which was announced by political leaders and military commanders to be to turn Palestinian public in Gaza against Hamas and against resistance to Israel. Senior Israeli officials stated, *inter alia*, that Israel would not distinguish between various elements of Hamas and that it considered all Hamas members to be "terrorists" and thus legitimate military targets; and military commanders spoke about a combat strategy of employing a "disproportionate use of firepower".⁶ The great number of

⁴ Turkel Commission, *Second Report*, pp. 91-93.

⁵ Submission of Human Rights Organizations based in Israel to the Goldstone Inquiry Delegation, June 2009, available at:

http://adalah.org/newsletter/eng/jun09/goldstone%20report_and_appendix%5b1%5d.pdf

⁶ *Ibid.*



dead and wounded; the vast destruction of property; the multiple testimonies describing the selected “bank” of targets; the excessive force that was used during the invasion; the fact that no precautions were taken to protect civilians or to allow them to flee from Gaza; and the lenient open fire regulations given to soldiers in the field all amount to “intent to harm” the civilian population and infrastructure in Gaza, or at least to an indifference or gross negligence to such harm.

Despite the gravity of these claims, the myriad of calls for their investigation, and the hundreds of specific complaints filed, they were not investigated or prosecuted. The Israeli army investigated only a small number of individual cases in which a suspicion was raised of a breach of commanders’ orders or the violation of absolute prohibitions in IHL; even in these cases the inquiry was not independent or impartial.⁷ This situation resulted from the lack of a genuine willingness to investigate the allegations, the involvement of those responsible for the investigations and the heads of the prosecution in the formulation of the actual military policies pursued during “Cast Lead”, and the involvement of the political echelon in the determination of the objectives and conduct of the military operation.

The Turkel Commission related to several relevant issues. It recommended the initiation of legislation in each area where there is a deficiency between international criminal prohibitions and Israeli criminal law, and the unequivocal adoption of international norms regarding war crimes into Israeli law. The Commission, like the UN independent experts’ committee established to monitor domestic investigations following the Goldstone Report, also referred to a conflict of interests in the role of the Military Advocate General (MAG) as both the person responsible for legal consultation to the army and to the political echelon regarding military operations and the person who heads the military prosecution.⁸ The Commission viewed this clear cut situation of conflict of interests as “suspect of appearing biased” and, in order to prevent this concern, recommended strengthening the position and independence of the MAG (recommendation no. 8) and the enactment of an appeal procedure to the Attorney General (AG) concerning decisions of the MAG (recommendation no. 13).

These recommendations must be welcomed, but they do not go far enough. The Commission refrained from explicitly recommending that investigations must be conducted independently of the army in cases of complaints relating to decisions that the MAG himself made or was involved in. The Committee should have recommended that an investigation into circumstances of conflict of interest must be prevented from the outset, and should not have been satisfied with an appeal of this decision, which would be submitted *ex post facto* or not at all, and, if submitted, subject to the AG’s discretion.

⁷ Adalah reports to the UN Experts Committee.

⁸ See the report of the UN Experts Committee in September 2010, paragraphs 63-64:

http://www2.ohchr.org/english/bodies/hrcouncil/docs/15session/A.HRC.15.50_AEV.pdf

Regarding the involvement of military commanders and their civilian superiors and their responsibilities, the Commission recommended setting provisions in the law that impose direct criminal responsibility on commanders and civilian superiors for violations committed by their subordinates when they did not employ all reasonable precautions to prevent them or did not act to bring the individuals responsible to justice when they learned of the offenses after the fact. Despite the recommendations' positive tone, they do not provide a response to the question of the investigation of commanders and civilian superiors concerning decisions they made. This is a particularly significant omission given that the official responsible for these investigations is the MAG, who provides commanders with legal advice and support for their decisions. In this matter, where the MAG is involved, the commission should have also clearly recommended that the investigation of these complaints be made by a body that is independent of the army and the government.

In its recommendations regarding the responsibility of the political echelon, the Turkel Commission stated that the obligation to open an investigation does not necessarily signify a criminal investigation, and the system of investigation (and examination) by commissions of inquiry satisfied Israel's legal obligations under international law (recommendation no. 17). These statements contradict those made by the Commission in its own introduction to the legal framework regarding the obligation to conduct an investigation. Accordingly, an effective investigation is one that is able to identify the individuals responsible and bring them to justice,⁹ and that the law that applies to civilian officials must be identical to the law that applies to any individual in cases when a suspicion arises that senior officials in the executive authority violated the law.¹⁰ It is possible that the system of investigation by commissions of inquiry (COI) is consistent with the demands of international law, but this is only valid when it identifies the individuals responsible and brings them to justice. An investigation by a COI cannot replace a criminal investigation when the law mandates this type of investigation, even if the suspect is a soldier, commander, the AG, a minister or a prime minister.

Similarly, the Commission ignored the fact that the establishment of a COI is at the discretion of the Prime Minister and is not a legal requirement, as is whether or not to implement its recommendations. Thus the committee's recommendations do not provide a response to cases that require the investigation of decisions of the political echelon and military command, and of the individuals involved in making these decisions, as was the case following Cast Lead. The Commission could have recommended the amendment of legislation to make the establishment of a commission of inquiry a requirement when claims are made against decisions of the executive authority, and when existing investigative bodies are themselves involved in making the decisions in question to avoid conflicts of interests.

⁹ Ibid., pp. 101-105.

¹⁰ Ibid., p. 263.



An additional example is the Israeli army's failure to investigate complaints and suspicions concerning the killing and wounding of a large number of civilians in the course of attacks on residential buildings in Gaza. The scores of complaints that were submitted following Cast Lead were not seriously investigated or prosecuted in any manner. The MAG did not even explain its decision not to investigate these complaints,¹¹ or it absolved the military of all responsibility even in the face of grave evidence, as illustrated by the Samouni family case in which 27 civilians were killed and 35 were injured after the bombing of a civilian residence in Gaza during Cast Lead.¹² Despite the fact that the Commission discussed the obligation to investigate complaints of IHL violations in the framework of an armed conflict, it did not clarify when there is an the obligation to investigate cases of the killing of civilians, whether they resulted from an attack that did not distinguish between civilians and combatants, or resulted from a disproportionate attack that caused excessive damage. The Committee was satisfied with a general statement that an attack, which incidentally causes the death or injury of a civilian during an armed conflict, does not necessarily raise a suspicion of a criminal violation.¹³

This determination is not new. In practice, the army has used it for many years as a pretext to justify the lack of investigations of suspicions of IHL violations, including potential war crimes.¹⁴ This was so in the case of the assassination of Salah Shehadeh in Gaza in 2002, and in the cases of the Al-Samouni, El-Daiya, Salaha, Abu-Ayesha families, and that of Said Siyam, killed in Cast Lead, and many others killed in both Operations Cast Lead and Pillar of Defense. Although the Commission added that the context in which the death or injury occurred would determine whether there is a reasonable suspicion of war crimes,¹⁵ this adjunct does not include clear guidelines regarding when a suspicion that requires the opening of an investigation does exist. The Commission should have added substance to this statement, even in the form of general directives, and clarified the circumstances that necessitate an investigation.

According to IHL, claims of attacks on residential buildings and the injury of civilians who were not in the vicinity of combatants or arms storehouses mandate an investigation into all aspects of the attack. Claims against attacks that do not distinguish between combatants and civilians and claims of disproportionate force and damage to civilians and civilian property and/or the causing of damage that outweighs the military advantage gained must likewise be investigated.

¹¹ See Adalah's reports to the UN Experts Committee regarding the investigation of complaints filed following Cast Lead, and Adalah's report to the Turkel Commission.

¹² See Palestine Center for Human Rights, *Israel's Disgraceful Decision to Close Samouni Case Makes Mockery of Victims' Rights and International Law*, 2 May 2013, http://www.pchrgaza.org/portal/en/index.php?option=com_content&view=article&id=8385:israels-disgraceful-decision-to-close-samouni-case-makes-mockery-of-victims-rights-and-international-law-&catid=36:pchrpressreleases&Itemid=194

¹³ Turkel Commission, *Second Report*, p. 92.

¹⁴ See HCJ 9594/03, *B'Tselem v. The MAG* (decision delivered 21 August 2011).

¹⁵ Turkel Commission, *Second Report*, p. 93.



In its decision in the assassinations case, the Israeli Supreme Court determined that an attack against combatants or civilians involved in combat is permitted as long as it is proportionate, that there is no alternative, less harmful means, and as long as innocent civilians who are in the vicinity are not injured.¹⁶ The court later related to the duty to investigate targeted assassinations actions *ex post facto* on the assumption that the injury of innocent civilians who did not take a direct part in combat action necessitates, in and of itself, the investigation of the action.¹⁷ Thus, international law and Supreme Court decisions reiterate the same criteria and hold that there is a need to investigate allegations regarding the illegality of attacks, and that it must not be assumed in advance that they are legal only because IHL recognizes the possibility that an incidental injury to civilians may be legal.¹⁸

The Commission, like the Supreme Court,¹⁹ missed the opportunity to present clear criteria to guide the army in the investigation of complaints of IHL violations during an armed conflict and to answer the question of *when* a suspicion arises that justifies the opening an investigation other than the violation of an absolute prohibition. This is no theoretical question, particularly since in the state's view only the intentional and deliberate killing of civilians constitutes a war crime and, unless the harm to civilians meets this definition, there is no obligation to investigate.²⁰ In IHL and international criminal law, many crimes are recognized in which the necessary psychological component is lower than intent, and crimes where the actual disproportionate damage itself constitutes an element of the offense.²¹ Therefore, there is no need to show intent to open an investigation; the very existence of disproportionate damage should raise the suspicion that a crime was committed, which mandates an investigation.

Despite its valuable recommendations, the Turkel Commission left the controversial subject of the war crimes investigations open and unregulated. The Commission has displayed greater courage than the Supreme Court in unequivocally concluding that an operational debrief was not a sufficient assessment of whether or not to open an investigation.²² The Commission recommended the establishment of a mechanism to carry out a fact-finding assessment to assist the MAG in deciding whether there is a need for an investigation (recommendation no. 5). If implemented, this recommendation may improve the efficiency and credibility of investigations into certain types of policing complaints, but not those of an armed conflict. This is so because, according to the Commission's recommendation, upon receiving the Preliminary Report Form, the legal context of the incident should be immediately classified, i.e., whether is

¹⁶ HCJ 769/02, *The Public Committee Against Torture v. The State of Israel* (decision delivered 14 December 2006).

¹⁷ *Ibid.*, para. 54.

¹⁸ For further details see, Adalah, "Case Review: The State's obligation to investigate suspected grave violations of international law committed in the Gaza Strip during the 2004 military Operations 'Rainbow' and 'Days of Penitence'," *Adalah's Newsletter*, vol. 90, February 2012, available at: <http://adalah.org/newsletter/eng/feb12/docs/Gaza%20Case%20Review%20English%20Final.pdf>

¹⁹ *Ibid.*

²⁰ Para. 89 of the state's response in HCJ 9594/03, *B'Tselem v. The MAG*.

²¹ For the analysis of the state's position see Adalah, "Case Review".

²² See HCJ 9594/03, *B'Tselem v. the MAG*, paragraph 12 of the decision.



it an incident involving “actual combat”, and therefore subject to the rules regulating the conduct of hostilities, or an incident subject to law enforcement norms (recommendation no. 4). Reports classified as the latter will qualify for a more in-depth investigation, and their victims will be entitled to receive information on the legal process (recommendation no. 11). In contrast, incidents subject to the laws of armed conflict will remain uninvestigated, and their numerous victims will be left without an explanation of the event and without justice.