



INSS Insight No. 403, February 13, 2013

The Second Turkel Commission Report

Avihai Mandelblit and Keren Aviram

Part Two of the report of the Public Commission to Examine the Maritime Incident of 31 May 2010, headed by retired Supreme Court Justice Yaakov Turkel, was published on February 6, 2013. This report addressed one of the most important and fundamental questions in international law relevant to every country in the world: methods of examining and investigating complaints and allegations about violations of the laws of war.

In accordance with Article 5 of the government resolution on establishment of the commission, the Turkel Commission, was instructed to examine “whether the mechanism for examining and investigating complaints and claims raised in relation to violations of the laws of armed conflict, as conducted in Israel generally, and as implemented with regard to the present incident [of the flotilla], conforms with the obligations of the State of Israel under the rules of international law.”

Significantly, this report not only engages in an ex-post facto inquiry of the Israeli mechanism for examining and investigating allegations of violations of the laws of war. It also looks toward the future, “to identify principles and methods to improve the mechanisms functioning in Israel, to ensure that they conform to the rules of international law and to the currently prevailing trends in other countries.” In the course of its work, the commission compared the Israeli mechanism of examination and investigation with the practice in six countries with a legal tradition similar to Israel's (United States, Canada, Australia, Britain, Germany, and Holland), which, like Israel, face asymmetric warfare.

This report is of the utmost importance for the moral image and legal defense of the State of Israel, both at home and abroad. In fact, the findings and conclusions of this report provide a response to Israel's critics who have repeatedly besmirched the ability and credibility of the Israeli justice system to examine and investigate allegations of violations of the laws of war. This effort was reflected in the various commissions of inquiry, appointed with increasing frequency over the past decade, primarily by the UN Human Rights Council. These were joined by attempts to impose universal jurisdiction in many countries around the world. There have also been efforts to drag the International Criminal Court into the political turmoil of the Israeli-Palestinian conflict. In all of these, it was alleged that the Israeli justice system (both military and civil) cannot and/or does not wish

to investigate and prosecute the perpetrators of serious international crimes, and that therefore the State of Israel will not be able to claim "complementarity" in accordance with the Rome Statute, which must be proven in the preliminary stage before the request to involve international judicial authorities. On this basis, the Israeli justice system has been presented as a built-in system acting to grant "immunity" to Israel's political and operational echelon in a manner that also has implications for Israel's international status and its image as a liberal democratic state governed by the rule of law.

The major findings of this report, prepared with the participation of international observers and the support of international experts in international law, completely reject these allegations and present an almost insurmountable obstacle to those who wish to avail themselves of international judicial mechanisms in place of the Israeli law enforcement system.

The most significant conclusion by the commission was that "the examination and investigation mechanisms in Israel for complaints and claims of violations of the laws of armed conflict generally comply with Israel's obligations under international law." This is the most important legal stamp of approval for the legitimacy and competence of Israel's law enforcement system.

The report also affirmed that the military justice system is sufficiently independent to carry out effective investigations as required by international law. This is thus a rejection of one of the serious criticisms leveled at military justice systems both in Israel and abroad, which argues that examination and investigation of complaints and allegations of violations of the laws of war should be removed from the military and given to an outside entity.

At the same time, the commission decided that there was room for structural and procedural changes to improve the various mechanisms of examination and investigation, and to this end formulated eighteen recommendations.

Some of the recommendations address the question of Israel's normative provisions defining violations of the rules of international humanitarian law ("What to investigate?"). On this issue, the commission recommended filling in gaps in Israeli legislation concerning both international prohibitions and the responsibility of commanders and civilian officials in charge. The goal is to comply with the demands of international law, which require that legislation be enacted that will allow effective criminal punishment. Similarly, the commission recommended putting all military directives in writing.

Most of the commission's recommendations relate to the second question, how the examination and investigation are carried out ("How to investigate?"). On this issue, the commission examined the procedures that take place in the IDF prior to the start of an investigation. The commission recommended that along with the operational inquiry intended to serve the operational needs of the IDF, there be a separate mechanism for conducting a "fact-finding assessment" in cases where further information is needed before

determining that there is a reasonable suspicion that a criminal offense has been committed. The commission also examined how various investigatory bodies in the IDF and the other security forces (police, General Security Services – GSS, prison service) conduct an investigation, as well as their compliance with the rules of international law.

The commission recommended expanding civilian oversight of the mechanisms of military examination and investigation, even though they earned the commission's stamp of approval. Thus, on the issue of the oversight procedure for the Military Advocate General, the commission recommended that in addition to the Department of International Law in the Military Advocacy General, an international law unit be established in the Justice Ministry's Department of Legal Advice and Legislation that would specialize in the rules of international humanitarian law and coordinate all legal issues in this area. The commission also made recommendations on the procedure for appointing the Military Advocate General, the length of his tenure, and his rank, as well as the procedure for appealing decisions by the Military Advocate General. In addition, the commission recommended that the procedure for examining and investigating police activities under the command of the IDF in Judea and Samaria be in the hands of the IDF and not the Israel Police. The commission recommended transferring control of the body that investigates complaints by people interrogated by the GSS to the Police Investigation Unit in the Ministry of Justice. Furthermore, in accordance with the statements by the head of the GSS in his testimony before the commission, it was recommended that there be full visual documentation of GSS interrogations.

The commission determined that notwithstanding the criticism, the use of commissions of inquiry (state and governmental) in Israel to handle complaints against the civilian echelon is in keeping with Israel's obligations under international law.

The report thus has tremendous significance for strengthening Israel's image around the world. It has an important role to play in Israel's battle for legitimacy, which has been unjustly impugned over the past decade. It is also a significant step in eliminating the international community's doubts about the credibility of the Israeli judicial system and its ability to investigate complaints and allegations of violations of the laws of war.

On a broader level, the report discusses an international question that goes beyond borders and is therefore also valid for assessing the judicial systems of foreign countries. The legal stamp of approval this report gives to military justice systems is not limited to the specific mechanisms of the State of Israel. Rather, it provides legal validity to the standard of examination and investigation of violations of the laws of war in all military justice systems in the world, and in so doing, it also responds to attempts to change the existing rules of international law.