



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

Second Report – The Turkel Commission

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

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According to International Law**

FEBRUARY 2013

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The Rt. Hon. David, Lord Trimble

As the Public Commission to Examine the Maritime incident of 31 May 2010 is now completing its remit by publishing its Second Report examining the question ‘whether the examination and investigation process for complaints and allegations raised with regard to violations of the law of armed conflict ... is consistent with the obligations of the State of Israel pursuant to the rules of international law’, it is appropriate to reflect on my experience over the last 30 months as an international observer attached to the Commission.

The international observers, myself, Brigadier-General (ret.) Kenneth Watkin (until April 2011) and Professor Timothy McCormack (from April 2011 to date), had access to all materials and were fully involved in the Commission’s work, participating in the testimony sessions, as is evident from the transcripts of those sessions, and participating actively in all the Commission meetings. Throughout the 30 months of the Commission’s work not one meeting – internal, public or in camera – was convened without the participation of both observers. We did not have a vote in those meetings, but then the Chairman’s patient pursuit of consensus meant that there were no votes. I am full of admiration of the way that our chairman, Supreme Court Justice Emeritus Jacob Turkel, guided the Commission through difficult and controversial issues to produce what I think are clearly balanced and fair reports. I also want to express my appreciation of the work of the Commission Coordinator, Advocate Hoshea Gottlieb in both his legal and administrative role. I particularly appreciate meetings with him to brief me on the preparation of the actual reports which facilitated an input to those reports.

As Kenneth Watkin has noted in his letter, international law on investigations and inquiries is complex and not entirely clear and it took

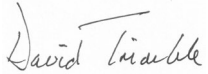
some time and the assistance of a number of experts for us to be able to state with some confidence just what the requirements of international law are. I think that this part of our Second Report will be a significant contribution to the development of this topic.

In terms of the Israeli examination and investigation mechanisms for alleged breaches of the laws of armed conflict, we did not limit ourselves to the military mechanisms only but assessed all the mechanisms (ISA – [Shin Bet], Israel Police, Israeli Prison Service and the political echelon). The Commission heard a wide array of parties – Government, Israeli human rights organizations and leading Israeli academics and a Palestinian family who spoke of the investigation process into the tragic loss of their child. This general area is of particular importance to me as a former academic lawyer and politician dealing sometimes with similar issues in my native land. I gave special attention to certain issues that are especially close to my heart and I appreciate that the Commission accepted an input both in terms of focus and emphasis.

Any reader of this Report will see that it is comprehensive and rigorous. It is independent. It reveals that, taken as a whole, Israeli law and practice will stand comparison with the best in the world, but there is always room for improvement and there is one area where, regrettably, a complaints procedure is ineffective. I am sure the Government and Knesset will want to deal comprehensively with that particular matter.

Finally, I want to thank all the members of the Commission and all those who have worked in and for it for their help and their friendship. I consider it a privilege to have been an observer to the Commission. I think I have benefitted enormously from the experience and have not regretted for one minute the time devoted to it. I have emerged with, I hope, a better understanding of the character of the peoples and the

difficulties and the opportunities they have in the clash between right and right in this, another, narrow ground.

A handwritten signature in cursive script that reads "David Trimble". The signature is written in black ink on a light-colored background.

Lord David Trimble

Brigadier-General (ret.) Kenneth Watkin, Q.C.

11 May, 2011

Since the submission of Part I of the Commission report in January, 2011, I have been honoured to continue to serve as an Observer to the Public Commission appointed to inquire into the maritime incident of 31 May 2010.

In turning its attention to the examination of whether the mechanism applied by Israel for the investigation of violations of the laws of armed conflict conforms with the rules of international law the Commission has embarked on an assessment of a complex but also essential area of law focused on accountability. The Commission has taken an appropriately broad view of its mandate looking at the accountability structure applicable to Israeli civilian as well as military security forces and decision makers.

It is important to note that the Commission has made considerable efforts to hear from a wide range of interested groups and individuals in addition to the Government witnesses. The Government officials who testified included the Attorney General, the Military Advocate General, the head of the ISA (GSS) and the Commander of the Military Police. It has again been particularly helpful to have the input of a number of Israeli human rights non-government organizations that provided a unique and important viewpoint on the investigation of alleged war crimes. One of those organizations arranged the appearance of Palestinian family members who testified about their perspective on the investigation process looking into the death of a deceased relative. That testimony provided a reminder of the human impact of such investigations.

The Commission also sought input from knowledgeable Israeli academics regarding not only their views of international law, but also

the Israeli process for conducting investigations. This effort to hear from a broad range of interested parties combined with the substantial written submissions provided to the Commission cannot help but enhance the comprehensiveness of the final Commission Report.

The Commission has continued to expend considerable effort to ensure that the Observers were provided with translations of the testimonies and written materials that were provided in Hebrew. The work of the translators during the testimony sessions has been impressive thereby permitting full engagement in the questioning process.

On a personal note I would like to thank Justice Turkel and all the Commission members for the collegial manner in which I was incorporated as a Foreign Observer into the Commission process. Throughout that process I have been provided complete access to witnesses and materials and have been fully involved by the Commission in its work.

I would also like to express my sincere appreciation to the exceptionally dedicated Commission Coordinator, Hoshea Gottlieb, who has been instrumental in facilitating not only my involvement as an Observer but also the overall work of the Commission. Further, I want to acknowledge the impressive legal work carried out by Moran Yahav who has worked tirelessly in assisting the Commission. No undertaking of this scope can be carried out without a dedicated administrative staff. Their efforts and the kindness demonstrated towards me are very much appreciated.

Finally, I am leaving the Commission before it has completed its work due to a prior commitment to become the Charles H. Stockton Professor of International Law at the United States Naval War College, Newport, Rhode Island. Having submitted my letter withdrawing as a Foreign Observer effective 15 April 2011 I depart the Commission with

a full understanding and appreciation of the unique role that I have been privileged to perform. Needless to say it has been both professionally and personally rewarding. Since the completion of the last report the Commission has continued to independently and rigorously investigate the significant issues with which it has been entrusted. Its work is an important reflection of the commitment to the Rule of Law.

A handwritten signature in black ink, appearing to read 'KW', enclosed in a light gray rectangular box.

Kenneth Watkin

Professor Timothy LH McCormack

It has been an honour for me to serve as one of two International Observers for Phase II of the Public Commission appointed to inquire into the maritime incident of 31 May 2010. I was formally appointed to the Commission in June 2011 to join Lord David Trimble and to replace Brigadier Ken Watkin – a formidable undertaking because of the esteem in which I and all the other members of the Commission hold Ken.

There was no basis for any personal feelings of inadequacy. I was warmly welcomed by Justice Jacob Turkel, by the other members of the Commission, General Amos Horev, Ambassador Reuven Merhav and Professor Miguel Deutsch, by Lord Trimble, by the Commission Co-ordinator, Hoshea Gottlieb, and by the research and administrative staff of the Commission. From my first visit to the Commission in June 2011 and through all subsequent visits I have consistently been received as an integral participant in the Commission's work. I am grateful for the warmth of that reception. My only regret is that I did not have the privilege of working with Ambassador Shabtai Rosenne who died before I joined the Commission.

I considered the focus of Phase II of the Commission's Inquiry – Israel's Mechanisms for Examination and Investigation of Alleged Violations of the Law of Armed Conflict – both intriguing and laudable. I was impressed that the Government of Israel was prepared to undertake this broad-ranging inquiry into its structures and procedures for investigating alleged violations of the Law of Armed Conflict and that they would do so by involving international observers throughout every stage of the inquiry process and ensuing deliberations. Other States would do well to follow Israel's example by including international observers in commissions of inquiry and, in my view, Israel itself would benefit from consistently following its own lead in the proceedings of all its other commissions of inquiry.

When I was first invited to replace Brigadier Watkin, I was acting as Special Adviser on International Humanitarian Law to the Prosecutor of the International Criminal Court in The Hague – a position I still hold. I discussed my Turkel Commission invitation with the then Prosecutor, Luis Moreno Ocampo, and we agreed that any State, Party or non-State Party to the Rome Statute, which wanted to review its national processes for investigation of alleged violations of the Law of Armed Conflict should be encouraged to do so. I remain grateful for Mr Ocampo's endorsement of my involvement in Jerusalem.

The subject matter of the Commission's work is of fundamental importance, not only for Israel but also for other States desirous of complying with international legal obligations and for the International Criminal Court itself given the complementarity formula in Article 17 of the Rome Statute. The essential requirements for an effective investigation of an alleged violation of the Law of Armed Conflict have received too little detailed analysis in the past. It has been a thoroughly rewarding professional experience for me to be involved in the comprehensive study now reflected in the Commission's Report. I am particularly grateful for the productive collaboration I have enjoyed with the indefatigable Commission Co-ordinator, Hoshea Gottlieb, and also with my dear friend and former PhD student from the Melbourne Law School, Dr Michelle Lesh. I believe that the Commission's study has identified the applicable international legal requirements for effective investigations into alleged violations of the Law of Armed Conflict and the ways Israel can improve its procedural and structural mechanisms consistently with such requirements. Of course world's best procedures and structures are of limited utility in the absence of effective implementation. My hope is that the tabling of the Commission's Report will provide an impetus for improvement in both theory and practice.

At the time of my appointment to the Commission, my own nation of Australia was engaged in an ongoing process of reform of our military justice system. I was particularly interested in the comparative study of selected national military justice systems by the Commission and was extended the privilege of preparing the Australian national report for this study. A former student from the Melbourne Law School, Megan Donaldson, now in the JSD program at New York University Law School, spent a few months in Jerusalem and did a superb job in assisting me with the Australian Report. I remain deeply indebted to her.

Although it was somewhat disadvantageous for me to join the Commission in June 2011 after hearings with interested parties had been completed, I attempted to familiarize myself with the testimony presented to the Commission. I was never precluded from accessing any of the relevant materials which were translated into English. Instead, I was encouraged to become fully engaged in the Commission's work. It is my observation that the members of the Commission and the international observers were free to deliberate and to recommend as we saw fit without interference from, and independently of, the Government of Israel.

A handwritten signature in black ink, appearing to read "Tim McCormack". The signature is stylized and cursive, with a prominent "T" and "M".

Professor Tim McCormack

PREFACE TO THE SECOND REPORT

The Commission's Second Report concerns one of the most important questions in international law generally, and in countries that respect the principles of the rule of law particularly, namely the procedures for examining and investigating complaints and claims of violations of international humanitarian law.¹ The manner in which such procedures are applied in Israel has legal, moral and educational aspects with significant ramifications both internally, for the Israeli society's views of itself, and externally, for the international community's views of Israel.

Unlike the Commission's First Report, where the examination was carried out retrospectively, this Report is prospective and its purpose is 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. The Commission also relied on lessons that were learned from the investigation of the maritime incident of 31 May 2010. These lessons revealed, for example, the great importance of written and detailed procedures and documentation reflecting the examination and investigation process in a reliable, fair, clear and precise manner. Standard operating procedures and documentation requirements are important through every stage – from the initial report of an incident until the examination and investigation are completed.

This Report, in its five chapters, is the result of considerable efforts to derive the main principles of international law from sources that are often vague and unclear, and from a comparison of legal systems and practices in other countries. Similar efforts were also devoted to examining the various mechanisms in Israel and their operating methods, which are

¹ The term 'laws of armed conflict' is used in the wording of Resolution No. 1796 of the 32nd Government, *Appointment of an Independent Public Commission, Chaired by Supreme Court Justice (ret.) Jacob Turkel, to Examine the Maritime Incident of 31 May 2010* (Jun. 6, 2010), para. 5 [hereinafter: *the Government resolution to appoint the Commission*]. However, in this Report we use 'international humanitarian law', according to the meaning of this term in Chapter A of this Report.

not always set out and defined precisely in written rules. On this basis, it was possible to provide a picture of the current Israeli situation and to recommend improvements to it.

The compilation of the Second Report turned out to be a much more difficult, complex and intricate process than expected at the outset. The considerable work invested in it resulted in a large-scale document that comprises approximately 470 pages and 500 pages of appendices. The introduction below is an attempt to outline a kind of 'road map' that is intended to enable the reader to find her or his way in what appears to be a maze of questions, sources, surveys, conclusions and recommendations.

INTRODUCTION

THE BACKGROUND TO THE FORMATION OF THE COMMISSION AND THE GOVERNMENT RESOLUTIONS

1. Let us consider some of the background contained in the introduction to the First Report. After the maritime incident of 31 May 2010, which was the focus of the Commission's First Report, and in view of the regrettable outcomes of the incident, the Government of Israel resolved on 14 June 2010 to establish an independent public commission to examine the maritime incident of 31 May 2010 (hereinafter: the Government's resolution to appoint the Commission).² The Commission was also requested, in paragraph 5 of the Government's resolution, to assess '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, [the maritime incident of 31 May 2010], conforms with the obligations of the State of Israel under the rules of international law'.³ This particular mandate required the Commission to determine whether Israel is complying with its obligations to examine and investigate such complaints and claims, *inter alia*, in view of the criticisms leveled in Israel and internationally with regard to the manner in which Israel investigates complaints and claims of violations of international humanitarian law. It should be noted that on 4 July 2010, the Commission's powers were extended and it was granted certain powers pursuant to the Commissions of Inquiry Law, 5729–1968.⁴

2. On 3 April 2009, the President of the United Nations Human Rights Council (hereinafter: the Human Rights Council) appointed a

² *The Government resolution to appoint the Commission, supra* note 1.

³ *Id.*, at para. 5.

⁴ See: the Justice Minister's resolution: *Determination regarding the Granting of Powers to the Public Commission for Examining the Maritime Incident of 31 May 2010* (Jul. 5, 2010).

committee ‘to investigate all violations of international human rights law and international humanitarian law that might have been committed at any time in the context of the military operations that were conducted in Gaza’ (‘Operation Cast Lead’), and Judge Richard Goldstone was chosen to chair the committee (hereinafter: the Goldstone Committee).⁵ Israel did not cooperate with the Goldstone Committee. On 29 September 2009, the Goldstone Committee submitted its conclusions to the Human Rights Council (hereinafter: the Goldstone Report).⁶ Part four of the Goldstone Report included harsh criticism of the functioning of the Israeli examination and investigation mechanisms in response to claims of breaches of international humanitarian law.⁷

3. On 14 April 2010, the Human Rights Council adopted decision no. 13/9, according to which a committee of independent experts, chaired by Prof. Christian Tomuschat, would be set up to consider the manner in which Israel and the Palestinians investigate claims that were raised with regard to the actions of the combatant parties in Operation Cast Lead, which were included in the Goldstone Report (hereinafter: the Tomuschat Committee).⁸ Israel did not cooperate with the Tomuschat Committee. On 21 September 2010, the Tomuschat Committee submitted its conclusions to the Human Rights Council.⁹ This report, *inter alia*, criticized the Israeli examination and investigation systems. In particular, it stated that the operating method of the military mechanisms that are responsible for

5 See: The grave violations of human rights in the Occupied Palestinian Territory, particularly due to the recent Israeli military attacks against the occupied Gaza Strip, U.N. Doc. A/HRC/S-9/L.1, para. 14 (Jan. 12, 2009).

6 See: Press Release (Apr. 3, 2009), *available at*: <http://unispal.un.org/UNISPAL.NSF/0/9E392B6EBDA7173D8525758D0049B222>; See also: Human Rights Council, Human Rights in Palestine and Other Occupied Arab Territories, Report of the United Nations Fact-Finding Mission on the Gaza Conflict, U.N. Doc. A/HRC/12/48 (2009).

7 *Id.*, at paras. 1773–1835.

8 See: Follow-up to the report of the United Nations Independent International Fact-Finding Mission on the Gaza Conflict, U.N. Doc. A/HRC/RES/13/9 (Apr. 14, 2010).

9 See: Human Rights Council, Report of the Committee of independent experts in international humanitarian and human rights laws to monitor and assess any domestic, legal or other proceedings undertaken by both the Government of Israel and the Palestinian side, in the light of General Assembly resolution 254/64 including the independence, effectiveness, genuineness of these investigations and their conformity with international standards, U.N. Doc. A/HRC/15/50 (Sep. 23, 2010).

investigating violations of international humanitarian law in Israel ‘raises concern’.¹⁰

4. In decision no. 15/6 of 6 October 2010, the Human Rights Council asked the Tomuschat Committee to continue the inspection and assessment of the Israeli and Palestinian investigations systems.¹¹ As a result of the resignation of two of the Committee’s members, Justice Mary McGowan–Davis, one of the members of the original Tomuschat Committee, was appointed to serve as chair of the Committee (hereinafter: the Davis Committee).

5. On 18 March 2011, the Davis Committee submitted its conclusions.¹² In its conclusions, the Davis Committee noted that Israel had made progress in investigating concrete cases mentioned in the Goldstone Report, and that considerable resources had been invested therein. The Davis Committee reiterated that in certain areas there was a concern that Israel was not complying with its obligations under international law. However, the Davis Committee spoke favorably of the Turkel Commission’s work method and its conclusion was that a public commission of inquiry such as the Turkel Commission was an example of a mechanism that Israel could use.¹³

10 *Id.*, at para. 91; see also: *Id.*, at para. 43 and the conclusions of the report regarding Israel in paras. 89–95.

11 See: Follow-up to the report of the Committee of independent experts in international humanitarian and human rights law established pursuant to Council resolution, UN Doc A/HRC/RES/15/6 (Oct. 6, 2010).

12 See: Report of the Committee of independent experts in international humanitarian and human rights law established pursuant to Council resolution 13/9, UN Doc A/HRC/16/24 (Mar. 18, 2011).

13 *Id.*, at para. 80.

MEMBERS OF THE TURKEL COMMISSION, ADVISERS TO THE COMMISSION AND THE PROFESSIONAL STAFF

6. As stated in the Turkel Commission's First Report, retired Supreme Court Justice Jacob Turkel was appointed to chair the Commission, and the late Prof. Shabtai Rosenne and General (ret.) Amos Horev were appointed as members. In addition, two foreign experts were appointed to act as observers: Lord David Trimble of Ireland, a Nobel Peace Prize winner and formerly First Minister of Northern Ireland, and Brigadier-General (ret.) Kenneth Watkin, former Judge Advocate General of the Canadian Forces.¹⁴

Advocate Hoshea Gottlieb was appointed as the Commission's Coordinator.

7. In July 2010, the composition of the Commission was expanded to include two additional members, Ambassador Reuven Merhav and Prof. Miguel Deutch.¹⁵ On 21 September 2010, Prof. Shabtai Rosenne passed away, but it was decided not to appoint another member, and the chair of the Commission was given 'an additional vote in any case where the votes of the members of the Commission were tied'.¹⁶

8. On 14 April 2011, upon his appointment as Stockton Professor of International Law at the United States Naval War College, Brigadier-General (ret.) Kenneth Watkin resigned as a foreign observer on the

14 The curriculum vitae of these Commission members and of the foreign observers were briefly detailed in the preface to *The Public Commission to Examine the Maritime Incident of 31 May 2010: The Turkel Commission* REPORT PART ONE, (2011) [hereinafter: THE COMMISSION'S FIRST REPORT]. For more comprehensive curriculums; see the Commission's website: www.turkel-committee.gov.il.

15 Resolution No. 2134 of the 32nd Government, *Appointment of additional members to serve on the Public Commission chaired by retired Supreme Court Justice Jacob Turkel to Examine the Maritime Incident of 31 May 2010* (Jul. 25, 2010). The curriculums of these Commission members were briefly detailed in the preface to The Commission's First Report. For more comprehensive curriculum vitae; see the Commission's website, supra.

16 Resolution No. 2297 of the 32nd Government, *The Public Commission chaired by retired Supreme Court Justice Jacob Turkel to Examine the Maritime Incident of 31 May 2010 – following the death of the late Prof. Shabtai Rosenne* (Oct. 4, 2010).

Commission. Brigadier–General Watkin contributed substantially to both of the Commission’s Reports, and for this the Commission is most appreciative.

9. On 23 June 2011, the Government of Israel appointed Professor of International Humanitarian Law Timothy McCormack, Professor of Law at the Melbourne Law School, and the Special Adviser on International Humanitarian Law to the Prosecutor of the International Criminal Court in The Hague, as a foreign observer to replace Brigadier–General (ret.) Watkin.¹⁷ Here it should be emphasized, that although the Government’s resolution to appoint the Commission stipulated that the observers ‘would not have a right to vote with regard to the proceedings and conclusions of the Commission’, according to the decision of the chair of the Commission, the observers acted as actual members, participated actively in all the sessions and deliberations of the Commission, and made a significant contribution in the expertise they provided to both of the Commission’s reports.¹⁸ It should be noted that no open or closed session of the Commission took place without the participation of the observers. The Commission is most grateful to them.

10. Several reputable expert advisers in the field of international law contributed to the Commission’s two reports. In the Second Report, Prof. Michael Schmitt,¹⁹ assisted the Commission until September 2011 when he was appointed as chair of the International Law Department at the United States Naval War College. Prof. Claus Kreß, the director of the Institute for International Peace and Security Law at the University of

17 Resolution No. 3338 of the 32nd Government, *The Public Commission chaired by retired Supreme Court Justice Jacob Turkel to Examine the Maritime Incident of 31 May 2010 – Appointment of a foreign observer* (Jun. 23, 2011).

18 *The Government resolution to appoint the Commission, supra* note 1, at para. 3.

19 *Prof. Michael Schmitt*. During the period that he advised the Commission, he served as the Chair of Public International Law at Durham University in the United Kingdom and as the General Editor of the *Yearbook of the International Humanitarian Law*.

Cologne,²⁰ and Prof. Gabriella Blum of Harvard University,²¹ also assisted the Commission and both agreed with the legal analysis in this Report (as set out in Chapter A) and advised the Commission in formulating its recommendations.

11. The professional staff that assisted the Commission's work during various periods included many lawyers, jurists and students from Israel and abroad, most of whom have advanced degrees specializing in international law. In particular, we would like to mention the important contribution of Dr. Michelle Lesh,²² Dr. Carmit Karin Yefet²³ and Advocate Moran Yahav.²⁴ In addition, administrative assistance was received especially from Mrs. Mali Peretz and Mr. Avi Attias. The Commission thanks them all.

12. The Commission's Coordinator, Advocate Hoshea Gottlieb,²⁵ expertly and efficiently managed and coordinated the professional contacts with the advisers, experts and professional and administrative staff. His professional skills and administrative abilities, together with a profound understanding of the international legal arena, enabled the Commission to compile a comprehensive and thorough report.

20 *Prof. Claus Kreß*. Professor of Public International Law and Criminal Law, Director of the Institute of International Peace and Security Law, and Chair of German and International Criminal Law, University of Cologne, Faculty of Law, Germany. Prof. Kreß has also been serving as a member on Germany's delegation in the negotiations on the International Criminal Court since 1998.

21 *Prof. Gabriella Bloom*. Rita E. Hauser Professor of Human Rights and Humanitarian Law at Harvard Law School, U.S.A.

22 Ph.D, Melbourne Law School, Australia.

23 J.S.D., Yale Law School, U.S.A.

24 LL.M, New York University Law School, U.S.A. (J.S.D. candidate).

25 LL.M, Harvard Law School, U.S.A.

THE COMMISSION'S SECOND REPORT

13. As stated above, in the Second Report, the Commission has considered the question presented in paragraph 5 of the Government's resolution to appoint the Commission, namely '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, [the maritime incident of 31 May 2010], conforms with the obligations of the State of Israel under the rules of international law'.²⁶ It should be noted here that whereas this Report distinguishes between the duty to examine and the duty to investigate, no distinction is made between the terms 'complaints' and 'claims', and they are used interchangeably.

14. The Commission focused mainly on the rules of international humanitarian law. The Commission also relied on the rules of international human rights law, international criminal law and the laws of State responsibility in so far as they were relevant to the issue under consideration (examination and investigation mechanisms for complaints and claims raised concerning violations of international humanitarian law). The Commission also took into consideration the relevant rules of Israeli constitutional and administrative law and general principles of the rule of law.

15. In this Report, the Commission mainly assessed the military examination and investigation mechanisms. As can be seen from the material that was submitted to the Commission, most of the claims of violations of the laws of armed conflict are directed at the Israel Defense Forces (hereinafter: the IDF), as the central security branch involved in combat. However, the Commission also saw fit to assess the examination and investigation mechanisms of other security branches, such as the

²⁶ *The Government resolution to appoint the Commission, supra note 1.*

Israel Police, the Israel Security Agency (hereinafter: the ISA) and the Israel Prison Service, both with respect to the investigation of incidents occurring in the West Bank and with respect to the investigation of incidents occurring in Israel. It should be emphasized that claims of breaches of the rules of international humanitarian law may also be leveled at senior decision-makers, whether in the military establishment or in the civilian leadership.

The Commission also assessed the oversight and review mechanisms of examination and investigation mechanisms, whether in appeal proceedings or in administrative review proceedings.

16. Here we should reiterate that the focus of this Report is prospective. In other words, the Commission has considered only fundamental jurisprudential questions of why, what, when and how complaints and claims of violations of international humanitarian law should be examined and investigated; the Commission has not assessed the application of these questions to specific cases.

17. It should be further noted that in the preface to the First Report, the Commission stated that in this Second Report it would consider additional questions that arose during its work, 'including questions that are of internal Israeli importance'.²⁷ Meanwhile the State Comptroller published a comprehensive report on 12 June 2012, in which he addressed the implementation of the National Security Council Law and the Councils' involvement in decision-making processes on foreign affairs and security issues. The State Comptroller's Report also addressed the decision-making processes in the Government with regard to the interdiction of the Turkish flotilla and the interaction in this regard between the political echelon and the IDF, including the planning, operation and control of the intelligence bodies involved in the maritime incident. Moreover, the

²⁷ See: THE COMMISSION'S FIRST REPORT, at para. 12.

State Comptroller's report considered the performance of the national public relations mechanisms and additional public relations organizations with respect to the maritime incident.²⁸ In view of the comprehensive and detailed consideration of these and other issues in the State Comptroller's Report (and without addressing the content of that Report), and as these issues were dealt with in other forums, the Commission is of the opinion that there is no need for it to consider these questions further at this time.

THE COMMISSION'S METHODOLOGY

18. The Commission assembled the information that it needed in various ways, including by means of oral and written testimony. The Commission heard witnesses that clarified the subjects of its deliberations from various viewpoints: the Attorney-General, the Deputy State Attorney (Special Assignments), the Military Advocate-General (hereinafter: the MAG), the Chief Military Police Commissioner, the head of the ISA, the ISA's legal adviser and the authorities involved in examining the claims of persons interrogated by the ISA, as well as representatives of human rights organizations, including B'Tselem, the Association of Civil Rights in Israel, Yesh Din and the Public Committee Against Torture. Moreover, researchers in the field of international law – Prof. Eyal Benvenisti, Prof. Yuval Shany and Dr. Amichai Cohen – testified. The Commission sought to obtain first-hand accounts by hearing testimony from complainants who were mentioned in the reports submitted to it by the human rights organizations, but ultimately only two family members of Mr. Yassir A-Tameizi, who was killed during IDF operations in the area of Hebron, came forward to testify.

In view of the importance of bringing as much information as possible before the public, the testimonies were heard in open sessions. Some of the

²⁸ See: State Comptroller, *Inspection Report on Implementation of the National Security Council Law and the Handling of the Turkish Flotilla* (2012).

testimonies were heard *in camera*, in order to protect State security and its foreign relations, pursuant to the Government's resolution to appoint the Commission.²⁹ However, the witnesses were told that after hearing the testimonies *in camera*, the Commission might see fit to disclose parts of them. All of the transcripts of the testimonies that were heard in open sessions have been made available on the Commission's website.³⁰ All of the testimonies were translated simultaneously into English, and the English transcripts were also made available on the Commission's website.

Apart from hearing testimony from witnesses, a considerable amount of material was also obtained at meetings between the Commission's Coordinator and various parties, including the MAG, the director of the Police Internal Investigations Department, the Deputy State Attorney (Criminal Matters) and senior police officers. Moreover, the Commission's Coordinator met with Colonel Erez Katz, who was in charge of one of the five Special Experts Debrief teams that were set up after Operation Cast Lead, in order to study the operational debriefing process in the IDF. The Commission also received from various parties many documents and surveys on matters relating to the subject of its work. The Commission also studied various domestic and international reports in order to clarify the questions before it. The documents that were submitted to the Commission, apart from classified documents, are available to the public at the Commission's website.³¹

In total, the Commission heard 16 testimonies over five days of hearings, of which four testimonies were heard *in camera*, and four meetings were held to obtain additional material. A list of the witnesses that appeared before the Commission and the dates of the testimonies are set out as Annex A of this Report.

29 *The Government resolution to appoint the Commission, supra* note 1, at para. 7.

30 See: www.turkel-committee.gov.il.

31 *Id.*

The Commission thanks all those who contributed from their time and expertise to its work, for enriching the factual, legal and institutional assessment of the complex questions the Commission dealt with.

19. In addition to examining all these documents, the Commission undertook a comprehensive comparison of the examination and investigation mechanisms of six Western countries (hereinafter: the comparative survey). The Commission also examined sample cases in which examinations and investigations were carried out by the IDF's examination and investigation mechanisms (hereinafter: the sample examination).

THE COMPARATIVE SURVEY

20. The aim of the comparative survey was to examine the mechanisms used in Israel in comparison to the mechanisms of other countries. Admittedly, each country has its own considerations when it chooses the appropriate tools and mechanisms for the purpose of fulfilling its obligations under international law. Such considerations relate to the circumstances of that country and its inhabitants, its government institutions, and its constitutional and legal system. Despite the differences in national approaches, the survey provides a wide range of mechanisms that countries may adopt in order to examine and investigate violations of international humanitarian law. It also assists in critically assessing the pros and cons of the different systems when considering the legal and operational needs and realities in Israel.

21. The six countries that were examined – the United States, Canada, Australia, the United Kingdom, Germany and the Netherlands – were chosen for several reasons: they are widely accepted as committed to the rule of law; they have been engaged in recent years in extensive

and diverse military operations which included complex armed conflict situations involving non-State groups, hostilities conducted in close proximity to a civilian population and situations in which the classification of the conflict (international or non-international armed conflict) was less than definitive; and they have sophisticated systems of investigation for violations of international humanitarian law. Four of these countries have a common law system, which is generally the system practiced in Israel, whereas two of them (Germany and the Netherlands) have a Continental law system.

22. For the purpose of carrying out the surveys, reputable experts in the relevant fields were chosen from each of the six countries. Some of them have practical experience, including serving in senior positions in the military justice systems of the countries that were surveyed. The US report was compiled by Prof. Sean Watts of Creighton University in the United States, who served as a Judge Advocate General in the United States army; the Canadian report was compiled by Captain (Navy) (ret.) Holly McDougal, who served as the Director of Military Prosecutions for the Canadian Forces; the Australian report was compiled by Prof. Timothy McCormack of the University of Melbourne in Australia, who is an observer of this Commission; the UK report was compiled by Prof. Peter Rowe of the University of Lancaster in the United Kingdom;³² the German report was compiled by Prof. Wolff Heintschel von Heinegg, Vice-President of the Europa-Universität Viadrina in Frankfurt (Oder) and by his assistant Dr. Robert Frau; the Netherlands report was compiled by Prof. Terry Gill of the University of Amsterdam and the Netherlands Defence Academy and by Major (res.) J.J.M. van Hoek of the Public Prosecutions Department in the office of the General Prosecutor in Arnhem.

The experts were sent an identical questionnaire (see Annex C of this Report), which mainly concerns a survey of the law in force in those

³² Prof. Peter Rowe also provided the Commission with comments on a preliminary draft of Chapter A.

countries and a description of the ways of examining and investigating complaints and claims of violations of international humanitarian law that are committed by the armed forces of the aforesaid countries. Information was also requested about the institutions that examine and investigate violations of international humanitarian law that are committed by other security forces and by civil authorities, as well as the examination and investigation processes. After the Commission received the country reports, it requested additional information from the experts on several matters. Chapter B of this Report is a summary of these reports (the full country reports are attached as Annex C of this Report).

The Commission thanks Ms. Megan Donaldson³³ for her important contribution to the preparation of the comparative survey.

THE SAMPLE EXAMINATION

23. As stated above, the Commission was not satisfied with the testimonies and materials submitted to it, so it also examined in detail a sample of cases in order to form a more comprehensive understanding of the examination and investigation processes. For this purpose, the Commission's Coordinator wrote to the MAG a request to submit to the Commission a sample of approximately 60 cases: 28 of these were mentioned in international and domestic reports and in documents submitted to the Commission by human rights organizations, and 30 of these were determined in accordance with categories defined by the Commission, such as incidents where it was decided not to open a Military Police investigation, incidents that were investigated by the Military Police where it was decided not to file an indictment and cases in which an indictment was filed (the letter of the Commission's Coordinator to the MAG is attached as Annex B of this Report). Of this sample, ten cases were chosen and were examined

33 LL.M, New York University Law School, U.S.A. (J.S.D. candidate).

thoroughly. The examination was carried out by Advocate Einat Benita, Senior Deputy District Attorney in the Central District, who examined, in accordance with the guidelines of the Commission's Coordinator, how the cases were handled, the contribution of the operational debriefing to the decision whether to open an investigation, and the quality of the investigation as it appears from the file. The Commission thanks her for her meticulous work.

It need not be said that a sample examination of this kind cannot provide a comprehensive picture, but the sample did allow the Commission to form an impression of the ways in which examinations and investigations are actually carried out. It should also be pointed out that a similar sample examination was carried out in 2007 by the State Attorney's Office for the purpose of examining complaints and claims raised against ISA interrogators. Also the results of that examination were used by the Commission.

THE STRUCTURE OF THE REPORT

24. This Report contains five chapters. Chapter A outlines the normative framework that governs the examination and investigation of complaints and claims regarding violations of international humanitarian law. This chapter, like the other chapters of the Report, was structured in accordance with the four questions that it seeks to answer: what are the normative sources of the duty to examine and investigate alleged violations of international humanitarian law as they are reflected in the relevant bodies of international law ('why investigate?'); what are the types of breaches that should be examined and investigated ('what to investigate?'); what are the grounds that give rise to the duty to examine and investigate and the way in which those grounds vary depending on the facts of the concrete event and the particular context in which it occurred ('when to investigate?');

and what are the general principles for conducting an examination and an investigation under international law ('how to investigate?').

25. Chapter B is a summary of the reports that were submitted to the Commission within the context of the comparative survey. As stated above, this chapter aims to describe and explain the manner in which the rules of international law are applied in six countries: the United States, Canada, Australia, the United Kingdom, Germany and the Netherlands. We should point out that this chapter uses the same terms used in the country reports submitted to the Commission, and not the terms that the Commission used in other chapters. This was done for the sake of precision and to preserve the wording of the actual reports.

26. Chapter C surveys the examination and investigation mechanisms in Israel. First, it presents the normative framework that gives rise to the duty to investigate violations as it is defined in Israel; whether according to Israel's international law obligations or according to Israeli domestic law ('why investigate?'). The second section of the chapter sets out the normative provisions applicable in Israel, that define the violations that give rise to a duty to investigate under Israeli law, i.e., what are the offenses involving violations of international humanitarian law that are recognized by Israeli domestic law ('what to investigate?'). The third section of the chapter describes the Israeli examination and investigation mechanisms for complaints and claims regarding violations of international humanitarian law, which are raised against members of the IDF, police, ISA workers, prison wardens and the civilian echelon, and the institutions that oversee and review their conduct ('who investigates?'). The fourth section of the chapter presents the grounds for the initiation of an examination and investigation by the various mechanisms, including the reporting procedures ('when to investigate?'). The last section of the chapter surveys the procedures for carrying out the examination and investigation as practiced by the various mechanisms ('how to investigate?').

27. Chapter D considers whether the mechanisms in Israel that examine and investigate complaints and claims of violations of the rules of international humanitarian law (Chapter C) are consistent with the obligations of the State of Israel under the rules of international law (Chapter A), in comparison to the trends that can be seen from the practices of the countries that were surveyed (Chapter B). *Inter alia*, we examined whether the offenses defined in Israeli domestic law are consistent with the offenses defined in international humanitarian law that give rise to an obligation to investigate. Likewise, we examined whether the grounds that give rise to the duty to investigate in Israeli law are consistent with those in international law, and we considered the examination and investigation institutions in Israel, as well as the criteria on which they operate, when they carry out examinations and investigations, and whether all of these are consistent with the rules of international law.

This chapter also incorporates, according to subject categories, the conclusions reached by the Commission and the recommendations that it made on matters where it saw fit to do so.

28. Chapter E concerns a special matter: the manner in which the maritime incident of 31 May 2010, was examined and investigated. This serves as a kind of test case (albeit not a typical one) of the manner in which complaints and claims of violations of international humanitarian law in Israel are examined and investigated. The first section of this chapter contains, in brief and merely as a reminder, a short review of the sequence of events that were described in detail in the Commission's First Report. The second section of the chapter reviews the examination and investigation operations that were carried out by the various mechanisms in Israel. The third section of the chapter considers some of the issues arising from the circumstances of the incident that relate to the examination and investigation mechanisms and the manner in which they operated in the

investigation of the aforesaid incident, from the viewpoint of the rules of international law, as set out and analyzed in this Report.

THE COMMISSION'S MAIN CONCLUSIONS AND RECOMMENDATIONS

29. As stated in the Preface of this Report, the examination and investigation methods that are the subject of this Report have legal, moral, and educational aspects with significant implications for the image of the State of Israel, both domestically and internationally. At the end of the Commission's deliberations and examinations, it may be determined 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. However, the Commission is of the opinion that in several of the areas examined there are grounds for amending the examination and investigation mechanisms and that in several areas there are grounds for changing the accepted policy. The Commission is also of the opinion that certain accepted practices – that are appropriate in themselves – should be enshrined in express written guidelines that are made publicly available. It should be emphasized that where the Commission saw a need for amendments or changes to the mechanisms and operating methods, it does not necessarily indicate essential flaws, but rather it is a blueprint for optimal improvement.

30. Thus, for example, the Commission has recommended domestic Israeli legislation to enshrine international norms that Israel already recognizes and implements. This will constitute a declaration of the commitment of the State of Israel to these norms that already guide the Israeli defense establishment. Another of the Commission's important recommendations is to change the current practice in the IDF whereby

the decision to initiate an investigation is based on the operational debrief. Additional recommendations that should be given special attention relate to the timeframe set for the MAG to make his decision about whether to initiate an investigation. Moreover, in the Commission's view there is a need to change the methods of appointing the MAG and the Chief Military Prosecutor and to determine in advance their term of office. The Commission also recommends strengthening the oversight and review powers of the civilian legal system over the military justice system. With regard to investigations that are conducted by the Israel Police, the Commission recommends transferring the investigation of shooting incidents in the West Bank from the police to the IDF. With regard to the examination of complaints and claims of persons interrogated by the ISA against their interrogators, the Commission also thinks that there is a need for a structural change to the mechanisms for examining the complaints.

31. In total the Commission has made 18 recommendations which conclude this Report (in addition to the recommendations contained in chapter E). When each of these recommendations has been implemented, Israel should be confident that its examination and investigation mechanisms will reflect international best practice.

CHAPTER A: THE NORMATIVE FRAMEWORK IN INTERNATIONAL LAW FOR THE DUTY TO EXAMINE AND INVESTIGATE COMPLAINTS AND CLAIMS OF VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW

INTRODUCTION

1. This chapter presents the normative framework for the duty under international law to examine and investigate complaints and claims of violations of international humanitarian law. In the first section of the chapter we will briefly outline the bodies of international law that govern this duty: primarily international humanitarian law, and also international human rights law, international criminal law and the law of State responsibility. In the second section of this chapter we will review the sources of the duty to examine and investigate alleged violations of international humanitarian law as they are reflected in the relevant bodies of law ('why investigate?'). In the third section of the chapter we will explain the meaning of violations of international humanitarian law in general, and will define the violations that constitute 'war crimes' ('what to investigate?'). In the fourth section of the chapter we will present the grounds that give rise to the duty to examine and investigate and the way in which those grounds vary depending on the facts of the concrete event and the particular context in which it occurred ('when to investigate?'). In the fifth section of the chapter we will outline the general principles for conducting an examination and an investigation under international law ('how to investigate?').

A. BACKGROUND

2. The international law governing the use of force broadly consists of the *jus ad bellum* and the *jus in bello*. The former governs *when* States may resort to force and it addresses issues such as the prohibition on the use of force found in customary law and set forth in Article 2(4) of the United Nations Charter; the right of States to engage in self-defense in accordance with customary law and Article 51 of the Charter; and mechanisms for ensuring collective security, which are set forth in Chapter VII of the UN Charter.¹

By contrast, the *jus in bello* incorporates the international legal regime governing *how* force may be employed during an armed conflict. This latter body of law is commonly referred to as either the ‘law of armed conflict’ or ‘international humanitarian law’.² International humanitarian law, which applies only during an ‘armed conflict’ as defined in the law, sets forth obligations, rights and protections for States and individuals who are involved in, or are otherwise affected by, an armed conflict.³ Issues such as the conduct of attacks, the legitimate means of warfare, detention, and the administration of an occupation are all dealt with in the framework of this body of law.

It should be emphasized that one of the most important and well-established principles in international law is the independence of the *jus in bello* from the *jus ad bellum*. In other words, international humanitarian

1 See: Articles 2(4), 39–42, 51 of the Charter of the United Nations, 3 Bevans 1153 (1945).

2 The Commission will adopt the term ‘international humanitarian law’ in this Report.

3 International humanitarian law places obligations on States even when they are not a Party to the armed conflict. See for example: Common Article 1 of the Geneva Conventions: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 75 U.N.T.S 31, Common Article 1 (1949); Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 75 U.N.T.S 85, Common Article 1 (1949); Convention (III) relative to the Treatment of Prisoners of War (IV), 75 U.N.T.S 135, Common Article 1 (1949); Convention (IV) relative to the Protection of Civilian Persons in Time of War, 75 U.N.T.S 287, Common Article 1 (1949) [Israel signed the conventions on Dec. 8, 1949 and ratified them on Jul. 6, 1951] [hereinafter: GENEVA CONVENTIONS].

law applies equally and uniformly in every situation amounting to an ‘armed conflict’ as defined in the law, irrespective of the question of the legality or legitimacy of the resort to force by the Parties to the conflict or whether a Party is either an ‘aggressor’ or a ‘victim’ in *jus ad bellum* terms.⁴

3. Alongside international humanitarian law, there are three additional bodies of law relevant to the duty to examine and investigate violations of international humanitarian law: international human rights law, international criminal law, and the laws of State responsibility. Each of these bodies of law is comprised of treaty law,⁵ customary law⁶ and ‘soft

4 See: Christopher Greenwood, *Historical Development and Legal Basis*, in THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW, 28 (Dieter Fleck ed., 2nd ed. 2008) [hereinafter: FLECK (ed.), THE HANDBOOK]. The rationale behind this principle is that the determination of who is the aggressor and who is the victim is often controversial and difficult to decide. However, it should be noted that framing the principle in this manner also ensures that the aggressor will have an incentive to uphold international humanitarian law. See: Adam Roberts, *The Equal Application of the Laws of War: A Principle Under Pressure*, 90(872) IRRRC 931, 939 (2008).

5 The accepted definition of a treaty is enshrined in Article 2(1)(a) of the Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, Article 2(1)(a) (1969): an ‘international agreement that was made in writing between states and is subject to international law, whether it is embodied in a single document or in two or more documents that are related to one another, and irrespective of whatever its special designation may be’. There is an important distinction between declaratory treaties (i.e., treaties that are based on international custom and codify it), and constitutive treaties (i.e., treaties that create new rules of international law) which may become declaratory over time due to the development of custom. (See Robert Jennings, *What is International Law and How Do We Tell It When We See It?*, 37 Sw. Y.B. INT’L L. 59, 62 (1981)). Treaties that are classified as declarative will constitute a part of Israeli domestic law and will not require an act of transformation into Israeli law. See: HCJ 41/49 *Shimshon Ltd. v. Attorney-General*, 4(4) 143, 145–146 (1951). By contrast, a constitutive treaty needs to be adopted into legislation, as stated by former Supreme Court President Shamgar: ‘The rules of conventional international law are not adopted automatically and do not become a part of the law in Israel as long as they have not been adopted or incorporated by means of legislation and become a part of the law in Israel by virtue of the provisions of statute or secondary legislation, which derives its authority from a legislative arrangement’ (HCJ 69/81 *Abu Aita v. The Regional Commander of Judea and Samaria*, 37(2) 197, 234 (1983)). For further reading on the application of treaty and customary law in Israel see: Ruth Lapidot, *International Law Within the Israeli Legal System*, 24 ILR 451 (1990). For additional reading on treaty law in international law, see: IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 12–16 (7th ed., 2008) [hereinafter: BROWNLIE, PRINCIPLES]; MALCOLM SHAW, INTERNATIONAL LAW 93–98 (6th ed., 2008) [hereinafter: SHAW, INTERNATIONAL LAW]. See also below, Chapter C of this Report, para. 2.

6 See: Article 38(1)(b) of the Statute of the International Court of Justice, 1 U.N.T.S. 993 (1945), which incorporates two elements that are required for the formulation of a customary rule in international law: a consistent practice by State representatives over a period of time, and a sense of legal obligation to act in accordance with the practice (*opinio juris*). The International Court of Justice (ICJ) went on to hold that these two elements should be regarded as ‘axiomatic’ elements for the purpose of proving the development of a customary norm in international law. See: Case Concerning the Continental Shelf (*Libyan Arab Jamahiriya v. Malta*), 1985 I.C.J. 13, para. 27 (June 3). For further reading, see: ICRC CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, xxxviii–li (Henckaerts & Doswald-Beck eds., 2005) [hereinafter: CIHL]; SHABTAI ROSENNE, PRACTICE AND METHODS OF INTERNATIONAL LAW 55, (1984). From the moment that a rule is recognized as reflecting customary international law, all States are bound by it. The sole exception to this is the ‘Persistent Objector’ rule. According to this rule, a State can exclude itself from the custom by persistently objecting to it during its formulation stages and before it becomes binding customary law. See the Fisheries Case (*United Kingdom v.*

law'.⁷ We will now discuss these various bodies of law in turn.

1. INTERNATIONAL HUMANITARIAN LAW

4. The main sources of international humanitarian law⁸ include the 1907 Hague Convention IV, and its annexed Regulations (hereinafter: the Hague Convention or the Hague Regulations) which are accepted as customary international law (and therefore binding on Israel);⁹ the four 1949 Geneva Conventions: the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (hereinafter: the First Geneva Convention), the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (hereinafter: the Second Geneva Convention), the Geneva Convention relative to the Treatment of Prisoners of War

Norway), 1951 I.C.J. 116, 131 (December 18); BROWNLIE, PRINCIPLES, *supra* note 5, at 11. From the earliest days of the State of Israel, the Courts have held that 'customary international law is a part of Israeli law, subject to Israeli legislation that contains a contrary stipulation' (HCJ 785/87 *Al Affo v. Commander of I.D.F. Forces in the West Bank* 42(2) 4, 35 (1988)) [hereinafter: *Al Affo* case]. However, even in cases of a possible conflict between domestic law and international law, the Israeli Court is entitled to implement the 'presumption of interpretive conformity', i.e., 'to interpret the statute when it is ambiguous and its content does not require a different interpretation, in accordance with the provisions of international law' (CA 336/61 *Eichman v. Attorney-General* 16 2033, 2040 (1962)) [hereinafter: *CA Eichman*].

7 For a definition of 'soft law' see: The Inter-Agency Standing Committee Task Force on Humanitarian Action and Human Rights, *Frequently Asked Questions on International Humanitarian, Human Rights and Refugee Law*, 2 (Mar. 4, 2004), available at: www.unicef.org/emerg/files/FAQs_IHL.pdf: 'Soft International Law is an important body of non-treaty standards usually adopted within the framework of the United Nations system (declarations, bodies of principles, standard minimum rules, etc.). Although not legally binding, soft law serves to interpret and elaborate treaty provisions and to develop new standards in emerging areas of international law'.

8 The process of codifying these basic rules only began in the second half of the nineteenth century. Prior to that, the rules were customary in nature. See, for example: Instructions for the Government of Armies of the United States in the Field, commonly known as the 'Lieber Code', U.S. War Department, General Orders No. 100 (Apr. 24, 1863), reprinted in THE LAWS OF ARMED CONFLICTS: A COLLECTION OF CONVENTIONS, RESOLUTIONS, AND OTHER DOCUMENTS, 3 (DIETRICH SCHINDLER & JIRI TOMAN eds., 1988).

9 The customary status of the Hague Regulations was first recognized in the Nuremberg trials at the end of the Second World War, see: TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL vol. I, 253–254 (1947); The customary status was also recognized by the ICJ in its 1996 advisory opinion on the use of nuclear weapons, see: Legality of the Threat or Use of Nuclear Weapons Advisory Opinion, 1996 I.C.J. 226, para.78–79 (July 8) [hereinafter: *ICJ Nuclear Weapons Advisory Opinion*]. Therefore, even though Israel is not Party to the Hague Regulations it views itself as bound by them by virtue of their customary nature, see for example: HCJ 606/78 *Ayub v. The Minister of Defense*, 33(2) 113, 120 (1979); *The Public Commission for Examining the Maritime Incident of May 31, 2010* 3 (Military Advocate-General position paper, Jul. 29, 2010).

(hereinafter: the Third Geneva Convention), and the Geneva Convention relative to the Protection of Civilian Persons in Time of War (hereinafter: the Fourth Geneva Convention);¹⁰ which are universally accepted to reflect customary law¹¹ (and have been signed and ratified by Israel);¹² and the two 1977 Additional Protocols to the Geneva Conventions. The First Additional Protocol concerns international armed conflicts (hereinafter: the First Additional Protocol),¹³ whereas the Second Additional Protocol concerns armed conflicts that are not of an international character (hereinafter: the Second Additional Protocol).¹⁴ Israel is not a Party to the Additional Protocols but recognizes their customary provisions.¹⁵ Other treaties that

10 See: GENEVA CONVENTIONS, *supra* note 3.

11 See: *ICJ Nuclear Weapons Advisory Opinion*, *supra* note 9, at para. 257; See also: Case Concerning Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. U.S.A.*), 1986 I.C.J. 14, para. 218 (June 27); FLECK (ed.), *THE HANDBOOK*, *supra* note 4, at 28.

12 The Geneva Conventions are recorded in Israel's *Convention Registry*: First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, 1949, TP 1, 387; Second Geneva for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 1949, TP 1, 423; Third Geneva Convention relative to the Treatment of Prisoners of War, 1949, TP 1, 559; the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War, 1949, TP 1, 453.

Since 1967, the official position of the State of Israel has been that the Geneva Conventions do not apply to the West Bank and the Gaza Strip because these were not territories of a 'High Contracting Party', as required by Common Article 2 of the Conventions. In 1971, the then Attorney-General, Meir Shamgar, declared that Israel would nonetheless comply with the 'humanitarian provisions' of the Fourth Geneva Convention (Meir Shamgar, *The Observance of International Law in the Administered Territories*, 1 ISR. Y.B.H.R. 262, 266 (1971)). However, the Government has never specified which provisions are 'humanitarian'. In recent years the Supreme Court has applied the Fourth Geneva Convention as a part of the main normative framework for considering cases before it; See: HCJ 4764/04 *Physicians for Human Rights v. IDF Commander in Gaza*, 58(5) 385 (2004) [hereinafter: *2004 Physicians for Human Rights case*]; HCJ 201/09 *Physicians for Human Rights v. Prime Minister of Israel* (still unpublished, Jan. 19, 2009). It should be noted that in Israel, international conventions to which Israel is a Party to are not automatically part of domestic law. See: Chapter C, para. 2.

13 See: Protocol I Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, 1125 U.N.T.S. 3 (1977) [hereinafter: FIRST ADDITIONAL PROTOCOL TO THE GENEVA CONVENTIONS].

14 See: Protocol II Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 1125 U.N.T.S. 609 (1977) [hereinafter: SECOND ADDITIONAL PROTOCOL TO THE GENEVA CONVENTIONS].

15 In his testimony before the Commission the Military Advocate-General, Major-General Avichai Mandelblit, stated: 'I think that your honor is well aware that neither we nor the Americans are fond of the First Additional Protocol. I would say the following. There are substantive provisions in the First Additional Protocol and there are procedural provisions that are intended to implement the substantive provisions. With regard to the substantive provisions, insofar as they indicate a customary norm such as the prohibition on indiscriminate attacks against civilians, for example, we accept that this is customary. We have great difficulty with the First Additional Protocol mainly because of its application clause that extends it to places that we do not think are correct, and which are certainly not customary, and in particular because they give greater power to what is referred to as 'liberation movements' at the expense of the military forces. Therefore our position is that everything that is not a substantive norm in the First Additional Protocol is not binding. In other words, we do not want to give it a customary status, and this is the traditional position of the State of

apply to wartime conduct include conventions on cultural property and arms control.¹⁶

5. The applicability of international humanitarian law is, as noted, dependent on the existence of an armed conflict. Treaty law recognizes

Israel; see: Transcript – Part B, session no. 2 “Testimony of the Military Advocate-General” 53 (Apr. 11, 2011) [hereinafter: *MAG’s Testimony*].

The Commission’s position on the applicability of the First Additional Protocol is that since Israel is not a Party to the Protocol, it should only be subject to those provisions that reflect customary law. The International Committee of the Red Cross (ICRC) found in its 2005 study on customary international humanitarian law that the provisions of the First Additional Protocol relating to the duty to investigate and try perpetrators of violations of the conventions and protocols, do indeed reflect customary law (see: CIHL, *supra* note 6, at 607–611, and especially note 206). The Commission accepts this position, despite the fact that some aspects of the ICRC’s study have been the subject of criticism (including by Israel), concerning the methodological approach of the study. See: *Military Advocate-General Position Paper 22* (Dec. 19, 2010) [hereinafter: *MAG Position Paper 2010*].

16 See for example: Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, 249 U.N.T.S. 240 (1954) (Israel signed the treaty on Apr. 16, 1958 and ratified it on Jul. 1, 1958) [hereinafter: *The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict*]; The Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, 1014 U.N.T.S. 163 (Israel is not a Party to this convention) [hereinafter: *The Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction*]; Convention on the Prohibition of Military or any Hostile Use of Environmental Modification Techniques (Dec. 10, 1976), 1108 U.N.T.S. 151 (Israel is not a Party to this convention); Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons, 1342 U.N.T.S. 171 (1980) (Israel signed and ratified the convention on Mar. 22, 1995 and it has ratified four out of five protocols additional to the convention, all except for the third protocol which deals with incendiary weapons); The Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, 1974 U.N.T.S. 45 (1993) (Israel signed the treaty on Jan. 13, 1993 but did not ratify it) [hereinafter: *The Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction*]; The Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, 36 I.L.M. 1507 (1997) (Israel is not a Party to this convention); Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts, G.A. Res. 54/263, Annex I, U.N. Doc. A/54/49, Vol.III (2000) (Israel signed the protocol on Nov. 14, 2001 and ratified it on Jul. 18, 2005); The Convention on Cluster Munitions, G.A. Res. 63/71, Annex I, U.N. Doc. A/63/PV.61 (2008) (Israel is not a Party to this convention).

two types of armed conflict, international¹⁷ and non-international,¹⁸ which differ in the level of hostilities required to meet the threshold of armed conflict. The Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia in *The Prosecutor v. Dusko Tadić* (hereinafter: the *Tadić* case) recognized the different thresholds for the existence of an armed conflict depending on its type:

[A]n armed conflict exists whenever there is resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.¹⁹

International humanitarian law also applies to situations of belligerent occupation.²⁰ The conduct of the armed forces in an occupied territory is

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- 17 See: Common Article 2 of the GENEVA CONVENTIONS, *supra* note 3: 'The present convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance' (For Israel's position on Common Article 2 see *supra* note 12). See also: Article 1(4) of FIRST ADDITIONAL PROTOCOL TO THE GENEVA CONVENTIONS, *supra* note 13: 'The situations referred to in the preceding paragraph include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations'. As previously noted, Israel is not Party to the First Additional Protocol and does not consider this Article to reflect customary international law. See: *MAG's Testimony*, *supra* note 15; For further reading on international armed conflicts see: A. P. V. ROGERS, *LAW ON THE BATTLEFIELD* (3rd ed., 2012); LESLIE GREEN, *THE CONTEMPORARY LAW OF ARMED CONFLICT* (2nd ed., 2000) [hereinafter: GREEN, *THE CONTEMPORARY LAW*].
- 18 See: Common Article 3 of the GENEVA CONVENTIONS, *supra* note 3: 'In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties...'; See also: Article 1 of SECOND ADDITIONAL PROTOCOL TO THE GENEVA CONVENTIONS, *supra* note 14: 'This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application, shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol. This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts'. Israel is not a Party to the Second Additional Protocol and does not consider it to reflect customary international law. For further reading on non-international armed conflicts see: ANTHONY CULLEN, *THE CONCEPT OF NON-INTERNATIONAL ARMED CONFLICT IN INTERNATIONAL HUMANITARIAN LAW* (2010); LINDSAY MOIR, *THE LAW OF INTERNAL ARMED CONFLICT* (2002).
- 19 *Prosecutor v. Tadić*, ICTY Case No. IT-94-1-A, App. Ch., para. 70 (Oct. 2, 1995) [hereinafter: *Tadić* case].
- 20 See: Common Article 2 of the GENEVA CONVENTIONS, *supra* note 3.

governed by a special set of laws within international humanitarian law. Article 42 of the Hague Regulations defines occupation:

Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.²¹

This definition requires that the Occupying Power ‘effectively control’ territory to which it does not have sovereign title.²² The Occupying Power, through the military administration that it sets up, exercises the powers that are necessary to maintain law and order and ensure security while complying with its obligations towards the local population, especially respecting their protected status and the rights deriving from this status.²³

21 See: Hague Convention (IV) Respecting the Laws and Customs of War on Land, 36 Stat. 2277, Article 42 (1907) [hereinafter: HAGUE REGULATIONS].

22 See: GERHARD GLAHN, THE OCCUPATION OF ENEMY TERRITORY: A COMMENTARY ON THE LAW AND PRACTICE OF BELLIGERENT OCCUPATION 29 (1957); EYAL BENVENISTI, THE INTERNATIONAL LAW OF BELLIGERENT OCCUPATION 4 (2nd ed., 2004) [hereinafter: BENVENISTI, BELLIGERENT OCCUPATION]; Hans–Peter Gasser, *Protection of the Civilian Population*, in FLECK (ed.), THE HANDBOOK, *supra* note 4, at 237, 274. See also: *The Public Commission to Examine the Maritime Incident of 31 May 2010: The Turkel Commission* REPORT PART ONE, at para. 46 (2011) [hereinafter: THE COMMISSION’S FIRST REPORT], where the Commission adopted the accepted position in international law that ‘occupation’ does not merely require military forces to be stationed in a certain territory, but also that the occupying power performs the functions of an existing government’. This position is also expressed in: Case Concerning Armed Activities on the Territory of the Congo (*D.R.C. v. Uganda*) 2005 I.C.J. 116, para. 231 (December 19) [hereinafter: *Congo v. Uganda* case]. For a different position see: COMMENTARY ON THE IV GENEVA CONVENTION OF 12 AUGUST 1949 RELATIVE TO THE PROTECTION OF THE CIVILIAN PERSONS IN TIME OF WAR, Article 6, 60–61 (Pictet ed., 1958) [hereinafter: COMMENTARY ON THE IV GENEVA CONVENTION] where it was emphasized that there is no *de jure* intermediate stage between entering a foreign territory and entering a situation of occupation and that the application of the rules regulating the conduct of hostilities, ‘even a patrol which penetrates into enemy territory without any intention of staying there must respect the Conventions in its dealings with the civilians it meets’.

23 See also: THE COMMISSION’S FIRST REPORT, *supra* note 22, at para 185: ‘military forces have always had to deal with civilians, including during the policing of occupied territories when carrying out their international humanitarian law responsibilities to maintain public order and safety’. See: HAGUE REGULATIONS, *supra* note 21, at Articles 42–45, 47–56; GENEVA CONVENTIONS, *supra* note 3, at Articles 27–45, 51–78. These Articles state, *inter alia*, that the commander of the armed forces in an occupied territory enters into the role of the sovereign from whom the territory was conquered and he therefore holds all the authorities which were up to that point in the hands of the sovereign, i.e., the legislative, executive and judicial authorities. The commander is also obligated by a series of administrative duties that relate to law enforcement, maintaining public order and ensuring the safety of the inhabitants of the territory. See also: ICRC REPORT, OCCUPATION AND OTHER FORMS OF ADMINISTRATION OF FOREIGN TERRITORY, 17–26 (TRISTEN FERRARO ed., 2012); Kenneth Watkin, *Use of Force during Occupation: Law Enforcement and Conduct of Hostilities*, 94 (885) IRRC REV. 267 (2012) [hereinafter: *Watkin, Use of Force*].

6. There are a number of fundamental principles that guide international humanitarian law. Primarily, this body of law is based on a carefully crafted balance between two conflicting interests that Parties to the conflict possess when engaged in armed conflict, namely, the principles of military necessity and humanity. The notion was famously captured in the preamble to the Hague Convention, which states that the Convention is ‘inspired by the desire to diminish the evils of war, as far as military requirements permit’.²⁴ Second, the principle of ‘distinction’²⁵ permits attacks on military objectives (individuals and objects)²⁶ while prohibiting attacks directed against civilians and against civilian

24 See: HAGUE REGULATIONS, *supra* note 21, at Article 3; See also for example: Declaration Renouncing the Use in Time of War of Explosive Projectiles Under 400 Grammes Weight, 18 Martens Nouveau Recueil (ser.1) 474 (1868); Article 22 of the Convention with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, 32 Stat. 1803 (1899); FIRST ADDITIONAL PROTOCOL TO THE GENEVA CONVENTIONS, *supra* note 13, at Article 35(1).

25 The ICJ recognized the principle of distinction as constituting one of the two foundational rules of international humanitarian law and as reflecting customary law see: *ICJ Nuclear Weapons Advisory Opinion*, *supra* note 9, at para. 78: ‘The cardinal principles contained in the texts constituting the fabric of humanitarian law are the following. The first is aimed at the protection of the civilian population and civilian objects and establishes the distinction between combatants and non-combatants; States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets...’. See also: *Congo v. Uganda* case *supra* note 22 at para. 208.

26 If an individual satisfies the definition of combatant status they have the right to take part in hostilities. Consequently, the individual becomes a legitimate target and is not immune from attack. Moreover, a combatant enjoys the protection of the *Geneva Convention* (prisoner of war (‘POW’) status upon capture and immunity from prosecution for lawful acts of war). Combatants must fulfill the strict criteria set out in THIRD GENEVA CONVENTION, *supra* note 3, at Article 4A2 and FIRST ADDITIONAL PROTOCOL TO THE GENEVA CONVENTIONS, *supra* note 13, at Article 43. In addition to combatants, international humanitarian law permits attacks against civilians ‘directly participating in hostilities’ in certain circumstances [hereinafter: DPH]. See: *Id.*, at Article 51(3). This Article reflects customary law (CIHL, *supra* note 6, at 3–8). The distinction between protected civilians and civilians who directly participate in hostilities, and who lose their protection for such time as they do so, is complex. For an examination of the position of the Israeli Supreme Court on this issue, see: HCJ 769/02 *The Public Committee Against Torture in Israel v. The Government of Israel*, 62(1) 507 (2006), at paras. 30–40 of President Barak’s judgment [hereinafter: *Targeted Killing* case]. In 2009, the ICRC formulated a guidance examining DPH in the context of targeting. See: International Committee of the Red Cross, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (Feb. 26, 2009), available at: www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf. For critiques and responses to aspects of the ICRC Guidance see: Kenneth Watkin, *Opportunity Lost: Organized Armed Groups and the ICRC “Direct Participation in Hostilities” Interpretive Guidance*, 42 N.Y.U.J. INT’L L. & POL. 641 (2010); Michael N. Schmitt, *Deconstructing Direct Participation in Hostilities: The Constitutive Elements*, 42 N.Y.U.J. INT’L L. & POL. 697 (2010); Bill Boothby, “And for Such Time As”: *The Time Dimension to Direct Participation in Hostilities*, 42 N.Y.U.J. INT’L L. & POL. 741 (2010); Hays Parks, *Part IX of the ICRC “Direct Participation in Hostilities” Study: No Mandate, No Expertise and Legally Incorrect*, 42 N.Y.U.J. INT’L L. & POL. 769 (2010); Nils Melzer, *Keeping the Balance between Military Necessity and Humanity: A Response to Four Critiques on the ICRC’s Interpretive Guidance on the Notion of Direct Participation in Hostilities*, 42 N.Y.U.J. INT’L L. & POL. 831 (2010).

objects.²⁷ Third, according to the principle of ‘proportionality’, even if an attack is directed against a lawful target, it will still be unlawful if the expected incidental harm to civilians or to civilian objects (‘collateral damage’) is excessive in relation to the concrete and direct military advantage anticipated.²⁸

2. INTERNATIONAL HUMAN RIGHTS LAW

7. International human rights law imposes binding obligations upon States to protect the rights of individuals. While the international legal order regulates the protection of human rights to some extent, generally these rights are reflected in the domestic legal system. The preamble of the 1948 Universal Declaration of Human Rights, the earliest international instrument dedicated to increasing respect for human rights, reflects the motivation for the development of legal obligations:

Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world...²⁹

In the decades following the adoption of the Universal Declaration, the modern corpus of international human rights law continued to develop. Among the founding treaties of this body of law are the International

27 International humanitarian law provides a negative definition of civilian: ‘A civilian is any person who does not belong to one of the categories of persons referred to in Article 4A(1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian’. See FIRST ADDITIONAL PROTOCOL TO THE GENEVA CONVENTIONS, *supra* note 13, at Article 50.

28 See: FIRST ADDITIONAL PROTOCOL TO THE GENEVA CONVENTIONS, *supra* note 13, at Article 51(5)(b), which incorporates the principle of proportionality in international humanitarian law and forbids any attack which: ‘may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated’.

29 See: Universal Declaration of Human Rights, G.A. Res. 217A (III). U.N. Doc. A/810 (1948). The ICJ recognized the Declaration as reflecting the basic principles of human rights drawn from the UN Charter itself. See: Case Concerning United States Diplomatic and Consular Staff in Tehran (*Iran v. U.S.A.*), 1980 I.C.J. 3, para. 91 (May 24).

Covenant on Civil and Political Rights³⁰ and the International Covenant on Economic, Social and Cultural Rights, both adopted in 1966.³¹ Other important conventions adopted since then include the International Convention on the Elimination of Racial Discrimination, the International Convention on the Elimination of all forms of Discrimination Against Women, the Convention Against Torture, and the Convention on the Rights of the Child.³²

8. In addition to these international treaties, regional conventions on human rights have also been adopted, imposing obligations for those States which are Parties to them. Such treaties include the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: The European Convention for Human Rights), the American Convention on Human Rights, and the African Charter on Human and Peoples' Rights.³³ These regional conventions established their

30 See: The International Covenant on Civil and Political Rights, 31 U.N.T.S 269 (1966) (Israel signed the covenant on Dec. 19, 1966, and ratified it on Oct. 3, 1991 [hereinafter: *The International Covenant on Civil and Political Rights*]). It should be noted that Article 28 of this Covenant established the Human Rights Committee, whose functions include ensuring the enforcement of the Covenant. The Committee is responsible for examining various States' adherence to human rights obligations by way of periodic reports, the publishing of general interpretive comments on Articles of the Covenant, and also examining individual complaints with regard to alleged violations of the Covenant by State Parties to the First Additional Protocol to the Covenant. The ICJ has held that special weight should be given to the interpretive case law and General Comments of the Human Rights Committee as an independent body that was established specifically to supervise the application of this Covenant. See: Case Concerning Ahmadou Sadio Diallo (*Republic of Guinea v. Democratic Republic of the Congo*), 2010 I.C.J. 103, para. 66 (November 30) [hereinafter: *Diallo case*].

31 See: The International Covenant on Economic, Social and Cultural Rights 993 U.N.T.S 3 (1966) [hereinafter: *The International Covenant on Economic, Social and Cultural Rights*] (Israel signed the covenant on Dec. 19, 1966 and ratified it on Oct. 3, 1991).

32 See: The International Convention on the Elimination of All Forms of Racial Discrimination, 660 U.N.T.S 195 (1965) (Israel signed the convention on Mar. 7, 1966 and ratified it on Oct. 3, 1979) [hereinafter: *The International Convention on the Elimination of All Forms of Racial Discrimination*]; Convention on the Elimination of all Forms of Discrimination Against Women, 1249 U.N.T.S 13 (1981) (Israel signed the convention on Jul. 17, 1980 and ratified it on Oct. 3, 1991); Convention on the Rights of the Child, 1577 U.N.T.S N 3 (1989) (Israel signed the convention on Jul. 3, 1990 and ratified it on Oct. 3, 1991) [hereinafter: *The Convention on the Rights of the Child*]; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 U.N.T.S 85 (1984) (Israel signed the convention on Oct. 22, 1986 and ratified it on Oct. 3, 1991) [hereinafter: *The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*]. See also: International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, G.A. Res. 61/106, Annex I, U.N. GAOR, 61st Sess., Supp. No. 49, at 65, U.N. Doc. A/61/49 (2006) (Israel signed the convention on Mar. 31, 2007 and ratified it on Sep. 10, 2012); International Convention for the Protection of All Persons from Enforced Disappearance, G.A. res. 61/177, U.N. Doc. A/RES/61/177 (2006) (Israel is not a Party to this convention).

33 See: European Convention for the Protection of Human Rights and Fundamental Freedoms, 312

own dedicated courts to rule on individual or State applications alleging violations of convention rights.³⁴ The International Court of Justice has relied, *inter alia*, on the jurisprudence of these courts as support for its own findings on the content of the rights set forth in the International Convention on Civil and Political Rights.³⁵

9. Both the international and regional conventions enumerate a list of basic civil and political rights, which the International Court of Justice has recognized as reflecting a ‘universal nature’.³⁶ These include, *inter alia*, the right to life, the right to due process, the prohibition against torture or cruel, inhuman or degrading treatment, and the protection of personal freedoms. Notwithstanding their primary goal of ensuring the basic protection of human rights, the conventions nonetheless allow States to derogate from certain human rights in specific circumstances in which the State’s vital interests are implicated.³⁷ Such derogation is permitted, for example, during a ‘time of public emergency which threatens the life of the nation’.³⁸ The derogation must be public, necessary, temporary, proportionate and non-discriminatory.³⁹ It should be noted that only some rights can be derogated from but other rights, for example, the right to life and the prohibition on torture, are non-derogable.⁴⁰

U.N.T.S 221 (1950) [hereinafter: *The European Convention for the Protection of Human Rights and Fundamental Freedoms*]; American Convention on Human Rights, 1144 U.N.T.S 123 (1969) [hereinafter: *The American Convention on Human Rights*]; The African Charter on Human and Peoples’ Rights, 21 I.L.M 58 (1981) [hereinafter: *The African Charter on Human and Peoples’ Rights*] (Israel is not a Party to these conventions).

34 See: *The European Convention for the Protection of Human Rights and Fundamental Freedoms*, *supra* note 33, at Article 19; *The American Convention on Human Rights*, *Id.*, at Article 33; Protocol to the African Charter on Human and People’s Rights on the Establishment of an African Court on Human and People’s Rights, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III), Article 1 (1998).

35 See for example: *Diallo* case, *supra* note 30, at para. 68.

36 See: *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, 1970 I.C.J. 3, para. 34 (February 5).

37 See: *The International Covenant on Civil and Political Rights*, *supra* note 30, at Article 4; *The European Convention for the Protection of Human Rights and Fundamental Freedoms*, *supra* note 33, at Article 15; *The American Convention on Human Rights*, *Id.*, at Article 27.

38 See: *The International Covenant on Civil and Political Rights*, *supra* note 30, at Article 4.

39 See: Human Rights Committee, General Comment 29: *States of Emergency (Article 4)*, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001).

40 See for example: *The International Covenant on Civil and Political Rights*, *supra* note 30, at Article 4(3).

The Interaction Between International Humanitarian Law and International Human Rights Law

10. The various rules that apply in the context of an armed conflict (international humanitarian law) and in the context of law enforcement (international human rights law) are generally clear. However, there is less clarity in identifying applicable rules in ‘mixed situations’ where these two bodies of law both apply.

11. There is disagreement among international bodies and jurists concerning the relationship between the two sets of laws and the extent of their applicability in various situations. The extraterritorial application of international human rights law has been endorsed by the International Court of Justice,⁴¹ other judicial and multilateral fora,⁴² and by scholars.⁴³

41 In its advisory opinion regarding the wall, the ICJ adopted the approach that the obligations stipulated in *The International Covenant on Civil and Political Rights*, *supra* note 30, in *The International Covenant on Economic, Social and Cultural Rights*, *supra* note 31, and in *The Convention on the Rights of the Child*, *supra* note 32, apply to Israel also in its operations in the West Bank (see: Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, paras. 109–113 (July 9) [hereinafter: *The Wall Opinion*]). It should be emphasized that this determination by the ICJ was based on the position that ‘the territories occupied by Israel have for over 37 years been subject to its territorial jurisdiction as the occupying power’. In *Congo v. Uganda* case, *supra* note 22, at paras. 179–180 and 216–217, the ICJ went a step further when it implicitly recognized the extraterritorial application of these human rights conventions also in cases of a short-term occupation; See also: *Georgia v. Russian Federation*, Request for the Indication of Provisional Measures, 2008 I.C.J. 941, para. 109 (October 15).

42 The Human Rights Committee has endorsed its application see: Human Rights Committee, General Comment 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13, para. 15, 18 (2004) [hereinafter: *General Comment 31 of the Human Rights Committee*]; *Lopez Burgos v. Uruguay*, HRC Communication No. R.12/52, U.N. Doc. A/36/40 176, para. 12.1–12.3 (1981); *Celiberti de Casariego v. Uruguay*, HRC Communication No. 56/1979, U.N. Doc. CCPR/C/13/ D/56/1979, para. 10.1 (1981); Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Concluding Observations of the Human Rights Committee with regards to Israel, U.N. Doc. CCPR/CO/78/ISR, para. 11 (2003). The European Court of Human Rights has endorsed its application, see for example: *McCann and Others v. United Kingdom*, App. No. 18984/91, Eur. Ct. H.R., para. 145–148, 161 (1995) [hereinafter: *McCann* case]; *Loizidou v. Turkey*, App. No. 15318/89, Eur. Ct. H.R., para. 56–64 (1995); *Cyprus v. Turkey*, App. No. 25781/94, Eur. Ct. H.R., para. 77 (2001); *Issa and Others v. Turkey*, App. No. 31821/96, Eur. Ct. H.R., para. 66–75 (2004) [hereinafter: *Issa* case]; *Öcalan v. Turkey*, App. No. 46221/99, Eur. Ct. H.R., para. 91 (2005); The Inter-American Court of Human Rights and the Inter-American Commission of Human Rights have also endorsed its application, see for example: *Coard et al. v. United States of America*, Case No. 10.951, Inter-Am. C.H.R., Report No. 109/99, OEA/Ser.L/V/II.106 Doc. 3 rev., para. 37 (1999); *Alejandre v. Cuba*, Case No. 11.589, Inter-Am. C.H.R., Report No. 86/99, OEA/Ser.L/V/II.106 Doc. 3 rev., para. 23–25 (1999).

43 See for example: MANFRED NOWAK, UN COVENANT ON CIVIL AND POLITICAL RIGHTS, CCPR COMMENTARY 41–43 (2005); NOAM LUBELL, EXTRATERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS 193–235 (2010); Marco Sassoli, *The Role of Human Rights and International Humanitarian Law in New Types of*

As stated in this Commission's First Report, the extent to which this body of law applies extraterritorially is not universally accepted.⁴⁴ Nonetheless, the Commission is of the view that in certain circumstances human rights law applies extraterritorially.

12. The International Court of Justice addressed the interaction between international humanitarian law and international human rights law in the *Legality of the Threat or Use of Nuclear Weapons Advisory Opinion* (hereinafter: the *Nuclear Weapons Advisory Opinion*). The Court held that the two sets of laws apply in parallel and that the right of the individual not to be arbitrarily deprived of life applies also during hostilities.⁴⁵ The extent to which the right applies is determined by the *lex specialis derogat lex generalis* ('*lex specialis*'), where the specialized rule overrides the general law.⁴⁶ In the *Nuclear Weapons Advisory Opinion*, international humanitarian law was characterized as the *lex specialis* of armed conflict and can therefore override international human rights law (*lex generalis*):

The Court observes that the protection of the International Covenant of (sic) Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived

Armed Conflicts, in INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW 63–66 (Orna Ben Naftali ed., 2011); Matthew Happold, *Banković v. Belgium and the territorial scope of the European Convention on Human Rights*, 3(1) H.R. L. REV. 77 (2003).

44 See: THE COMMISSION'S FIRST REPORT, *supra* note 22, at para. 186. It should be noted that the US position, as reflected in para 186, should also be read in light of: Fourth Periodic Report of the United States of America to the United Nations Committee on Human Rights Concerning the International Covenant on Civil and Political Rights (Dec. 30, 2011), paras. 504–505, available at: http://ushrnetwork.org/sites/default/files/declaration-treaty/ICCPR_Fourth_Periodic_Report.pdf ('...The United States is mindful that in General Comment 31 (2004) the Committee presented the view that State Parties are required by Article 2, paragraph 1, to respect and ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State Party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party...').

45 See: *ICJ Nuclear Weapons Advisory Opinion*, *supra* note 9, at para. 25.

46 The reasoning behind the ICJ's approach to the dual application of these two sets of can be seen in: *Congo v. Uganda* case, *supra* note 22, at para. 218; *The Wall Opinion*, *supra* note 41, at para. 109–113.

of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.⁴⁷

In subsequent case law the International Court of Justice has unequivocally endorsed that an interaction exists between international humanitarian law and international human rights law. In its *Advisory Opinion regarding the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (hereinafter: the *Advisory Opinion regarding the Wall*) the Court held:

As regards the relationship between international humanitarian law and human rights law there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law.⁴⁸

13. More specifically, in the *Advisory Opinion regarding the Wall*, the Court further developed its approach on the appropriate interaction between international human rights law and international humanitarian law in the context of Israel's responsibility as an Occupying Power in the West Bank:

In order to answer the question put to it, the Court will have to take into consideration both these branches of international

⁴⁷ See: *ICJ Nuclear Weapons Advisory Opinion*, *supra* note 9, at para. 25.

⁴⁸ See: *The Wall Opinion*, *supra* note 41, at para. 106. This approach was also adopted in *Congo v. Uganda* case, *supra* note 22, paras. 216–220.

law, namely human rights law and, as *lex specialis*, international humanitarian law.⁴⁹

Therefore, while human rights law does not exclusively govern the duties of the occupier, it is widely accepted that some human rights norms apply to varying degrees during occupation.⁵⁰ Conceptually, legally and practically, the relationship between the military administration and the inhabitants of the occupied territory is closer to the one that exists between the State and its citizens than to the one that exists between a State that is a Party to an armed conflict and the citizens of the other Party.

49 See: *The Wall Opinion*, *supra* note 41, at para. 106. It should be noted that in several judgments, the Israeli Supreme Court has applied international human rights law to the military administration in the West Bank, without expressly adopting the position of the ICJ on the extraterritorial application of the international human rights conventions. See, for example: HCJ 3239/02 *Marab v. IDF Commander in the West Bank*, 57(2) 349, 360 (2003); HCJ 3278/02 *The Center for the Defense of the Individual founded by Dr. Lota Salzberger v. Commander of the IDF Forces in the West Bank*, 57(1) 285, 296 (2002); HCJ 1890/03 *Bethlehem Municipality v. State of Israel – Ministry of Defense*, 59(4) 736, 755 (2005); HCJ 7957/04 *Mara'abe v. The Prime Minister of Israel*, 60(2) 477, 492, 500, 506, 523 (2005) [hereinafter: *Mara'abe* case], where the Court held in para. 57 that: 'The ICJ determined that in addition to the humanitarian law, the conventions on human rights apply in the occupied territory. ... For the purposes of our judgment in this case, we assume that these conventions indeed apply'. Dinstein views the Court's decision not to expressly reject the ICJ's approach as evidence that the conventions should be applied in the West Bank (see: YORAM DINSTEIN, *THE INTERNATIONAL LAW OF BELLIGERENT OCCUPATION* 71 (2009) [hereinafter: DINSTEIN, *BELLIGERENT OCCUPATION*]).

50 The Human Rights Committee has taken this approach in relation to Israel's treaty obligations, see: *supra* note 42; the European Court of Human Rights has adopted this position in regards to the Turkish occupation of North Cyprus, *Id.*; and the ICJ has also taken this approach in a series of cases, see *supra* note 41. In the academic literature, three different approaches have arisen in assessing the relevant normative framework applicable to occupied territory:

(1) Only international human rights law applies in occupied territory, on the basis of the duty of the Occupying Power prescribed in Article 43 of the Hague Regulations to maintain order and public life in an occupied territory. This duty that is carried out by means of policing and law enforcement operations (see for example: Marco Sassòli, *Legislation and Maintenance of Public Order and Civil Life by Occupying Power*, 16 EUR. J. INT'L. L. 661, 665 (2005); For the position that human rights applies as the *lex specialis* during occupation see: William Abresch, *A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya*, 16 EUR. J. INT'L. L. 741 (2005)).

(2) Only international humanitarian law applies in occupied territory, and it constitutes the *lex specialis* that applies in the territory by virtue of the Hague Regulations and the Fourth Geneva Convention (see for example: Michael J. Dennis, *Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation*, 99 AM. J. INT'L. L. 119 (2005))

(3) A 'mixed situation' applies to the occupied territory, in which the two normative regimes, human rights law and the international humanitarian law, apply in parallel. It should be noted that the term 'mixed situation' has been given various interpretations see, for example: DINSTEIN, *BELLIGERENT OCCUPATION*, *supra* note 49, at 99–101; Kenneth Watkin, *Maintaining Law and Order during Occupation: Breaking the Normative Chains*, 41 ISR. L. REV. 175, 192 (2008) [hereinafter: *Watkin, Maintaining Law and Order*]; Steven R. Ratner, *Foreign Occupation and International Territorial Administration: The Challenges of Convergence*, 16(4) EUR. J. INT'L. L. 695, 710 (2005). For discussion of the effect of a prolonged occupation on the applicable law, see also: Orna Ben-Naftali & Yuval Shany, *Living in Denial: The Application of Human Rights in the Occupied Territories*, 37 ISR. L. REV. 17, 105 (2003–2004).

14. In sum, the Commission takes the position that the interaction between international humanitarian law and international human rights law is complementary.⁵¹ The Commission addressed the question of this interaction in the First Report and noted that it is often forgotten in this complex debate that both normative regimes have a common core of basic standards that should be applied at all times.⁵² Indeed, as noted in the First Report, ‘international humanitarian law reflects many of the norms that are also recognized as being a part of human rights law’.⁵³ Thus, for example, Article 75 of the First Additional Protocol, which is gradually being recognized as having customary status,⁵⁴ describes in general terms the basic rights of ‘persons who are in the power of a Party to the conflict and who do not benefit from more favorable treatment under the Conventions or under this Protocol’ such as certain ‘due process’ rights, separate detention for men and women, etc.⁵⁵ As already noted, some human rights are so fundamental as to be non-derogable in all circumstances. However, international human rights law concedes that in times of emergency it is

51 This position was adopted by the Supreme Court; See, for example, *Targeted Killing* case, *supra* note 26, at para. 18; *Mara’abe* case, *supra* note 49, at para. 57 of President Barak’s judgment; HCJ 3969/06 *Alharov v. IDF Commander in West Bank* (still unpublished, Oct. 22, 2009), at paras. 10–11 of President Beinisch’s judgment: ‘The powers of the Military Commander derive from the rules of international law that govern a belligerent occupation. ... It is sometimes possible to supplement the humanitarian provisions with international human rights law’.

52 See: THE COMMISSION’S FIRST REPORT, *supra* note 22, at para. 185; FIRST ADDITIONAL PROTOCOL TO THE GENEVA CONVENTIONS, *supra* note 13, at Article 72: ‘The provisions of this Section are additional to the rules concerning humanitarian protection of civilians and civilian objects in the power of a Party to the conflict contained in the Fourth Geneva Convention, particularly Parts I and III thereof, as well as to other applicable rules of international law relating to *the protection of fundamental human rights during international armed conflict*’ [emphasis added]. It should also be noted that, according to Dinstein: ‘Customary human rights are conferred on human beings wherever they are’; See: DINSTEIN, BELLIGERENT OCCUPATION, *supra* note 49, at 70–71. See also: Franklin Guillermo Aisalla Molina (Ecuador–Colombia), Inter–state Petition IP–02 on Admissibility, Inter–Am. C.H.R., Report No. 112/10, OEA/Ser.L/V/II.140 Doc. 10, para. 117 (2010) [hereinafter: *Molina* case] (‘In common with other universal and regional human rights instruments, the American Convention and the 1949 Geneva Conventions share a common core of non-derogable rights and the mutual goal of protecting the physical integrity and dignity inherent in the human being’).

53 See: THE COMMISSION’S FIRST REPORT, *supra* note 22, at para. 185.

54 See: FIRST ADDITIONAL PROTOCOL TO THE GENEVA CONVENTIONS, *supra* note 13, at Article 75; CIHL, *supra* note 6, at 432; *Hamdan v. Rumsfeld*, 548 U.S. 557, 71 (2006), where the majority opinion established that article 75 is a part of customary humanitarian law. It should also be noted that in 2011 the US State Department stated that it will adhere to the set of norms set out in Article 75. See: Secretary of State Clinton, Press Statement, Reaffirming America’s Commitment to the Humane Treatment of Detainees (Mar. 7, 2011), available at: www.state.gov/secretary/rm/2011/03/157827.htm; See also: William Taft, *The Law of Armed Conflict After 9/11: Some Salient Features*, 28 YALE J. INT’L L. 319, 322 (2003).

55 FIRST ADDITIONAL PROTOCOL TO THE GENEVA CONVENTIONS, *supra* note 13, at Article 75.

possible to derogate from certain other rights in the face of genuine security needs.⁵⁶

In situations of armed conflict, international humanitarian law is the *lex specialis*. In situations involving traditional law enforcement activities during armed conflict the *lex generalis* of international human rights law applies, in order to fill a *lacuna* in international humanitarian law. The Commission is of the view that certain human rights norms apply to supplement international humanitarian law rather than the separate normative regime of human rights law replacing international humanitarian law.⁵⁷ Should it become necessary to use force against civilians during these activities (e.g., using force to stop looting by civilians or otherwise to maintain law and order), human rights norms regulating the use of force apply, including the principles of necessity and proportionality (these terms are defined differently in a law enforcement context from the way in which they are defined in international humanitarian law).⁵⁸ This is particularly so in a situation of occupation. Note, however, there may be operations during armed conflict which lie on the borderline between combat actions and law enforcement activity. Examples include taking control of inhabited buildings, searches, and erecting temporary barriers. In such situations the question of the interaction between the two sets of laws becomes more complex.

56 See *supra*, at para. 9; International humanitarian law also recognizes the option to derogate: COMMENTARY ON THE PROTOCOL ADDITIONAL TO THE GENEVA CONVENTION OF 12 AUGUST 1949, AND RELATING TO THE PROTECTION OF VICTIMS OF INTERNATIONAL ARMED CONFLICT, Article 72, para. 2933 (Sandoz et al. eds., 1987) [hereinafter: COMMENTARY ON THE FIRST ADDITIONAL PROTOCOL TO THE GENEVA CONVENTIONS] ('Therefore it is to be foreseen that States will frequently use the possibility available to them to suspend the application of these agreements [ICCPR, ECHR, ACHR, etc.] for the duration of the armed conflict; thus only the clauses which permit no derogation remain applicable').

57 For an extension of this issue see: *Watkin, Use of Force, supra* note 23, at 304–310.

58 According to the principle of necessity in human rights law the use of force is permitted only when non-violent options have been exhausted and have proven to be insufficient, and only to the extent needed in order to enforce the law or in order to guarantee the safety of the law enforcement officers. The principle of proportionality in human rights law establishes that the prevention of the foreseen harm, must not exceed the damage caused by the actual use of force (for example, the use of deadly force is not be permitted in order to protect insignificant property, but it is permitted to prevent murder or in self-defense). See: UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, U.N. Doc. A/CONF.144/28/Rev.1, Article 9 (1990) [hereinafter: UN Basic Principles, Use of Force and Firearms 1990]. See also: Code of Conduct for Law Enforcement Officials, G.A. res. 34/169, annex, 34 U.N. G.A.O.R Supp. No. 46, U.N. Doc. A/34/46, Article 2–3 (1979).

3. INTERNATIONAL CRIMINAL LAW

15. In addition to international humanitarian law and international human rights law, international criminal law is a third body of law that establishes responsibility when a substantive rule has been breached.

16. International criminal law establishes individual criminal responsibility over various categories of proscribed behavior, primarily, war crimes, crimes against humanity, acts of genocide, and crimes of aggression.⁵⁹ The main treaty sources include the 1907 Hague Regulations, the Geneva Conventions (and their additional protocols) and the 1948 Genocide Convention.⁶⁰ These and other treaties form the basis for many of the crimes within the jurisdiction of the international criminal tribunals and the Rome Statute of the International Criminal Court (hereinafter: *Rome Statute*).⁶¹

59 For additional readings on this body of law see: ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW (2nd ed., 2008) [hereinafter: CASSESE, INTERNATIONAL CRIMINAL LAW]; See also: Claus Kreß, *International Criminal Law*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, para. 15–18 (2009), available at: www.mpepil.com [hereinafter: Kreß in PLANCK]; For reading about the history of the development of international criminal law see: ROUTLEDGE HANDBOOK OF INTERNATIONAL CRIMINAL LAW 5–107 (Schabas & Bernaz eds., 2011) [hereinafter: ROUTLEDGE HANDBOOK].

60 Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S 277 (1948) (Israel signed the convention on Aug. 17, 1949 and ratified it on Mar. 9, 1950) [hereinafter: *The Convention on the Prevention and Punishment of the Crime of Genocide*].

61 See: Rome Statute of the International Criminal Court, 2187 U.N.T.S 3, Articles 12, 13 (1998) [hereinafter: *Rome Statute*]. However, the crimes in the Rome Statute are not derived solely from preexisting treaty law and represent a significant expansion of the Court's subject matter jurisdiction. It should be emphasized that in addition to the substantive law, international criminal law provides a series of procedural rules that concern the framework for conducting criminal proceedings. At the center of these rules lies the question of the jurisdiction of domestic courts and the various international criminal tribunals, in prosecuting these offenses. In this context, it is important to note that Israel is not a Party to the *Rome Statute*. This does not, however, mean that the Court will never enjoy jurisdiction over matters involving Israel or Israelis. This may occur in a number of scenarios: where an Israeli citizen has a foreign nationality of a State that is a Party to the *Rome Statute* or of a State which accepts the Court's jurisdiction with respect to the crime in question; where the State in whose territory an Israeli citizen committed an offense is a Party to the *Rome Statute* or accepts the Court's jurisdiction with respect to the crime in question; or where the Security Council authorizes the Court to try a matter where the suspect is an Israeli national. For further reading on the jurisdiction of the ICC over Non-Member States, and in particular Israel, see: Dapo Akande, *The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits*, 1 JICJ 618 (2003); Yaël Ronen, *ICC Jurisdiction over Acts Committed in the Gaza Strip: Article 12(3) of the ICC Statute and Non-State Entities*, 8 JICJ 3 (2010); Yuval Shany, *In Defense of Functional Interpretation of Article 12(3) of the Rome Statute A Response to Yaël Ronen* 8 JICJ 329 (2010). For a discussion of Universal Jurisdiction, see: *fn* 121.

17. The importance of the principle of individual criminal responsibility was first articulated in the judgment of the Nürnberg Tribunal: ‘crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced’.⁶² Since the Nürnberg Trials, the principle has been codified in the treaties already identified, and it is unquestionably a principle accepted as customary international law and has been repeatedly reaffirmed by the UN Security Council.⁶³

4. LAW OF STATE RESPONSIBILITY

18. The last body of law relevant to the formation of the duty to examine and investigate violations of international humanitarian law is the law of State responsibility. While international criminal law determines individual responsibility for violations of substantive rules, this body of law, as its name suggests, focuses on State responsibility for international wrongs. According to the doctrine of State responsibility, whenever a State (or its agents) commits an internationally wrongful act, the State is responsible for that violation of international law and is liable for redress.

19. The principal source of the law of State responsibility is the International Law Commission’s Articles on Responsibility of States for Internationally Wrongful Acts (hereinafter: ILC Articles),⁶⁴ which are, in part, reflective of customary law.⁶⁵ Article 2 of the ILC Articles defines the

62 See: Judgment of the International Military Tribunal, *reprinted in* NAZI CONSPIRACY AND AGGRESSION: OPINION AND JUDGMENT 53 (United States Government Printing Office, 1947).

63 See, for example, the following Security Council resolutions: Security Council Res. 1970, U.N. Doc. S/RES/1970 (2011); Security Council Res. 1820, U.N. Doc. S/RES/1829 (2008); Security Council Res. 1546, U.N. Doc. S/RES/1546 (2004); Security Council Res. 1264, U.N. Doc. S/RES/1264 (1999); Security Council Res. 1203, U.N. Doc. S/RES/1203 (1998); Security Council Res. 955, U.N. Doc. S/RES/955 (1994); Security Council Res. 827, S/RES/827 (1993).

64 See: International Law Commission, *Articles and Commentaries on Responsibility of States for Internationally Wrongful Acts*, Annex G.A. Res. 56/83, U.N. GAOR Sess. 56, Supp. No. 10, U.N. Doc. A/56/10, p.59 (2001) [hereinafter: ILC Articles]. The rules were first drafted in 1981, and updated in 2001, when they were adopted in a resolution without a vote by the General Assembly.

65 See for example: Application of the Convention on the Prevention and Punishment of the Crime of

elements for an internationally wrongful act of a State:

There is an internationally wrongful act of a State when conduct consisting of an action or omission:

a. is attributable to the State under international law; and

b. constitutes a breach of an international obligation of the State.⁶⁶

When a State has committed an internationally wrongful act, according to the ILC Articles, it may be liable for ‘cessation and non-repetition’,⁶⁷ ‘restitution’,⁶⁸ ‘compensation’,⁶⁹ or ‘satisfaction’.⁷⁰

20. The same unlawful act might amount to violations under both international criminal law and the law on State responsibility, albeit with separate and distinct liabilities for individuals and for the State concerned. An illustrative example involved the Srebrenica massacre. While Slobodan Milošević was on trial before the International Criminal Tribunal for the Former Yugoslavia for, *inter alia*, two counts of genocide for his alleged involvement at Srebrenica, Bosnia Herzegovina submitted an application to the International Court of Justice alleging Serbia’s international legal responsibility for violations of its obligations under the Genocide Convention.⁷¹

Genocide (*Bosnia & Herzegovina v. Serbia & Montenegro*), 2007 I.C.J. 138, p. 142–153 (February, 3) [hereinafter: *Bosnia v. Serbia* case]; See also Caron: ‘The ILC articles represent (at best) a restatement of the customary international law of the secondary principles of state responsibility’. (David Caron, *The ILC Articles on State Responsibility: The Paradoxical Relationship between Form and Authority*, 96 AM. J. INT’L. L. 857, p. 872 (2002) [hereinafter: *Caron, State responsibility*]).

66 See: ILC Articles, *supra* note 64, at Article 2.

67 *Id.*, at Article 30.

68 *Id.*, at Article 35.

69 *Id.*, at Article 36.

70 *Id.*, at Article 37.

71 See: *Bosnia v. Serbia* case, *supra* note 65, at paras. 377–450; See also: Prosecutor v. Milošević, ICTY Case No. IT-02-54, Initial Indictment (Bosnia), para. 32 (Nov. 22, 2001); *The Convention on the Prevention and Punishment of the Crime of Genocide*, *supra* note 60, Article 1, 5–6.

B. SOURCES OF THE DUTY TO EXAMINE AND INVESTIGATE COMPLAINTS AND CLAIMS OF VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW (‘WHY INVESTIGATE?’)

21. The obligation to respond to alleged violations of international humanitarian law is derived from various sources. In this section we will review international humanitarian law (applicable to both international and non-international armed conflict), international human rights law, international criminal law and the law on State responsibility in so far as they apply to situations of armed conflict. As will be seen from all of these sources, the obligation to examine and investigate alleged violations of international humanitarian law is an established and recognized obligation in international law.

1. THE SOURCE OF THE OBLIGATION IN INTERNATIONAL HUMANITARIAN LAW

22. All Parties to an armed conflict have a general obligation to respect and ensure respect for international humanitarian law.⁷² To give effect to the general obligation, States are specifically obliged to criminalize certain violations of international humanitarian law,⁷³ but that is not the only measure required. Military commanders must also act both proactively and reactively to ensure compliance with the law.⁷⁴ The Commission considers that these legal obligations can only be satisfied through proper accountability processes. First there is a general duty to broadly *examine* all suspected violations of international humanitarian law. Second there is an additional duty to *investigate* certain types of alleged violations known

72 See: Common Article 1 of the GENEVA CONVENTIONS, *supra* note 3.

73 See: FOURTH GENEVA CONVENTION, *Id.*, at Article 146 and equivalent provisions; FIRST ADDITIONAL PROTOCOL TO THE GENEVA CONVENTIONS, *supra* note 13, at Article 85.

74 FIRST ADDITIONAL PROTOCOL TO THE GENEVA CONVENTIONS, *supra* note 13, at Article 87.

as ‘war crimes’. The distinction between these duties, together with the sources upon which they are based, will be explained below. Often there is overlap between the sources from which they derive.

A. Examine

23. The rationale for the obligation to examine all alleged violations of international humanitarian law is to ensure compliance with this body of law and its effective implementation during military operations.⁷⁵ States are obliged to undertake complementary means to facilitate compliance with the rules of international humanitarian law. These include dissemination and educational activities, appropriate military training, reporting duties, disciplinary measures and other actions.

The obligation to examine alleged violations of international humanitarian law is fundamental to the attainment of the general objective of compliance. Violations of the law are to be prevented but, if they do occur, States are obliged to hold those responsible accountable.⁷⁶ Article 146 of the Fourth Geneva Convention (as well as the other three Geneva Conventions and the First Additional Protocol) imposes a general duty to prevent all violations of international humanitarian law (‘suppress’).⁷⁷ ‘Suppression’

⁷⁵ See for example: *Id.*, at Article 87, as well as COMMENTARY ON THE FIRST ADDITIONAL PROTOCOL TO THE GENEVA CONVENTIONS, *supra* note 56, at 1017–1023; *2004 Physicians for Human Rights case*, *supra* note 12, at para. 34 of President Barak’s judgment: ‘According to the humanitarian rules of international law, military activity has the following two requirements: *first*, that the rules of conduct should be taught to all combat soldiers and internalized by them, from the Chief of General Staff down to the private; *second*, that institutional arrangements are created to allow the implementation of these rules and putting them into practice during combat’; Eyal Benvenisti, *Human Dignity in Combat: The Duty to Spare Enemy Civilians*, 39 IS. L. REV. 2, 92, 99 (2006). The duty to ensure compliance with international humanitarian law is also imposed directly on commanders; see the FIRST ADDITIONAL PROTOCOL TO THE GENEVA CONVENTIONS, *supra* note 13, at Article 87(2); For a review of the tools available for a commander to ensure compliance, see: Renaut Céline, *The Impact of Military Disciplinary Sanctions on Compliance with International Humanitarian Law*, 90 IRR 870 (2008).

⁷⁶ See: THE FIRST GENEVA CONVENTION, *supra* note 3, at Article 52; SECOND GENEVA CONVENTION, *Id.*, at Article 53; THIRD GENEVA CONVENTION, *Id.*, at Article 132; FOURTH GENEVA CONVENTION, *Id.*, at Article 149.

⁷⁷ See: THE FIRST GENEVA CONVENTION, *supra* note 3, at Article 49; SECOND GENEVA CONVENTION, *Id.*, at Article 50; THIRD GENEVA CONVENTION, *Id.*, at Article 129; FOURTH GENEVA CONVENTION, *Id.*, at Article 146. See also: FIRST ADDITIONAL PROTOCOL TO THE GENEVA CONVENTIONS, *supra* note 13, at Article 86(1).

of violations requires States to ensure compliance with international humanitarian law in its entirety and to prevent future violations from being committed or repeated.⁷⁸ Examination *post factum* focuses attention on the importance of abiding by and enforcing international humanitarian law *ab initio*.

B. Investigate

24. Article 146 of the Fourth Geneva Convention imposes an additional obligation to search and bring to trial those allegedly responsible for certain types of violations of the Convention ('repress'):

The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case.⁷⁹

The obligation to 'repress' violations includes the adoption of penal or disciplinary sanctions, usually through the enactment of criminal legislation, and also searching for, trying and punishing convicted perpetrators of serious violations. This obligation is not restricted merely to the nationals and servicemen of a Party to a conflict, but applies to every

78 See: COMMENTARY ON THE IV GENEVA CONVENTION, *supra* note 22, at 590–594.

79 See: The FOURTH GENEVA CONVENTION, *supra* note 3, at Article 146.

State in relation to every person present in its territory who is suspected of having committed such violations.⁸⁰ Article 85 of the First Additional Protocol adopts the same approach towards the duty to ‘repress’ violations (albeit with an expanded list of offenses).⁸¹

25. In relation to the nature of the violations, it can be deduced from the Commentary on the Geneva Conventions that the obligation to investigate and commit for trial the perpetrators of breaches is not limited merely to those grave breaches defined as such in the Conventions, but includes all breaches of international humanitarian law that amount to ‘war crimes’.⁸² The international criminal tribunals and the Rome Statute have also expanded the category of war crimes beyond grave breaches (for a discussion on the definition of war crimes, see below paragraphs 39–44). Furthermore, Rule 158 of the International Committee of the Red Cross’s Study on Customary International Law (hereinafter: the ICRC Study) discusses the existence of express customary obligations to investigate and commit for trial perpetrators of all breaches of international humanitarian law that amount to ‘war crimes’:

States must investigate war crimes allegedly committed by their nationals or armed forces, or on their territory, and, if appropriate,

80 See: COMMENTARY ON THE IV GENEVA CONVENTION, *supra* note 22, at 592–593.

81 FIRST ADDITIONAL PROTOCOL TO THE GENEVA CONVENTIONS, *supra* note 13, at Article 85; See also: Claus Kreß, *Reflections on the Iudicare Limb of the Grave Breaches Regime*, 7 J. INT’L CRIM. JUST. 789, 794 (2009) [hereinafter: *Kreß, Reflections on the Iudicare*].

82 See: COMMENTARY ON THE FIRST GENEVA CONVENTION OF 12 AUGUST 1949 RELATIVE TO THE PROTECTION OF THE CIVILIAN PERSONS IN TIME OF WAR, Article 49, 367–368 (Pictet ed., 1958) where it was noted that: ‘Article 29 of the 1929 Convention called for the punishment of ‘all’ acts contrary to the provisions of the Convention, and there could be no question of the Diplomatic Conference of 1949 not going as far as in 1929... It is thus clear that ‘all’ breaches of the present Convention should be repressed by national legislation. At the very least, the Contracting Powers, having arranged for the repression of the various grave breaches and fixed an appropriate penalty for each, must include a general clause in their national legislative enactments, providing for the punishment of other breaches of the Convention. Furthermore, under the present paragraph the authorities of the Contracting Parties should issue instructions in accordance with the Convention to all their subordinates, and arrange for judicial or disciplinary proceedings to be taken in all cases of failure to comply with such instructions’. See also: Yuval Shany & Amichai Cohen, *Beyond the Grave Breaches Regime: The Duty to Investigate Alleged Violations of International Law Governing Armed Conflicts*, YIHL, 5–8 forthcoming, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1982201 [hereinafter: Shany & Cohen, *Beyond the Grave Breaches*] see the updated citation in Chapter B para 2 *fn* 5; Michael N. Schmitt, *Investigating Violations of International Law in Armed Conflict*, 2 HARV. NAT. SEC. J. 31, 38 (2011) [hereinafter: *Schmitt, Investigating Violations*].

prosecute the suspects. They must also investigate other war crimes over which they have jurisdiction and, if appropriate, prosecute the suspects.⁸³

As to violations of international humanitarian law falling short of this threshold, the separate duty to ‘examine’ is consistent with the obligation to ‘suppress’.

The Obligations of Military Commanders and Other Superiors

26. The exercise of effective military authority is fundamental to ensuring compliance with the law. International humanitarian law recognizes the central role of commanders and other superiors in the context of military operations. Subordinate military forces must know that their commanders and other superiors will respond effectively to violations of international humanitarian law. Failure to do so entails legal responsibility for the military commanders and other superiors as well as for the perpetrators themselves.⁸⁴ Commanders and other superiors have a general obligation to prevent violations of international humanitarian law and to take measures to ensure that appropriate steps are taken in response to suspected violations. These obligations are expressly articulated in the First Additional Protocol, which addresses the responsibility of superiors (including civilian leaders) for violations committed by their subordinates, their duty to act to prevent potential violations, and, when and as appropriate, report violations or initiate disciplinary or criminal proceedings:

The High Contracting Parties and the Parties to the conflict shall require military commanders, with respect to members of

83 See: CIHL, *supra* note 6, rule 158 (at 607–611), as well as Schmitt’s position on the customary status of the rule: *Schmitt, Investigating Violations, supra* note 82, at 44. It should also be further noted that rule 161 of the CIHL (at 618–622), which refers to Article 88 of the First Additional Protocol to the Geneva Convention, determines that in relation to the investigation of serious violations: ‘States must make every effort to cooperate, to the extent possible, with each other in order to facilitate the investigation of war crimes and the prosecution of the suspects’.

84 See: FIRST ADDITIONAL PROTOCOL TO THE GENEVA CONVENTIONS, *supra* note 13, at Article 86(2).

the armed forces under their command and other persons under their control, to prevent and, where necessary, to suppress and to report to competent authorities breaches of the Conventions and of this Protocol.⁸⁵

Thus, in obligating superiors to prevent and punish alleged violations, Articles 86 and 87 of the First Additional Protocol further develop the distinction between ‘suppress’ and ‘repress’.⁸⁶ The Commentary on Article 87 of the First Additional Protocol provides that commanders’ obligations include actions such as writing a report on the circumstances of the incident, imposing (or recommending) an appropriate disciplinary sanction, and, where necessary, referring the matter to the appropriate authorities.⁸⁷ In a study of the duty to investigate breaches of international law in armed conflict, Professor Michael Schmitt states that this obligation extends throughout the chain of command.⁸⁸

The obligation of commanders has also been recognized in statutes establishing the international criminal tribunals,⁸⁹ rulings of various

85 See: *Id.*, at Article 87(1). See also: *Id.*, at Articles 86–87, which were recognized as reflecting customary law (see: CIHL, *supra* note 6, at 556–563); Prosecutor v. Akayesu, ICTR Case No. ICTR–96–4–T–A, T. Ch. I, paras. 490–491 (Sep. 2, 1998); Prosecutor v. Kayishema and Ruzindana, ICTR Case No. ICTR–95–1–T, T. Ch., para. 213–216 (May 21, 1999) [hereinafter: *Kayishema and Ruzindana* case]; Prosecutor v. Aleksovski, ICTY Case No. IT–95–14/1–T, App. Ch., para. 76 (Mar. 24, 2000); Prosecutor v. Delalić, ICTY Case No. IT–96–21–T, T. Chamber II, para. 356 (Nov. 16, 1998); Prosecutor v. Delalić, ICTY Case No. IT–96–21–T, App. Ch., para. 196, 250, 354–363 (Feb. 20, 2001) [hereinafter: *Delalić* case]; The criminal liability of commanders and supervisors is also incorporated in the *Rome Statute* see in this context: *Rome Statute*, *supra* note 61, at Article 28.

86 See: FIRST ADDITIONAL PROTOCOL TO THE GENEVA CONVENTIONS, *supra* note 13, at Articles 86–87; See also: COMMENTARY ON THE FIRST ADDITIONAL PROTOCOL TO THE GENEVA CONVENTIONS, *supra* note 56, at 1010–1011, at paras. 3538–3539.

87 See: COMMENTARY ON THE FIRST ADDITIONAL PROTOCOL TO THE GENEVA CONVENTIONS, *supra* note 56, at 1023, at para. 3526.

88 See: *Schmitt, Investigating Violations*, *supra* note 82, at 43.

89 See: Statute of the International Tribunal for the former Yugoslavia, S.C. Res. 808 Annex, U.N. Doc. S/RES/808, Article 7(3) (1993) [hereinafter: *Statute of the International Tribunal for the former Yugoslavia*]; Statute of the International Tribunal for Rwanda, S.C. Res. 955 annex, U.N. Doc. S/RES/955, Article 6(3) (1994) [hereinafter: *Statute of the International Tribunal for Rwanda*]; *Rome Statute*, *supra* note 61, at Article 28(a).

international tribunals since 1945,⁹⁰ the ICRC Study⁹¹ and military manuals of various States.⁹² Of particular importance in this regard is the Rome Statute, which specifically addresses in depth the responsibility of commanders and other superiors.⁹³ **The Commission is satisfied that, as a matter of both treaty and customary international law, commanders and other superiors have an obligation to ensure that suspected violations (a standard examined below) of international humanitarian law are appropriately examined and investigated. Commanders and other superiors must also take appropriate remedial, disciplinary or penal measures, or ensure that they are taken by others, in response to confirmed violations. This responsibility extends throughout the chain of command.**

Examination and Investigation During Non-International Armed Conflict

27. Having addressed the issue of the obligation to examine and investigate in the context of international armed conflict, we shall now turn to address this obligation with regards to a non-international armed

90 See for example: Prosecutor v. Blaškić, ICTY Case No. IT-95-14-A, App. Ch., para.69 (Jul. 29, 2004) [hereinafter: *Blaškić* case]; Prosecutor v. Halilović, ICTY Case No. IT-01-48-T, T. Ch. I, para. 39 (Nov. 16, 2005) [hereinafter: *Halilović* case]; Prosecutor v. Jean-Pierre Bemba Gombo, ICC Case No. ICC-01/05-01/08, Pt. Ch. II, para. 402-443 (Jun. 15, 2009) [hereinafter: *Bemba* case]; Prosecutor v. Boškoski and Tarčulovski, ICTY Case No. IT-04-82-T, T. Ch. II, para. 418 (Jul. 10, 2008) [hereinafter: *Boškoski and Tarčulovski* case]. It should be noted that in the *Boškoski and Tarčulovski* case, the ICTY discussed the practical interpretation of the doctrine of 'command responsibility' and held that: 'A superior's duty to punish the perpetrators of a crime may encompass an obligation to conduct an effective investigation with a view to establishing the facts. The obligation to investigate translates into an obligation on the part of the superior to take active steps to ensure that the perpetrators will be punished. To that end, the superior may exercise his own powers of sanction, or if he lacks such powers, report the perpetrators to the competent authorities. It has been held in the jurisprudence of the Tribunal that civilian superiors, who may lack the disciplinary or sanctioning powers of military commanders, may discharge their obligation to punish by reporting to the competent authorities whenever a crime has been committed if these reports are likely to trigger an investigation or initiate disciplinary or criminal proceedings'.

91 See: CIHL, *supra* note 6, rule 152 (at 556-558): 'Commanders and other superiors are criminally responsible for war crimes committed pursuant to their orders'; As well as rule 153 (at 558-563): 'Commanders and other superiors are criminally responsible for war crimes committed by their subordinates if they knew, or had reason to know, that the subordinates were about to commit or were committing such crimes and did not take all necessary and reasonable measures in their power to prevent their commission, or if such crimes had been committed, to punish the persons responsible'.

92 See for example: DEP'T OF THE ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE, para. 501, (Jul. 18, 1956).

93 See: *Rome Statute*, *supra* note 61, at Article 28.

conflict.⁹⁴ It should be noted that the duty to examine and investigate violations of international humanitarian law is not mentioned in Common Article 3 of the Geneva Conventions, or in the Second Additional Protocol.⁹⁵ The Commission, however, is of the opinion that there is no longer a difference between the law of international and non-international armed conflicts with regard to the existence of an obligation to examine and investigate imposed on the territorial State and the State of nationality of the suspect.⁹⁶ The Commission has arrived at this conclusion based on the following factors: first, Article 149(3) of the Fourth Geneva Convention (as well as an equivalent provision in the other three Conventions) states that there is an obligation to suppress *all* acts contrary to the Conventions (including, it may be assumed, acts contrary to Common Article 3).⁹⁷ Second, the preamble to the Rome Statute recognizes a customary duty of States to investigate all crimes under international law, including war crimes committed in non-international armed conflicts.⁹⁸ Third, the question of commanders' responsibility for committing their subordinates for trial for violations of international humanitarian law is also included in the Statute of the International Criminal Tribunal for Rwanda, which

94 The records to the discussion that took place at the diplomatic conference for the revision of the Geneva Conventions between 1974–1977 reveal the reluctance of representatives of the drafting States to enshrine the rules that apply to non-international armed conflicts. Although a group of States, led by Norway, India and Iraq, called for drafting a single protocol, which would determine identical rules for armed conflict irrespective of the classification of the conflict, the majority position preferred that a distinction be made between the set of laws that apply to international armed conflicts and those that apply to non-international armed conflicts. For additional reading, see: Sylvie S. Junod, *Additional Protocol II: History and Scope*, 33 AM. U. L. REV. 29 (1983).

95 See: *Schmitt, Investigating Violations*, *supra* note 82, at 48.

96 See: *Kreß, Reflections on the Iudicare*, *supra* note 81, at 794–795; *Tadić* case, *supra* note 19, in the separate opinion of justice Abi-Saab, para. 6.

97 See: FIRST GENEVA CONVENTION, *supra* note 3, at Article 52; SECOND GENEVA CONVENTION, *Id.*, at Article 53; THIRD GENEVA CONVENTION, *Id.*, at Article 132; FOURTH GENEVA CONVENTION, *Id.*, at Article 149.

98 See: *Rome Statute*, *supra* note 61, at the preamble, para. 6. It should also be noted that there is considerable similarity between the list of offenses that constitute war crimes in international armed conflicts (Article 8(2)(a–b)) and the parallel list of offenses in non-international conflicts (Article 8(2)(c–f)). Furthermore, during the June 2010 Kampala Review Conference on the Rome Statute of the International Criminal Court a resolution was adopted to limit even further the gaps between the lists of offenses. The Review Conference also emphasized that 'the abovementioned relevant elements of the crimes [in international armed conflicts] can also help in their interpretation and application in armed conflict not of an international character'. See: ICC Review Conference of the Rome Statute, RC/Res.5 Concerning amendments to Article 8 of the Rome Statute, 13 (Jun. 10, 2010), available at: www.icc-cpi.int/iccdocs/asp_docs/ASP9/OR/RC-11-Part.II-ENG.pdf [hereinafter: *Summary report of the Review conference on the Rome Statute of the International Criminal Court, Kampala 2010*].

regulates the prosecution of war criminals in an armed conflict that is not international.⁹⁹ Fourth the general trend that emerges from the rulings of courts and tribunals is to impose the rules of international humanitarian law on conflicts that are not international.¹⁰⁰ Fifth, the duty imposed on States in any case by virtue of the principle that conventions should be complied with (*pacta sunt servanda*) enshrined in Article 26 of the Vienna Convention on the Law of Treaties.¹⁰¹ Finally, the obligation to investigate alleged war crimes in both international and non-international armed conflict can be derived from, for example, Article V of the Convention on the Prevention and Punishment of the Crime of Genocide,¹⁰² Article 28 of the 1954 Hague Convention for the Protection of Cultural Property in the event of Armed Conflict¹⁰³ and Article 7(1) of the 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction.¹⁰⁴ The international crimes contained in each of these treaties apply regardless of the specific context in which they are committed.

99 See: *Statute of the International Tribunal for Rwanda*, *supra* note 89, at Article 6(3).

100 In recent decades, in case law and academic literature, the trend suggests that it is now perceived to be custom that many rules for international armed conflicts apply to non-international armed conflicts. The consequence has been to apply the law applicable to international armed conflicts by analogy to non-international armed conflicts. See: *Tadić* case, *supra* note 19, at para. 109–127; CIHL, *supra* note 6, at xvi; THE COMMISSION'S FIRST REPORT, *supra* note 22, at para. 42. It should be noted that this trend has been subject to much debate (see, for example: Sandesh Sivakumaran, *Re-Envisaging the International Law of Internal Armed Conflict*, 22 EUR. J. INT'L L. 219 (2011); Gabriella Blum *Re-Envisaging the International Law of Internal Armed Conflict: A Reply to Sandesh Sivakumaran*, 22 EUR. J. INT'L L. 265 (2011); Sandesh Sivakumaran, *Re-Envisaging the International Law of Internal Armed Conflict: A Rejoinder to Gabriella Blum*, 22 EUR. J. INT'L L. 273 (2011)).

101 See: Vienna Convention on the Law of Treaties, 1155 U.N.T.S 331, Article 26 (1969), which provides that: 'Every treaty in force is binding upon the parties to it and must be performed by them in good faith'. Schmitt deduces from the requirement of compliance in good faith that a broad interpretation should be given to the investigation obligations enshrined in treaty law applicable to international armed conflicts concerning suspected violations of international humanitarian law, so that it also relates to suspected violations that occur in non-international armed conflicts. For more on this issue see: *Schmitt, Investigating Violations*, *supra* note 82, at 48.

102 See: *The Convention on the Prevention and Punishment of the Crime of Genocide*, *supra* note 60, at Articles 1, 4–6.

103 See: *The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict*, *supra* note 16, at Article 28; See also: Second Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflicts, 38 I.L.M 769, Articles 15–17 (1999) (Israel is not a Party to this protocol).

104 See: *The Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction*, *supra* note 16, at Article 7(1).

28. **Based on a review of the sources, the Commission is satisfied that as a matter of customary international humanitarian law, States have a duty to investigate complaints and claims regarding war crimes and examine all other violations. This obligation applies to both international armed conflicts and non-international armed conflicts.**

2. THE SOURCE OF THE OBLIGATION IN INTERNATIONAL HUMAN RIGHTS LAW

29. An additional area of law relevant for investigating certain activities during an armed conflict is international human rights law. Most of the principal international human rights law treaties, apart from the Convention against Torture,¹⁰⁵ do not include an express provision requiring the investigation of alleged violations. The obligation to investigate violations of human rights law is usually deduced from the general obligation ‘to uphold and guarantee’ human rights and from the right for ‘effective remedy’ by a competent authority.¹⁰⁶

The obligation to investigate has often been reaffirmed in case law, particularly cases involving alleged violations of the right to life, as well as in other general human rights instruments. For example, in *General*

105 See: *The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, *supra* note 32, at Articles 6–8.

106 Thus, for example, *The International Covenant on Civil and Political Rights*, *supra* note 30, at Article 2: ‘1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status; 2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant; 3. Each State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; (c) To ensure that the competent authorities shall enforce such remedies when granted.’

Comment No. 31 'Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (the International Covenant on Civil and Political Rights), the Human Rights Committee stated that:

There may be circumstances in which a failure to ensure Covenant rights as required by Article 2 would give rise to violations by States Parties of those rights, as a result of States Parties' permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities. ... A failure by a State Party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant.¹⁰⁷

Another expression of this interpretation can be found in the judgment of the European Court of Human Rights in *McCann and others v. United Kingdom*:

The obligation to protect the right to life under Article 2 of the Convention, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention," also requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force.¹⁰⁸

30. Moreover, additional reference to the international human rights law obligation to investigate can be found in 'soft law' instruments.¹⁰⁹ The

¹⁰⁷ See: *General Comment 31 of the Human Rights Committee, supra* note 42, at paras. 15 and 18.

¹⁰⁸ See: *McCann case, supra* note 42; Other examples of rulings by the European Human Rights Court on this issue include: *Kaya v. Turkey*, App. No. 22947/93, 22948/93, Eur. Ct. H.R., para. 105 (Oct. 10, 2000) [hereinafter: *Kaya case*]; *Isayeva, Yusupova and Bazayeva v. Russia*, Apps. Nos. 57947/00, 57948/00, 57949/00, Eur. Ct. H.R. para. 208–213 (2005) [hereinafter: *Isayeva, Yusupova and Bazayeva case*]; A similar approach was adopted in rulings by the Inter-American Court of Human Rights, see for example: *Velásquez-Rodríguez v. Honduras*, Inter-Am. Ct. H.R. (Ser. C), No. 4, para.161–172 (Jul. 29, 1988) [hereinafter: *Rodríguez v. Honduras case*].

¹⁰⁹ See for example: UN Basic Principles, Use of Force and Firearms 1990, *supra* note 58, at Articles 6, 11(f), 22–23; Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions as Recommended by the Economic and Social Council in Resolution 1989/65, Supp. No. 1, Annex, U.N. Doc. E/1989/89, Articles 9, 10, 11 (1989) [hereinafter: ESCOR Principles, Effective Prevention and Investigation 1989]; *General Comment 31 of the Human Rights Committee, supra* note 42, at paras. 15 and 18.

UN established international standards governing the use of force in law enforcement, and these include the accountability of law enforcement agents.¹¹⁰ For example, the *United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials* require strict accountability for the use of firearms. The principles call on governments and law enforcement agencies to ‘ensure that an effective review process is available’ and to report any incident of death or injury caused by the use of force ‘promptly to the competent authorities’.¹¹¹ Those affected by the alleged violation (or their legal representatives) must enjoy access to an independent, judicial process, and, in the event of their death, the right applies to their dependents.¹¹² Similar accountability requirements can be found in the *UN Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions*. The Principles call for an investigation of all suspected cases of extra-legal, arbitrary and summary executions, including cases where complaints by relatives or other reliable reports suggest unnatural death. The ‘purpose of the investigation shall be to determine the cause, manner and time of death, the person responsible, and any pattern or practice which may have brought about that death’.¹¹³

31. In summary, although an explicit obligation to investigate alleged human rights violations can rarely be found in human rights conventions, various international bodies and other ‘soft law’ sources have interpreted the substantive rights and the general obligation to ensure the realization of human rights to include, *inter alia*, the obligation to investigate human rights violations. The Commission accepts this interpretation, and in particular the requirement to investigate immediately following the use of lethal force in a law enforcement context.

110 See: ESCOR Principles, Effective Prevention and Investigation 1989, *supra* note 109, at Article 1.

111 See: UN Basic Principles, Use of Force and Firearms 1990, *supra* note 58, at Article 22.

112 *Id.*, at Article 23.

113 See: ESCOR Principles, Effective Prevention and Investigation 1989, *supra* note 109, at Article 9.

3. THE SOURCE OF THE OBLIGATION IN INTERNATIONAL CRIMINAL LAW

32. A third area of law relevant for investigating certain activities during an armed conflict is international criminal law. Normally, international crimes are expected to be tried, first and foremost, at the domestic level, whereas it is envisioned that international courts would assume jurisdiction only when the national system fails or needs to be induced to exercise its powers properly.¹¹⁴ The general principle that a domestic system enjoys priority is expressed in two notions of international criminal law, namely complementarity and subsidiarity, which both emphasize the primacy of an examination and investigation by the national justice system.¹¹⁵

33. Article 17 of the Rome Statute ('Admissibility') enshrines the principle of complementarity. It reflects the trend in international criminal law according to which an international court will serve as the last resort when States cannot or will not themselves carry out their obligation to investigate and prosecute:

1. Having regard to paragraph 10 of the Preamble and Article 1, the Court shall determine that a case is inadmissible where:

(a) *The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable*

114 See for example: ROBERT CRYER ET AL., AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW 64 (2010) [hereinafter: CRYER, INTRODUCTION]: 'International crimes are primarily intended to be prosecuted at the domestic level'. In certain cases, however, the principle of complementarity is dismissed and primacy is given to the international tribunals over the national courts of all States. One example of this can be found in the jurisdiction of the *ad hoc* criminal tribunals established by the Security Council in the 1990s, see: *Statute of the International Tribunal for the former Yugoslavia*, *supra* note 89, at Article 9(2); *Statute of the International Tribunal for Rwanda*, *Id.*, at Article 8(2). An additional model is mixed tribunals, whose composition, jurisdiction, methods of financing, prosecutors and defendants, incorporate both international and national dimensions. Courts of this kind were established, for example, in Sierra Leone, Cambodia, Iraq and Lebanon. For further reading on mixed tribunals see: SHAW, INTERNATIONAL LAW, *supra* note 5, at 417–430; CASSESE, INTERNATIONAL CRIMINAL LAW, *supra* note 59, at 330–336.

115 For further reading on the relationship between the principle of complementarity and the principle of subsidiarity see: Claus Kreß, *Universal Jurisdiction Over International Crimes and the Institut de Droit International*, 4 J. INT'L CRIM. JUST. 3, 561, 579 (2006).

genuinely to carry out the investigation or prosecution;

- (b) *The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;*

2. *In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:*

- (a) *The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in Article 5;*
- (b) *There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;*
- (c) *The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.*

3. *In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.*¹¹⁶

Naturally, Article 17 of the Statute is relevant to acts that are defined by the Rome Statute such as war crimes, crimes against humanity, the crime of genocide, (and in the future, also the crime of aggression).¹¹⁷ For the

¹¹⁶ See: *Rome Statute*, *supra* note 61, at Article 17 [emphases added].

¹¹⁷ The jurisdiction of the Court over the crime of aggression is enshrined in the *Rome Statute*, *supra* note

purposes of this analysis, when a State exercises its authority to investigate violations of international humanitarian law of a certain type – namely, the alleged commission of war crimes – the matter becomes inadmissible in proceedings before the International Criminal Court.¹¹⁸ Therefore, the Court will only intervene where it is possible to determine that the State is *unwilling* (i.e., the proceedings in the State were initiated with the intent of shielding the suspect; there has been an unjustified delay in the proceedings which is inconsistent with an intent to bring the person concerned to justice; the proceedings were not conducted independently or impartially and in a manner which is consistent with an intent to bring the person concerned to

61, at Article 5(d). However, this jurisdiction was suspended until after States Parties approved a definition of this crime. On Jun. 11, 2010, resolution RC/Res.6 was adopted which defined aggression and set out the conditions for exercising jurisdiction over this crime. See *Summary report of the Review conference on the Rome Statute of the International Criminal Court, Kampala 2010*, *supra* note 98, at 17. The *Rome Statute* has been amended to incorporate the definition of the crime of aggression (Article 8 *bis*) and the bases for the exercise of the Courts's jurisdiction over it (Article 15 *bis*).

118 One issue that has arisen in relation to the duty to investigate is the question of whether the State is obliged to adopt the international criminal law codex, including replicating Articles 6–8 of the *Rome Statute*, *supra* note 61, into domestic legislation. In the *Lubanga* case the Court held that 'it is a condition *sine qua non* for a case arising from the investigation of a situation to be inadmissible that national proceedings encompass *both the person and the conduct* which is the subject of the case before the Court' [emphasis added] (see: Prosecutor v. Lubanga, ICC Case No. ICC–01/04–01/06–8–US–Corr, Decision on the Prosecutor's Application for a Warrant of Arrest, Pt. Ch. I, para. 58 (Feb. 10, 2006)). By adopting this approach the ICC took the view that the national criminal legislation should condemn the conduct rather than the specific crime for which the accused is tried in the parallel ICC proceeding. Thus, it can be deduced from this ruling that it is sufficient if domestic legislation accurately reflects the range of criminal activities enshrined in the *Rome Statute*. In this respect, the judgment rejects the Hard–Mirror thesis which requires the indictment of an international crime rather than a translation of that crime into an 'ordinary crime' from domestic law. This thesis was originally incorporated in the *Statute of the International Tribunal for the former Yugoslavia*, *supra* note 89, Article 10(2), and in particular by the ICTY in the *Tadić* case, *supra* note 19, para. 58; in the *Statute of the International Tribunal for Rwanda*, *supra* note 89, Article 9(2); as well as in the ILC Draft Statute for an International Criminal Court, Article 42 (see: Draft Statute for an International Criminal Court, Report of the ILC on the work of its forty–sixth session, G.A.O.R Supp. No. 10, U.N. Doc. A/49/10 (1994)). The rejection of this thesis by the Court in the *Lubanga* case corresponds to the position of the drafting States in the discussions during the Rome Conference and the position expressed by the ICC prosecutor's office: 'There is no requirement that the crimes charged at the national proceedings have the same 'label' as the ones before this Court. The Statute does not set out to regulate how States may choose to incorporate crimes within the jurisdiction of the Court into their national legal system. Therefore there may be discrepancies in the way a particular act is criminalized under the Rome Statute and under national law'. See: John Holmes, *The Principle of Complementarity*, in THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE, ISSUES, NEGOTIATIONS, RESULTS 57–58 (Lee ed., 1999); Prosecution Response to Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute, OTP ICC–01/11–01/11 (Jun. 5, 2012); Claus Kreß, *The Principle of Complementarity under the Rome Statute of the International Criminal Court: A Legal Opinion Submitted to the Israeli Independent Public Commission to Examine the Maritime Incident of 31 May 2010, headed by Supreme Court Justice Jacob Turkel* 43–46 (Aug. 16, 2011) available at: <http://www.turkel-committee.gov.il/files/worddocs/Manuskript.pdf> [hereinafter: Kreß, *The Principle of Complementarity*].

justice) or *unable* (due to a total or substantial collapse or unavailability of its national judicial system) to carry out the investigation (or prosecution) *genuinely*.¹¹⁹ The principle of complementarity, as recognized in the Rome Statute, is based on sound considerations of legal policy and signifies the importance that international criminal law attributes to the State's compliance with its obligation to investigate, and the consequences that follow from a failure to carry out that obligation.¹²⁰

34. The principle of subsidiarity applies the same test (i.e., the 'unwilling or unable' test) in determining the applicability of the universal jurisdiction of bystander States.¹²¹ Subsidiarity recognizes the real possibility of competing claims to jurisdiction and prioritizes territory and nationality over universality. While the principle of complementarity has been enshrined in the Rome Statute through its preambular provisions,¹²² the principle of subsidiarity has not yet been codified and its customary status remains debatable.¹²³ National prosecution and judicial authorities have recently

119 *Rome Statute*, *supra* note 61, at Article 17. For an detailed examination of the different bases for the principle of complementarity as they are incorporated in Article 17 of the Statute see: *Kreß, The Principle of Complementarity*, *supra* note 118, at 43–46.

120 For further reading on the rationales and policy considerations that underlie the principle of complementarity, see: JANN KLEFFNER, COMPLEMENTARITY IN THE ROME STATUTE AND NATIONAL CRIMINAL JURISDICTIONS 57–99 (2008) [hereinafter: KLEFFNER, COMPLEMENTARITY]; Christoph Bughard, *Complementarity as Global Governance*, in *THE INTERNATIONAL CRIMINAL COURT AND COMPLEMENTARITY FROM THEORY TO PRACTICE*, VOL. I, 167–197 (Stahn & El Zeidy eds., 2011).

121 Universal jurisdiction refers to the jurisdiction of a national court to try an individual for an international crime, without there being any connection between the State where the proceeding is taking place and the crime that is the subject of the proceeding. The first case to address universal jurisdiction was the *Eichmann* case in Israel. The District Court held that: 'The abhorrent crimes defined in this Law [Nazis and Nazi Collaborators (Punishment) Law, 5710–1950, LA 57] are crimes not under Israeli law alone. These crimes which offended the whole of mankind and shocked the conscience of nations are grave offenses against the law of nations itself ('delicta juris gentium')... in the absence of an International Court, the international law is in need of the judicial and legislative authorities of every country, to give effect to its penal injunctions and to bring criminals to trial. The jurisdiction to try crimes under international law is universal' (CF (Jerusalem) 61/40 *Attorney-General v. Eichmann*, 45, 3, 12 (1961)). See also: *CA Eichmann*, *supra* note 6, at 2039–2065. The rules that govern the application of universal jurisdiction have been discussed in various sources: CIHL, *supra* note 6, rule 157 (at 604–607); The Princeton Principles on Universal Jurisdiction, formulated by the participants of the Princeton Project at the Princeton University Program in Law and Public Affairs (Macedo ed., 2001), *available at*: http://lapa.princeton.edu/hosteddocs/unive_jur.pdf; as well as in The Institute of International Law, 17th Commission, Universal Jurisdiction With Regard to the Crime of Genocide, Crimes Against Humanity and War Crimes (Aug. 26, 2005), *available at*: www.idi-iiil.org/idiE/resolutionsE/2005_kra_03_en.pdf.

122 *Rome Statute*, *supra* note 61, at the Preamble: 'emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions'.

123 See: *Kreß, The Principle of Complementarity*, *supra* note 118, at 37–38; Jo Stigen, *The Relationship*

applied the principle of subsidiarity to favor the State in whose territory or by whose citizens the alleged offense was committed over a third State claiming universal jurisdiction.¹²⁴ Thus, it can be concluded that universal jurisdiction cannot be relied on when the State possessing either territorial jurisdiction or personal jurisdiction is willing and able to prosecute the alleged offense.

35. Another aspect of international criminal law relevant to the duty to investigate is the doctrine of ‘command responsibility’. A breach of the obligation imposed on officers and superiors to investigate effectively violations committed by their subordinates may itself be a breach of international criminal law and a basis for a criminal conviction.¹²⁵ This

between the Principle of Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes, in COMPLEMENTARITY AND THE EXERCISE OF UNIVERSAL JURISDICTION FOR CORE INTERNATIONAL CRIMES, 133–142 (Bergsmo ed., 2010) [hereinafter: *Jo Stigen, Complementarity and the Exercise of Universal Jurisdiction*]; M. Cherif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, 42 VIRG. J. INT’L. L. 81, 89 (2001); The AU–EU Expert Report on the Principle of Universal Jurisdiction, EU Doc. 8672/1/09, REV 1 (Apr. 16, 2009), available at: http://ec.europa.eu/development/icenter/repository/troika_ua_ue_rapport_competence_universelle_EN.pdf. The International Court of Justice has not made a determination as to the existence of a subsidiarity criterion, however, in the *Arrest Warrant* case, Justices Higgins, Kooijmans and Buergenthal addressed the matter in their Joint Separate Opinion. The Justices noted that a State contemplating bringing criminal charges based on universal jurisdiction must first offer the national State of the prospective accused the opportunity to act upon the charges concerned. See: Case Concerning Arrest Warrant of Apr. 11, 2000 (Democratic Republic of the Congo v. Belgium), Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, 2002 I.C.J. 3, paras. 54–59 (Feb. 14, 2002).

124 The trend of applying the principle of subsidiarity to favor the State holding territorial or personal jurisdiction is reflected in series of recent domestic cases and legislation, in particular in Spain. See: National Criminal Court, Case of Spanish Citizens who Disappeared in Argentina, Court Order No. 5 (May 11, 1998) as translated by Angel Sanchez Legido, *Spanish Practice in the Area of Universal Jurisdiction*, 8 SPANISH YB. INT’L. L. 17, 38 (2001–2002); Tribunal Supremo, Feb. 25, 2003, Case No. 327–2003, section II, para. 6, available at: www.derechos.org/nizkor/guatemala/doc/gtmsent.html; Audiencia Nacional, Preliminary Proceedings No. 157/2008 (May 4, 2009), available at: www.pchgaza.org/files/PressR/English/2009/04-05-2009-2.html; See also: *The Committee of Solidarity with the Arab Cause et al. v. The Office of the Public Prosecutor* which dealt with a complaint concerning the death of civilians as a result of Israel’s targeting of Salah Shehadeh. The Spanish Court of Appeal held that its universal jurisdiction would yield to the proceedings taking place in the State of Israel, namely the establishment, upon the recommendation of the Israeli Supreme Court, of the Inbar Commission (later, the Strasberg–Cohen Commission) to examine the incident (See: Special Committee for Examining the Targeted Killing of Salah Shehadeh REPORT (2011) (in Hebrew): www.pn.gov.il/NR/rdonlyres/DA339745-7D9F-40C7-B20F-4481AAF1F4C7/0/reportshchade.pdf). This decision was upheld by the Supreme Court of Spain (See: Tribunal Supremo, Sala de lo penal (Auto 550/2010), Appeal No. 1979/2009 (Mar. 4, 2010), available at: http://estaticos.elmundo.es/documentos/2010/04/13/auto_gaza.pdf). For further discussion on State practice in this area see: Cedric Ryngaert, *Applying the Rome Statute’s Complementarity Principle: Drawing Lessons from the prosecution of Core Crimes by states Acting Under the Universality Principle*, THE INSTITUTE OF INTERNATIONAL LAW, WORKING PAPER 98, 7–14 (2006), available at: www.law.kuleuven.be/iir/nl/onderzoek/wp/WP98e.pdf; *Jo Stigen, Complementarity and the Exercise of Universal Jurisdiction*, *supra* note 123, at 137–142.

125 For a detailed analysis on this issue in relation to the duty to investigate see: Yuval Shany, Amichai

obligation was recognized by the International Military Tribunal for the Far East in Tokyo,¹²⁶ and also by the US Military Commission in Manila during the trial of General Yamashita.¹²⁷ Similar obligations were also included in the statutes of the various international criminal tribunals, such as in Article 7(3) of the Statute of the International Criminal Tribunal for the Former Yugoslavia, which states that:

The fact that any of the acts referred to in Articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.¹²⁸

An essentially identical Article also appears in the Statute of the International Criminal Tribunal for Rwanda.¹²⁹ The equivalent provision in Article 28 of the Rome Statute is more detailed in the articulation of the relevant test for criminal responsibility and it provides that:

In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:

(a) A military commander or person effectively acting as a military commander shall be criminally responsible for

Cohen & Ido Rosenzweig, *Response Document Presented by the Researchers of the Israel Democracy Institute's "Terror and Democracy" Project to the Position Paper presented to the Commission by the Military Advocate General, regarding the investigation of International Humanitarian Law violation allegations* 26 (Feb. 10, 2011) [hereinafter: *Shany, Cohen & Rosenzweig, Response Document to the MAG position paper*].

126 See: United States et al v. Araki Sadao et al, *reprinted in* THE TOKYO MAJOR WAR CRIMES TRIAL: THE RECORDS OF THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST WITH AN AUTHORITATIVE COMMENTARY AND COMPREHENSIVE GUIDE, Vol. 2, Indictment 13 (2002); See also: Gideon Boas, *Command Responsibility for the Failure to Stop Atrocities: The Legacy of the Tokyo Trial*, in BEYOND VICTOR'S JUSTICE: THE TOKYO WAR CRIMES TRIAL REVISITED 163–183 (Tanka, McCormack & Simpson eds., 2011).

127 See: Trial of General Tomoyuki Yamashita, Case No. 21 (Apr. 4, 1946), *reprinted in* UNITED NATIONS WAR CRIMES COMMISSION, LAW REPORTS OF TRIALS OF WAR CRIMINALS, Vol. IV (1948).

128 See: *Statute of the International Tribunal for the former Yugoslavia*, *supra* note 89, at Article 7(3).

129 See: *Statute of the International Tribunal for Rwanda*, *supra* note 89, at Article 6(3).

crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

(i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and

(ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.¹³⁰

Even though the doctrine of command responsibility as expressed in Article 28 of the Rome Statute does not, as such, deal with the State's duty to investigate, it is clearly based on the assumption that such a duty exists. For the commander's duty to report a war crime 'to the competent authorities for investigation and prosecution' makes sense only insofar as those authorities are then required to act upon the report.

36. To conclude, the recent development of international criminal law has significantly contributed to the evolution and consolidation of a customary duty to investigate cases of alleged war crimes in both international and non-international armed conflicts. The customary rules governing the powers and duties of States to investigate alleged war crimes may be viewed as forming part of both international humanitarian law and international

¹³⁰ See: *Rome Statute*, *supra* note 61, at Article 28(1); For further reading on the scope of the duty see: *Halilović* case, *supra* note 90, at paras. 39, 67–68; *Blaškić* case, *Id.*, at para. 69; *Bemba* case, *Id.*, at paras. 433–436; *Delalić* case, *supra* note 85, at paras. 238–239; *Boškoski and Tarčulovski* case, *supra* note 90, at paras. 413–414. For an analysis of command responsibility under Israeli law see: Report of the Commission of Inquiry into the Events at the Refugee Camps in Beirut (The Kahan Commission), reprinted in *THE YITZHAK KAHAN BOOK: IN MEMORY OF SUPREME COURT PRESIDENT YITZHAK KAHAN*, paras. 71, 75–78 (Menachem Elon ed., 1989) (Heb.).

criminal law.¹³¹ Furthermore, international criminal law emphasizes the importance attributed to, and provides an incentive for, compliance with this duty.

4. THE SOURCE OF THE OBLIGATION IN THE LAW OF STATE STATE RESPONSIBILITY

37. The final area of international law relevant for investigating certain activities during armed conflict is the law on State responsibility. As previously stated, a breach of an international legal obligation, i.e., an international humanitarian law or international human rights law obligation, gives rise to international responsibility rendering the relevant State a duty either for ‘cessation and non–repetition’, ‘restitution’, ‘compensation’, or ‘satisfaction’.¹³²

131 See: Kreß in PLANCK, *supra* note 59, at paras. 10–14.

132 See: Caron, *State responsibility*, *supra* note 65.

SUMMARY OF THE VARIOUS SOURCES OF THE DUTY TO EXAMINE AND INVESTIGATE COMPLAINTS AND CLAIMS OF VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW

38. In sum, international humanitarian law, international human rights law, and international criminal law each establishes a duty to investigate. In international humanitarian law, for example, there is a duty to ‘suppress’, which involves an obligation to examine all violations of international humanitarian law, as well as a duty to ‘repress’, involving an obligation to investigate certain violations of international humanitarian law. These obligations are intended to ensure that militaries encourage and develop an internal culture of commitment, to and compliance with, the law. International human rights law requires the relevant authorities to investigate any use of force resulting in death or serious injury caused by State security forces. International criminal law, through the principle of complementarity, places the duty on States to investigate and bring to trial perpetrators of war crimes on States. It is also the case that the obligation to investigate stands on its own, in the sense that non-compliance with the obligation has legal consequences additional to those applicable to the immediate perpetrators of serious violations of international humanitarian law. The law of State responsibility attributes individual acts to the relevant State and renders that State liable for dealing with violations of the law.

C. VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW THAT REQUIRE EXAMINATION OR INVESTIGATION (‘WHAT TO INVESTIGATE?’)

39. We have established in paragraph 23 that there is an obligation to *examine* all alleged violations of international humanitarian law. However, only a violation of certain provisions of international humanitarian law demands criminal accountability.¹³³ Such violations constitute ‘war crimes’.¹³⁴ We will now turn to the definition of ‘war crimes’ as it has developed in international law.

40. The precise definition of the term ‘war crimes’ has varied over time. Although in the past it was widely recognized that every violation of international humanitarian law was regarded as a ‘war crime’,¹³⁵ it is accepted today that only violations that reach a certain level of severity amount to ‘war crimes’.¹³⁶

As early as 1944, Professor Hersch Lauterpacht criticized the broad definition of ‘war crimes’:

[D]oes every violation of a rule of warfare constitute a war crime?

133 See: Rüdiger Wolfrum & Dieter Fleck, *Enforcement of International Humanitarian Law*, in FLECK (ed.), THE HANDBOOK, *supra* note 4, at 691: ‘Each member of the armed forces who has violated the rules of international humanitarian law must be aware of the fact that he or she can be prosecuted according to penal or disciplinary provisions. This provision refers to every violation, both grave breaches and others. The consequences of a grave breach are always of a penal nature; other violations may be punished through disciplinary procedures’.

134 See: GREEN, THE CONTEMPORARY LAW, *supra* note 17, at 286; According to Green the definition of *war crimes* is based on the definition in Article 6(b) of the Nuremberg Charter (also called *The London Charter* (Charter of the International Military Tribunal, 82 U.N.T.S 280 (1945) [hereinafter: *Charter of the Nuremberg Military Tribunal*]): ‘War Crimes are namely violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity’.

135 See: YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 229 (2004) [hereinafter: DINSTEIN, THE CONDUCT OF HOSTILITIES].

136 See: CRYER, INTRODUCTION, *supra* note 114, at 272.

It appears that, in this matter, textbook writers and, occasionally, military manuals and official pronouncements have erred on the side of comprehensiveness. They make no attempt to distinguish between violations of rules of warfare and war crimes. ... It is possible that one of the reasons for the failure to give effect to the decision to prosecute war criminals after the first World War was the extent of the list of offences ... and the absence of a distinction between violations of international law and war crimes in the more restricted sense of the term.¹³⁷

Lauterpacht suggested a narrower definition for ‘war crimes’:

These may be defined as such offences against the law of war as are criminal in the ordinary and accepted sense of fundamental rules of warfare and of general principles of criminal law by reason of their heinousness, their brutality, their ruthless disregard of the sanctity of human life and personality, or their wanton interference with rights of property unrelated to reasonably conceived requirements of military necessity.¹³⁸

A codification of this approach is found in the Geneva Conventions and the First Additional Protocol, which describe breaches of certain provisions as ‘grave breaches’ and distinguish them from other, less serious, breaches. These grave breaches are subject to an established obligation to investigate and prosecute perpetrators.¹³⁹

137 See: Hersch Lauterpacht, *The Law of Nations and the Punishment of War Crimes*, 21 BRIT. Y.B. INT’L. L. 58, 77 (1944).

138 *Id.*, at 79.

139 ‘Grave breaches’ are defined in the FIRST GENEVA CONVENTION, *supra* note 3, at Article 50; SECOND GENEVA CONVENTION, *Id.*, at Article 51; THIRD GENEVA CONVENTION, *Id.*, at Article 130; FOURTH GENEVA CONVENTION, *Id.*, at Article 147. These breaches include, *inter alia*, a deliberate killing of a protected person; torture or inhumane treatment; including scientific or medical experiments on protected persons; deliberate causing of damage or great suffering or of serious injury to the body or health; wide-scale destruction of property without military necessity, which is done unlawfully and without restraint. The FIRST ADDITIONAL PROTOCOL TO THE GENEVA CONVENTIONS, *supra* note 13, at Article 85, adopted the list of ‘grave breaches’ provided in the Geneva Conventions and added to them, *inter alia*, the following: attacking targets in a manner that is likely to cause serious and unjustified harm to a civilian population; the perfidious use of the emblems of medical services; the transfer by the Occupying Power of its population into the occupied territory; an unjustifiable delay in the

41. While the Geneva Conventions and the First Additional Protocol limit the scope of war crimes to the ‘grave breaches’ of their provisions, it is clear that the scope of war crimes includes a broader range of violations of international humanitarian law. The Statute of the International Criminal Tribunal for the Former Yugoslavia, for example, includes ‘grave breaches of the Geneva Conventions’ in Article 2 and other violations of the ‘laws or customs of war’ in Article 3. In the *Tadić* case, the Appeals Chamber interpreted Article 3 of the Statute and defined four conditions that must be met in order for the Tribunal to assume jurisdiction. One of these conditions necessitates that the violation be ‘serious’:

The Appeals Chamber deems it fitting to specify the conditions to be fulfilled for Article 3 to become applicable. The following requirements must be met for an offence to be subject to prosecution before the International Tribunal under Article 3:

- (i) the violation must constitute an infringement of a rule of international humanitarian law;
- (ii) the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met (see below, para. 143);
- (iii) the violation must be “serious”, that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim. Thus, for instance, the fact of a combatant simply appropriating a loaf of bread in an occupied village would not amount to a “serious violation of international humanitarian law” although it may be regarded as falling foul of the basic principle laid down in Article 46, paragraph 1, of the Hague Regulations (and the corresponding rule of customary international law) whereby “private property must be respected” by any army occupying an enemy territory;

repatriation of prisoners of war; apartheid practices and a deliberate attack on cultural or religious buildings. It should be noted that the grave breaches listed in the four Geneva Conventions are seen as reflecting customary law. See: CIHL, *supra* note 6, at 568–604.

- (iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.

It follows that it does not matter whether the “serious violation” has occurred within the context of an international or an internal armed conflict, as long as the requirements set out above are met.¹⁴⁰

In articulating the scope of Article 3 of the Statute, the Appeals Chamber was also reflecting the general statement of jurisdiction for the Tribunal incorporated in Article 1 – ‘The International Tribunal shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991’.¹⁴¹ The four conditions articulated by the Appeals Chamber have been applied in subsequent decisions of the Tribunal.¹⁴² The conditions set out in *Tadić* offer a useful framework for identifying ‘serious violations’ but the Commission acknowledges that debate exists regarding their exact scope.¹⁴³

42. The definition of ‘war crimes’ in Article 8 of the Rome Statute is also broader than the category of ‘grave breaches of the Geneva Conventions’ (set out in Article 8(2)(a) of the Statute), and Articles 8(2)(b) and 8(2)(e) refer to ‘other serious violations of the laws and customs’ applicable in international armed conflicts and non–international armed conflicts respectively.¹⁴⁴ The

140 See: *Tadić* case, *supra* note 19, at para. 94.

141 See: *Statute of the International Tribunal for the former Yugoslavia*, *supra* note 89, at Article 1.

142 See, for example: Prosecutor v. Galić, ICTY Case No. IT-98-29-T, T. Ch. I, paras. 13–32 (Dec. 5, 2003); Prosecutor v. Galić, ICTY Case No. IT-98-29-A, App. Ch., paras. 90–98 (Nov. 30, 2006). The ICRC study also adopted the distinction in the *Tadić* case, *supra* note 19, according to which only the most serious violations of international humanitarian law will be regarded as war crimes (‘States in fact limit war crimes to the more serious violations of international humanitarian law’). However, the ICRC further developed its interpretation of the concept of ‘serious’ by broadening its scope to include those violations that ‘endanger protected persons or objects’ or ‘breach important values’. See: CIHL, *supra* note 6, at 568–570; See also: CRYER, INTRODUCTION, *supra* note 114, at 272.

143 There is no international agreement on the question of whether all of the war crimes enumerated in the *Rome Statute*, *supra* note 61, at Article 8, reflect customary law. See on this matter: DINSTEIN, THE CONDUCT OF HOSTILITIES, *supra* note 135, at 232–233.

144 See: *Rome Statute*, *supra* note 61, at Article 8.

Commission accepts that ‘serious violations’ of international humanitarian law are ‘war crimes’.

43. It should also be noted that during an armed conflict other international crimes can occur in addition to war crimes, including ‘genocide’, ‘crimes against peace’¹⁴⁵ and ‘crimes against humanity’,¹⁴⁶ but this Report will not focus on these additional categories of international crimes.

44. An additional matter for consideration when defining the term ‘war crimes’ is the identity of the perpetrator. Several international tribunals have determined that the commission of a war crime is not limited to commanders, combatants and other members of the armed forces but that even the acts of civilians, committed in the context of, and associated with, an armed conflict may amount to war crimes.¹⁴⁷ This

145 ‘Crimes against peace’ were defined in the *Charter of the Nuremberg Military Tribunal*, *supra* note 134, at Article 6(a) in the following manner: ‘namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing’. The term ‘crime of aggression’ serves, occasionally, as an alternative to the expression ‘crimes against peace’, and it is defined as part of the ICC’s judicial jurisdiction. See *supra* note 117. For further reading on these crimes, see: CRYER, INTRODUCTION, *supra* note 114, at 312–328; ROUTLEDGE HANDBOOK, *supra* note 59, at 155–169.

146 Whereas war crimes and the crime of genocide have undergone a process of codification in a series of constitutive documents, there is no uniform definition of ‘crimes against humanity’ in international criminal law. In recent years, however, a greater degree of coherence on its definition and its main characteristics has emerged in the case law. It has referred to particularly odious offenses in that they constitute a serious attack on human dignity or grave humiliation or degradation of one or more persons. These offenses must be carried out as a part of a government policy or widespread and systematic practice towards a civilian population. For further reading, see: CASSESE, INTERNATIONAL CRIMINAL LAW, *supra* note 59, at 98–123; CRYER, INTRODUCTION, *supra* note 114, at 230 –267; and ROUTLEDGE HANDBOOK, *supra* note 59, at 121–139.

147 See: Prosecutor v. Akayesu, ICTR Case. No. ICTR–96–4–T, App. Ch., paras. 443–444 (Jun. 1, 2001) [hereinafter: *Akayesu* case]: ‘The Appeals Chamber is of the view that the minimum protection provided for victims under common Article 3 implies necessarily effective punishment on persons who violate it. Now, such punishment must be applicable to everyone without discrimination, as required by the principles governing individual criminal responsibility as laid down by the Nuremberg Tribunal. ... The Trial Chamber [in this case] found that the four Conventions “were adopted primarily to protect the victims as well as potential victims of armed conflicts”. It went on to hold that “[t]he category of persons to be held accountable in this respect then, would in most cases be limited to commanders, combatants and other members of the armed forces”... In the opinion of the Appeals Chamber, the Trial Chamber erred in requiring that a special relationship should be a separate condition for triggering criminal responsibility for a violation of Article 4 of the Statute’. For a comprehensive analysis of this issue by the Appeals Chamber see paras 425–446. See also: Hadamar Trial, 1 LRTWC 53–54; the Essen Lynching Case, 1 LRTWC 88, and the Zyklon B Case, 1 LRTWC 103; *Kayishema and Ruzindana* case, *supra* note 85, at para. 175; Prosecutor v. Rutaganda,

development dismisses the ‘public agent or government representative test’ used to determine who can be held liable for serious violations of Common Article 3 to the Geneva Conventions. Thus, acts committed by the political echelons and civilian superiors may constitute war crimes.¹⁴⁸ The rationale behind this was explained by the Appeals Chamber of the International Criminal Court for Rwanda in *The Prosecutor v. Jean–Paul Akayesu*:

... international humanitarian law would be lessened and called into question if it were to be admitted that certain persons be exonerated from individual criminal responsibility for a violation of common Article 3 under the pretext that they did not belong to a specific category.¹⁴⁹

45. The Commission is satisfied that a legal obligation to undertake an *investigation* applies to those acts that constitute serious violations of international humanitarian law otherwise known as ‘war crimes’. Furthermore, in order to ensure future compliance, there is an obligation to conduct some form of *examination* into violations of all other provisions of international humanitarian law.

ICTR Case. No. ICTR–96–3–A, App. Ch., para. 440 (May 26, 2003); Prosecutor v. Musema, ICTR Case No. ICTR–96–13–T, App. Ch., para. 274 (Jan. 27, 2000).

148 It is not clear whether political leaders that supervise the military echelon (such as the Minister of Defense or the Prime Minister) are included in the first category of the THIRD GENEVA CONVENTION, *supra* note 3, at Article 4, which relates to soldiers in regular military service. However, insofar as a hierarchical commander–subordinate relationship exists between the political echelon and the military one, the political echelon will also be entitled to prisoner of war status (this was the position in the Noreiga case, in which the former ruler of Panama was entitled to prisoner of war status, see: *United States v. Noriega*, 808 F. Supp. 791 (S.D. Fla. 1992)). It follows that it is possible to consider members of the political echelon in certain cases as ‘combatants’, and as such their actions can fall within the scope of ‘war crimes’, even without extending the category of the identity of the perpetrators to one that also includes civilians. Additional support for this rationale can be found in the *Rome Statute*, *supra* note 61, at Article 27, which is entitled ‘irrelevance of official capacity’. By virtue of this article, it follows that the jurisdiction of the Convention is not limited because of the immunity of heads of State and that international criminal liability will apply equally and without discrimination. See, for example, Kōki Hirota, Judgement, Record of Proceedings of the International Military Tribunal for the Far East (1946–1949), Vol. 20, 49, paras. 788–792, *reprinted in* THE TOKYO WAR CRIMES TRIAL (Pritchard & Zaide eds., 1981).

149 See: *Akayesu* case, *supra* note 147, at para. 443.

D. THE GROUNDS FOR CARRYING OUT THE OBLIGATION TO EXAMINE AND INVESTIGATE (‘WHEN TO INVESTIGATE?’)

46. In determining the grounds for carrying out the obligation to examine and investigate we will distinguish between the general duty to examine *every* violation of the rules of international humanitarian law and the specific duty to conduct an investigation. The Commission’s approach is that the threshold required for an investigation is where a credible accusation¹⁵⁰ is made or a reasonable suspicion arises¹⁵¹ that a war crime has been committed.¹⁵² There is agreement among some scholars that there is no restriction on the source of a complaint or allegation, and it may come from State authorities, a private citizen, non-governmental organizations, etc.¹⁵³ Whether a reasonable suspicion of a war crime exists depends on the facts of the concrete event and its particular context. In certain cases, the facts of the matter are sufficient to indicate that the act allegedly committed is ostensibly of a criminal nature and, consequently, an investigation should be commenced immediately. Examples of cases of this kind include alleged violations of absolute prohibitions of international law, such as use

¹⁵⁰ See: *Schmitt, Investigating Violations*, *supra* note 82, at 83.

¹⁵¹ The comparative survey conducted by the Commission (see: Annex C of this Report and Chapter B) indicates that most of the countries surveyed devised a threshold of reasonableness for triggering an investigation. For example, in the United States there must be ‘credible information’ that a suspected violation occurred; in Canada there must be a ‘reasonable belief’ that an offense has been committed; in Australia there must be a ‘reasonable suspicion’ that an offense has been committed; in the United Kingdom, a ‘reasonable person’ must become aware that an offense has been committed; in the Netherlands there must be a ‘reasonable suspicion’ that a criminal offense has been committed; in Germany there must be ‘sufficient grounds’ for suspicion that a criminal offense has been committed. It is also worth noting that ‘reasonable suspicion’ was recently adopted as the appropriate threshold for opening an investigation by the Israeli Supreme Court (See: HCJ 9594/03 *B’Tselem – Israeli Information Center for Human Rights in the Territories v. the Chief Military Prosecutor* (still unpublished, Aug. 21, 2011) [hereinafter: *B’Tselem* case]. For an in depth analysis on the triggering mechanisms for the duty to investigate See: *Shany & Cohen, Beyond the Grave Breaches*, *supra* note 82, at 13–17.

¹⁵² See: *Schmitt, Investigating Violations*, *supra* note 82, at 38–39; According to Schmitt: ‘the Commentary [to the Fourth Geneva Convention] refers to the International Law Commission’s 1954 *Draft Code of Offences against the Peace and Security of Mankind*’s inclusion of “acts in violation of the laws or customs of war”. The reference implies that the duties set forth in the provisions are not limited to those articulated in the Conventions themselves, but extend to any war crimes’. See: COMMENTARY ON THE IV GENEVA CONVENTION, *supra* note 22, Article 146, at 588.

¹⁵³ See: *Schmitt, Investigating Violations*, *supra* note 82, at 38; See also: *Examination and Investigation Duties Regarding Violations of the Laws of Armed Conflict that apply to the State of Israel* 1–8 (legal opinion submitted to the Commission by Prof. Eyal Benvenisti, Apr. 13, 2011), at 15 [hereinafter: *Benvenisti Opinion*].

of civilians as ‘involuntary human shields’,¹⁵⁴ rape,¹⁵⁵ looting,¹⁵⁶ or a willful attack against civilians.¹⁵⁷ The common denominator of these cases is that international law does not recognize any circumstances that justify their occurrence, and therefore credible information suggesting their occurrence in itself gives rise to a reasonable suspicion that a war crime has been committed.

On many occasions, however, the question of the criminality of an act depends upon the legal regime that governs the specific activity during armed conflict, and especially whether an operation is governed by the law regulating the conduct of hostilities (e.g., combat operations), or law enforcement norms (e.g., policing operations).

THE DUTY TO INVESTIGATE IN THE CONTEXT OF AN ARMED CONFLICT

47. As outlined in paragraph 6, in the context of an armed conflict a deliberate attack on a person may be legal, if that person is a combatant, or if the person is a civilian taking a direct part in hostilities. Moreover, according to the principle of proportionality, expected incidental loss of civilian life, injury to civilians or damage to civilian objects may be lawful (albeit regrettable) if they are not ‘excessive’ relative to the concrete and direct military advantage anticipated from the attack.¹⁵⁸ The Rome Statute

154 See: FIRST ADDITIONAL PROTOCOL TO THE GENEVA CONVENTIONS, *supra* note 13, at Article 51(7), 57(b) (iii); THE THIRD GENEVA CONVENTION, *supra* note 3, at Article 23; THE FOURTH GENEVA CONVENTION, *Id.*, at Article 28; *Targeted Killing* case, *supra* note 26, at para. 36 of President Barak’s judgment; HCJ 3799/02 *Adalah – Legal Center for Arab Minority Rights in Israel v. GOC Central Command, IDF*, 60(3) 67 (2005), at paras. 20–25 of President Barak’s judgment.

155 See: FIRST ADDITIONAL PROTOCOL TO THE GENEVA CONVENTIONS, *supra* note 13, at Article 75(2); SECOND ADDITIONAL PROTOCOL TO THE GENEVA CONVENTIONS, *supra* note 14, at Article 4(2)(e); *Rome Statute*, *supra* note 61, at Articles 8(2)(b)(xxii) and 8(2)(e)(vi).

156 HAGUE REGULATIONS, *supra* note 21, at Article 47; FOURTH GENEVA CONVENTION, *supra* note 3, at Articles 33, 147; *The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict*, *supra* note 16, at Article 4(3).

157 See: FOURTH GENEVA CONVENTION, *supra* note 3, at Article 147; FIRST ADDITIONAL PROTOCOL TO THE GENEVA CONVENTIONS, *supra* note 13, at Articles 51(2) and 51(4).

158 This principle, which finds expression in the FIRST ADDITIONAL PROTOCOL TO THE GENEVA CONVENTIONS, *supra* note 13, at Articles 51(5)(b), 57(2). This principle has been recognized as reflecting customary law; See: *ICJ Nuclear Weapons Advisory Opinion*, *supra* note 9, at para. 41.

adopted a more lenient formula for the principle of proportionality that sets the threshold of criminality higher in that the International Criminal Court can only convict an accused for the war crime of disproportionate military force where the expected incidental injury or death of civilians or damage to civilian property is ‘*clearly excessive*’ in relation to the concrete and direct overall military advantage.¹⁵⁹

48. It is thus clear that not every case of death or injury of a person in an armed conflict amounts to a breach of the rules of international humanitarian law. The death or injury of combatants, civilians directly participating in hostilities, and collateral civilian casualties that are proportionate are permissible under international humanitarian law. The death of an individual is thus different from *prima facie* prohibited acts, such as the use of involuntary human shields or rape, which can never be justified as legitimate acts of warfare. The incidental death or injury of a civilian during an armed conflict, conversely, does not necessarily give rise to an automatic suspicion of criminality; it will be the context in which the incidental death or injury occurred that will determine whether there is a reasonable suspicion of the perpetration of a war crime. Any such reasonable suspicion will immediately trigger an investigation.

Fact-Finding Assessment

49. Some form of an examination is required when the level of suspicion does not meet the aforementioned threshold and the information is only partial or circumstantial, and there is a need to ascertain the circumstances of the event (in this Report this type of examination will be referred to as a ‘fact-finding assessment’).¹⁶⁰ A fact-finding assessment may lead to a

¹⁵⁹ *Rome Statute*, *supra* note 61, at Article 8(2)(b)(iv). This stringent definition of ‘proportionality’ exemplifies the core difference between an offense under international criminal law and a violation of a customary norm of international humanitarian law. While a certain act might constitute a violation of Article 57(2) to the FIRST ADDITIONAL PROTOCOL TO THE GENEVA CONVENTIONS, *supra* note 13, theoretically, it still might not arise to the level of a ‘war crime’ that is subject to a criminal sanction.

¹⁶⁰ See Benvenisti’s criticism of the Military Advocate-General’s opinion: ‘The document does not

subsequent investigation if the assessment reveals a reasonable suspicion of the commission of a war crime. This type of assessment applies, *inter alia*, to exceptional or unexpected events and incidents such as civilian casualties that were not anticipated when the attack was planned that do not, *prima facie*, give rise to a reasonable suspicion of a war crime.

50. It should be emphasized that a commander may well wish to order that an examination or investigation be carried out because of a variety of other, non-legal considerations, including operational needs, a desire to learn from mistakes, or otherwise improve the performance of the unit in the future. For example, in some countries factual investigations are required as a matter of policy in any instance in which members of the country's armed forces kill a civilian.¹⁶¹

THE DUTY TO INVESTIGATE IN A LAW ENFORCEMENT CONTEXT

51. Unlike the incidental death of an uninvolved civilian during combat operations, which does not immediately trigger a duty to investigate, the Commission is of the view that the killing of an individual (or the causing of serious injury) by security forces during law enforcement incidents, gives rise *in itself* to an investigatory obligation. In this context, the legitimate use of deadly force is limited to special circumstances, particularly to prevent a real and immediate life-threatening danger to oneself or another

provide an answer to the necessary question: what are the grounds for opening a "preliminary factual clarification!" Throughout the 100 pages of the detailed document, there is no answer to this key question' (*Benvenisti Opinion, supra* note 153, at 19); See also: *Shany & Cohen, Beyond the Grave Breaches, supra* note 82, at 17. Shany and Cohen advocate lowering the threshold to less than fully credible allegations or well-founded suspicions in potentially serious cases. Their rationale for this is that: 'Hence, allegations or suspicions pertaining to the most serious violations of law may require investigations even on the basis of less than fully credible allegations or well founded suspicions. A lowering of the threshold ... not only ensures a higher level of humanitarian protection, it also increases the prospects that less-serious violations would be effectively addressed. ... As a result, an incident featuring serious consequences in questionable circumstances, such as unexpected loss of life or wanton harm to property without a clear justification, may warrant an investigation even if no evidence of wrongdoing is initially available'.

¹⁶¹ See below, Chapter B, para. 81(4)(a) and in paras. 4, 32, 42–45, 50, 67–68.

person.¹⁶² Causing death as a result of the use of force in a manner that exceeds the aforesaid restrictions will constitute an unlawful violation of the right to life.¹⁶³ In other words, in a law enforcement context, legitimate use of force is the exception, and the use of deadly force (shooting to kill) is the most narrowly prescribed exception.¹⁶⁴ Therefore, a law enforcement operation in which security forces cause the death or serious injury of an individual automatically gives rise to a requirement to investigate.¹⁶⁵

THE DUTY TO INVESTIGATE LAW ENFORCEMENT ACTIVITY IN ARMED CONFLICT

52. As noted in paragraph 14, law enforcement activity can occur during armed conflict, which raises the question of the applicability of the duty to investigate in such cases. According to the jurisprudence of the European Court of Human Rights, the obligation to investigate, which is derived from the right to life as it is enshrined in the European Convention for Human Rights, can extend to armed conflict situations.¹⁶⁶ The extent

162 See: THE COMMISSION'S FIRST REPORT, *supra* note 22, at para. 189.

163 See: *The International Covenant on Economic, Social and Cultural Rights*, *supra* note 30, at Article 6; *The European Convention for the Protection of Human Rights and Fundamental Freedoms*, *supra* note 33, at Article 2; *The American Convention on Human Rights, Id.*, at Article 4; *The African Charter on Human and Peoples' Rights, Id.*, at Article 4.

164 See in particular: UN Basic Principles, Use of Force and Firearms 1990, *supra* note 58, which determines that the use of deadly force by State representatives is generally permitted in three circumstances: (1) self-defense; (2) protection of others; and (3) law enforcement. The use of force in these circumstances is subject to additional basic principles, which are intended to ensure that the use of force would be essential and proportionate.

165 The duty to investigate such cases is expressed in various international documents and also in the jurisprudence of the human rights tribunals. See for example: UN Basic Principles, Use of Force and Firearms 1990, *supra* note 58, at Articles 22–24; ESCOR Principles, Effective Prevention and Investigation 1989, *supra* note 109, at Articles 9–11; *McKerr v. The United Kingdom*, App. No. 28883/95, Eur.Ct. H.R. (2001) [hereinafter: *McKerr* case]: 'The obligation to protect the right to life under Article 2 of the Convention, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention", also requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force'; See also: Juliet Chevalier-Watts, *Effective Investigations under Article 2 of the European Convention on Human rights*, 21(3) EUR. J. INT. L. 711–712 (2010) [hereinafter: *Chevalier-Watts, Effective Investigations*].

166 For a review of the European Court of Human Rights' interpretation of the question of the doctrine of 'dual applicability' of international human rights law in the context of armed conflict, see: Andrea Gioia, *The Role of the European Court of Human Rights in Monitoring Compliance with Humanitarian Law in Armed Conflict*, in INTERNATIONAL HUMANITARIAN AND HUMAN RIGHTS LAW 201–203 (Ben-Naftali

to which the duty to investigate applies is determined by the nature of the operational activity. In several cases, the Court has interpreted and applied the obligations set forth in the Convention in the context of armed conflict, albeit in relation to policing activities rather than to combat operations or military hostilities. For instance, the Court recognized the need for exceptional measures in imposing public order and security in South–East Turkey, including resort to deadly armed force. According to the Court, such security demands do not, however, obviate the obligation to carry out an investigation whenever death ensues.¹⁶⁷ In *Issa and others v. Turkey*, the Court even extended the obligation to investigate, at least in principle, to military operations conducted beyond Turkish borders.¹⁶⁸ Similarly, in *Al–Skeini v. United Kingdom* (hereinafter: the *Al–Skeini* case), which concerned occupied Iraqi territory where intense hostilities were occurring, the Court ruled that the duty to investigate continues to apply even during an armed conflict (we shall return to this decision within the framework of the discussion of the law that applies in occupied territory).¹⁶⁹

53. The Commission is of the view that where force must be used against uninvolved civilians during combat operations (as distinct from the use of force against military objectives that result in collateral damage), for instance, in forcefully clearing a residence of uninvolved civilians so that it may be used as a military position, the *lex generalis* of international human rights law will apply. This is so because these are usually acts of traditional law enforcement activities, even if they occur within the general context of an armed conflict. It follows that injury to an individual during operations of *this* kind may, *prima facie*, give rise to greater suspicion of criminality than collateral damage during a combat action, and in

ed., 2011).

167 See: *Kaya* case, *supra* note 108, at para. 91.

168 See: *Issa* case, *supra* note 42, at paras. 66–75.

169 See: *Al–Skeini and Others v. United Kingdom*, App. No. 55721/07, Grand Chamber Eur.Ct. H.R., paras. 163–165 (Jul. 7, 2011) [hereinafter: *Al–Skeini* case].

certain circumstances, will also require the immediate commencement of an investigation. The duty to investigate that arises from the killing or injuring of an individual during armed conflict depends therefore on a combination of the particular context and the facts relating to the specific incident which might determine whether it is legitimate or suspected.

54. In summary, the Commission is satisfied that during an armed conflict there is a difference between the use of force in the context of the conduct of hostilities and the use of force in the context of law enforcement activities. Unlike the law enforcement context, the death or injury of a civilian during the conduct of hostilities does not automatically give rise to a duty to investigate.¹⁷⁰ However, a fact-finding assessment is required wherever there is a need to clarify the circumstances in order to establish whether there is a reasonable suspicion of an unlawful act (such as an attack resulting in significant unintended civilian casualties). This assessment may lead to a subsequent investigation. Conversely, where force causes any serious injury or death of an individual in the context of law enforcement activities there is a duty to investigate.¹⁷¹

170 See: *MAG Position Paper 2010*, *supra* note 15, at 12–13; *Schmitt, Investigating Violations*, *supra* note 82, at 79; Dick Jackson, *Reporting and Investigation of Possible, Suspected, or Alleged Violations of the Law of War*, 11(6) *THE ARMY LAWYER* 95, 98 (2010).

171 See: *The International Covenant on Civil and Political Rights*, *supra* note 30, at Articles 2 and 6; *General Comment 31 of the Human Rights Committee*, *supra* note 42, at para. 15; *Rodríguez v. Honduras* case, *supra* note 108, at para. 170; Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UN Doc A/RES/60/147, para. 3(b) (Dec. 16, 2005), [hereinafter: UN Principles, Remedy for Victims of Violations 2005]; *Benvenisti Opinion*, *supra* note 153, at 28.

THE DUTY TO INVESTIGATE IN OCCUPIED TERRITORY

55. During an occupation, and especially during a prolonged occupation, the Occupying Power may be engaged in both law enforcement activities (such as maintaining public order) and combat operations relating to an armed conflict.¹⁷²

56. Article 43 of the Hague Regulations, which has been called a ‘mini-constitution for the occupation administration’,¹⁷³ is of particular importance for periods of relative calm or for policing activities in general.¹⁷⁴ The Article determines the duty of the Occupying Power to impose public order and safety in the occupied territory:

The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.¹⁷⁵

Professor Yoram Dinstein explains the rationale behind the duty to ensure public order and safety:

[T]he occupant cannot sit idly by if marauders pester the occupied

172 *B’Tselem case*, *supra* note 151, at paras. 7 and 11; *MAG Position Paper 2010*, *supra* note 15, at 10–12; *Shany, Cohen & Rosenzweig, Response Document to the MAG position paper*, *supra* note 125, at para. 22, where it is argued that the conflict should be viewed as a ‘hybrid conflict’. See further: Michael N. Schmitt & Charles Garraway, *Occupation Policy in Iraq and International Law*, 9 INT’L PEACEKEEPING 27, 31 (2005) [hereinafter: *Schmitt & Garraway, Occupation Policy*]; *Watkin, Use of Force*, *supra* note 23, at 298–301.

173 BENVENISTI, *BELLIGERENT OCCUPATION*, *supra* note 22, at 69.

174 See: *Watkin, Maintaining Law and Order*, *supra* note 49, at 179; Rudiger Wolfrum, *The Adequacy of International Humanitarian Law Rules on Belligerent Occupation: To What Extent May Security Council Resolution 1483 Be Considered a Model for Adjustment*, in INTERNATIONAL LAW AND ARMED CONFLICT – EXPLORING THE FAULTLINES: ESSAYS IN HONOUR OF YORAM DINSTEIN 497, 500–501 (Schmitt & Pejic eds., 2007).

175 THE HAGUE REGULATIONS, *supra* note 21, at Article 43; It should be noted that the French original contained the expression *la vie publique* (‘civil life’), which was erroneously translated into English as ‘safety’. See: BENVENISTI, *BELLIGERENT OCCUPATION*, *supra* note 22, at 10–11. The French expression strengthens even further the proposed reading, that the duty of the Occupying Power involves obligations that are derived from international human rights law.

territory, killing the inhabitants, even though no soldiers of the army of occupation get injured. The occupant must maintain law and order, and he is not at liberty to tolerate the situation of lawlessness and disorder in the occupied territory.¹⁷⁶

‘Enforcement’ activity takes place mainly on the ground, where the military forces carry out patrols, arrests and searches, man checkpoints and barriers, enforce curfews and disperse riots. From a legal viewpoint, such enforcement activity is akin to police actions within the State and therefore it is subject to human rights norms that permit the use of lethal force only in exceptional circumstances (see above in paragraph 51). Consequently, the death of the inhabitants of the occupied territory (as well as cases of serious injury) caused by the security forces of the Occupying Power is an exceptional event, which gives rise to a suspicion of an unlawful act, and therefore requires the immediate initiation of an investigation.¹⁷⁷

57. In situations of armed hostilities in an occupied territory, the obligation to investigate is complex. In the *Al-Skeini* case, the European Court of Human Rights held that the activity of the British forces in Iraq during the period between May 2003 (the period when the coalition forces declared Iraq to be occupied territory) and June 2004 (when sovereign power was transferred to the transitional Iraqi Government) amounted to effective control and was therefore governed by the European Convention for Human Rights.¹⁷⁸ Thus, a duty to investigate arose with every case of an individual’s death.

It should be noted that although the European Court of Human Rights cited the *Advisory Opinion regarding the Wall*, it did not address the specific content of the *lex specialis* principle and the entirety of its effect. The Court found that a State exercising effective control over foreign

176 See: Yoram Dinstein, *International Law of Belligerent Occupation and Human Rights*, 8 ISR. Y.B. HUM. RTS. 104, 111 (1978).

177 See: *MAG Position Paper 2010*, *supra* note 15, at 33–34.

178 See: *Al-Skeini* case, *supra* note 169.

territory has an obligation to secure the human rights of the individuals under its control. It held that in ‘determining whether effective control exists, the Court will primarily have reference to the strength of the state’s military presence in the area’.¹⁷⁹ Indeed, the rules of engagement that were given to the British forces in Iraq reflected a paradigm of law enforcement. However, by treating the situation in Iraq as one *fully* amenable to human rights, the Court seemed to ignore the very facts presented in its judgment, which reflected high levels of armed violence (more than 1000 violent incidents, including 145 mortar attacks, and 535 shooting incidents). The question of the intensity of hostilities or the nexus to the conflict and its effect on the applicable legal paradigm received no treatment in the decision. In this regard, it must be noted that the Court did emphasize that the United Kingdom was under the special obligations of the European Convention for Human Rights and that the Convention ‘does not govern the actions of States not Parties to it, nor does it purport to be a means of requiring the Contracting States to impose Convention standards on other States’.¹⁸⁰

58. The Commission’s approach is that when hostilities break out during an occupation, the laws regulating the conduct of hostilities set forth in international humanitarian law apply. However, even during an armed conflict human rights norms apply to actions that can be broadly characterized as law enforcement activities, though ‘separating the law enforcement role from the conduct of hostilities aspect of an insurgency is neither factually nor legally simple’.¹⁸¹

The Commission is satisfied that in occupied territory, and especially in a prolonged occupation, the default position is that the norms regulating the use of force are those of law enforcement.¹⁸²

179 *Id.*, at para. 139.

180 *Id.*, at para. 141.

181 *Watkin, Use of Force, supra* note 23, at 294.

182 See: *Id.*, at 294-295 (Consistent with traditional counterinsurgency doctrine, operational planning

Only if the activities necessitating the resort to lethal force qualify as ‘direct participation in hostilities’¹⁸³ and are not mere internal disturbances and tensions, such as riots, isolated and sporadic acts of violence,¹⁸⁴ is the situation governed by the rules regulating the conduct of hostilities.¹⁸⁵ Obviously, classifying the nature of the activity must be circumstance-specific depending on the attendant facts.

59. In summary, the death of an uninvolved civilian during hostilities that amount to an armed conflict (whether in an occupied territory or not) 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 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.

should rely on the “police primacy principle”... [However] it is also evident that the nature and scale of the threat posed by ongoing hostilities, as well as the organization, training, traditional role and equipment of police forces, means that they are not the only security forces engaged either in law enforcement or in countering the insurgency during an occupation. Military forces of the Occupying Power will be required to participate in hostilities; fill gaps in the policing capacity; and provide support to police operations”). See, also: RENE PROVOST, *INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW* 349–350 (2002) (‘While there is indeed space for enlightened cross-pollination and better integration of human rights and humanitarian law, each performs a task for which it is better suited than the other, and the fundamentals of each system remain partly incompatible with that of the other’).

183 See: *FIRST ADDITIONAL PROTOCOL TO THE GENEVA CONVENTIONS*, *supra* note 13, at Article 51(3).

184 See: *COMMENTARY ON THE PROTOCOL ADDITIONAL TO THE GENEVA CONVENTION OF 12 AUGUST 1949, AND RELATING TO THE PROTECTION OF VICTIMS OF NON-INTERNATIONAL ARMED CONFLICTS*, Article 1, para. 4474 (Sandoz et al. eds., 1987), *Rome Statute*, *supra* note 61, at Article 8(2)(d).

185 See: *Schmitt & Garraway, Occupation Policy*, *supra* note 172, at 31: ‘Despite the existence of an occupation, humanitarian law related to the conduct of hostilities continues to govern actions with a direct nexus to the conflict. ... on the other hand, actions with no direct nexus to the hostilities are subject to human rights law, law imposed by the occupier, and any domestic penal law remaining in force’. For a definition of the term ‘nexus’ in the context of armed conflict, see: *Prosecutor v. Gotovina*, ICTY Case No. IT-06-90-T, T. Ch., para. 1677 (Apr. 15, 2011) (‘The alleged crime need not have occurred at a time and place in which there was actual combat, so long as the acts of the perpetrator were “closely related” to hostilities occurring in territories controlled by parties to the conflict. The existence of this close relationship between the crime and the armed conflict will be established where it can be shown that the conflict played a substantial part in the perpetrator’s ability to commit the crime, his or her decision to commit it, the manner in which it was committed, or the purpose for which it was committed’). See also: *Watkin, Use of Force*, *supra* note 23, at 310–311.

Such clarification is particularly important where an exceptional incident has occurred pointing to facts or circumstances that might subsequently reveal the need for an investigation. The existence of a reasonable suspicion that a war crime has been committed is dependent both on the facts of the incident, and the legal context. Where the context indicates that the situation should be governed by the norms of law enforcement, the death of an individual (or serious injury) by security forces gives rise to an immediate duty to investigate as aforesaid, because of the *prima facie* suspicion of criminality inherent in such a situation.

E. METHOD OF CONDUCTING AN EXAMINATION AND AN INVESTIGATION (‘HOW TO INVESTIGATE?’)

60. In determining the manner in which inquiries should be conducted we will distinguish between the general duty to examine every violation of the rules of international humanitarian law and the specific duty to conduct an investigation where a reasonable suspicion of the commission of a war crime has been met.

EXAMINATION

61. Not every violation of the rules of international humanitarian law entails criminal liability, and certain situations call for disciplinary or other sanctions which only the commander is able to impose. International humanitarian law attaches supreme importance to the obligation to comply with its rules i.e., to ‘suppress all other breaches’.¹⁸⁶ As noted above, the duty to ‘examine’ is consistent with the obligation to ‘suppress’. The duty to suppress may be carried out through reporting duties, disciplinary measures and other actions and activities that facilitate compliance. **Therefore, an examination of events must be conducted in a fashion that guarantees the suppression of violations and ensures future compliance with international humanitarian law.**¹⁸⁷

INVESTIGATION

62. The obligation to ‘repress’ requires the investigation of alleged serious violations of international humanitarian law. The jurisprudence of the international courts and tribunals has considered the meaning of

¹⁸⁶ See: FIRST ADDITIONAL PROTOCOL TO THE GENEVA CONVENTIONS, *supra* note 13, at Article 86.

¹⁸⁷ See: THE COMMENTARY ON THE PROTOCOL ADDITIONAL TO THE GENEVA CONVENTION, *supra* note 56, at paras. 3559–3562; See also: COMMENTARY ON THE IV GENEVA CONVENTION, *supra* note 22, Article 146, at 594.

the duty to investigate in the context of the obligation on commanders and other superiors to hold their subordinates accountable. In *The Prosecutor v. Jean-Pierre Bemba Gombo* Confirmation of Charges decision, the Pre-Trial Chamber of the International Criminal Court stated that the duty to ‘repress’ breaches of international humanitarian law includes, in practice, two separate duties, which should be discharged at different points in time. One is the duty to stop the occurrence of crimes, and the other is the duty to punish those responsible for committing crimes. The Court stated that the duty to punish could be fulfilled in one of two ways:

[E]ither by the superior himself taking the necessary and reasonable measures to punish his forces, or, if he does not have the ability to do so, by referring the matter to the competent authorities.¹⁸⁸

In its analysis of the duty imposed on superiors to punish their subordinates for the commission of war crimes, the Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia in the *Prosecutor v. Sefer Halilović* held that:

The *duty to punish* includes at least an obligation to *investigate* possible crimes or have the matter investigated, to *establish the facts*, and if the superior has no power to *sanction*, to *report* them to the competent authorities.

Military tribunals established after World War II interpreted the superiors’ duty to punish as implying an obligation for the superior to *conduct an effective investigation* and to take active steps to ensure that the perpetrator will be brought to justice. Whether the superior has called for a report on the incident and the thoroughness of the investigation could also be relevant in this respect.¹⁸⁹

¹⁸⁸ *Bemba* case, *supra* note 90, at para. 440.

¹⁸⁹ See: *Halilović* case, *supra* note 90, at paras. 97–98 [emphases added]; See also: *Boškoski and Tarčulovski* case, *Id.*, at para. 418.

Thus, it can be interpreted from the case law that an ‘effective investigation’ is one that is capable of identifying those responsible and committing them to justice. In most cases an investigation will be criminal but it can also take other forms.¹⁹⁰ We shall now turn to analyze the accepted general principles for holding an ‘effective investigation’.

The Requirements for Conducting an ‘Effective Investigation’

63. International humanitarian law provides sparse details on the practical content of investigations,¹⁹¹ but more systematic and comprehensive guidance can be found in international human rights instruments.¹⁹² Four ‘general principles’ have been identified as applying to investigations: independence, impartiality, effectiveness and thoroughness, and promptness (hereinafter: the general principles). The adherence to these four principles forms an ‘effective investigation’.¹⁹³ The Commission is of the view that international human rights law further articulates transparency as a fifth principle (its application under international humanitarian law

190 Debate has arisen in the literature concerning the most suitable form for an investigation under international humanitarian law. Shany and Cohen argue against an exclusive focus on criminal investigations and question whether it is the most effective technique available. They offer the example of commissions of inquiry as a useful non-criminal response to alleged violations of international humanitarian law. See *Shany & Cohen, Beyond the Grave Breaches*, *supra* note 82, at 37–39.

191 On the standards relevant for legal proceedings in general see: FIRST ADDITIONAL PROTOCOL TO THE GENEVA CONVENTIONS, *supra* note 13, at Article 75(4); SECOND ADDITIONAL PROTOCOL TO THE GENEVA CONVENTIONS, *supra* note 14, at Article 6(2); On the duty to put those accused of war crimes on trial promptly and without bias, see: COMMENTARY ON THE IV GENEVA CONVENTION, *supra* note 22, Article 146 at 593; On the duty to carry out an effective investigation on cases of the death of prisoners of war, see: COMMENTARY ON THE III GENEVA CONVENTION OF 12 AUGUST 1949 RELATIVE TO THE TREATMENT OF PRISONERS OF WAR, Article 121, 570 (Pictet ed., 1958) [hereinafter: COMMENTARY ON THE III GENEVA CONVENTION]; UN Principles, Remedy for Victims of Violations 2005, *supra* note 169, at para. 3(b).

192 See: UN Basic Principles, Use of Force and Firearms 1990, *supra* note 58, at Article 22; ESCOR Principles, Effective Prevention and Investigation 1989, *supra* note 109, at Articles 9–17; Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc A/RES/55/89 (Feb. 22, 2001) [hereinafter: UN Principles, Effective Investigation of Torture 2001].

193 A distinction should be made between two uses of the term ‘effective’ when describing investigations. The first use of the term is ‘effective’ in the broad sense, which relates to the overall requirement of conducting an ‘effective investigation’ according to the obligation under international law. An ‘effective investigation’ must comply with the principles for carrying out an investigation. The second use of the term is ‘effective’ in the narrow sense, which constitutes one of the principles for carrying out an investigation. More specifically, this principle (which includes effectiveness and thoroughness) is concerned with the means of the investigation in order to discover the truth.

will be discussed below in paragraphs 106–107). It should be emphasized that from the moment a duty to carry out an ‘effective investigation’ arises, there is no *fundamental* difference, nor should there be, between the principles for conducting an ‘effective investigation’ in a situation of an armed conflict and the principles for conducting an ‘effective investigation’ in a situation of law enforcement.¹⁹⁴ An important qualification of this position is that the Commission considers the practical implementation of the principles to be contextual,¹⁹⁵ and therefore the precise content may vary under the international humanitarian law and international human rights law regimes. The final part of the chapter will explore how the general principles translate in situations of armed conflict.

64. The general principles for an ‘effective investigation’ can be found in various international human rights law sources, including binding conventions (such as the Convention against Torture);¹⁹⁶ interpretations of the International Covenant on Civil and Political Rights by the Human

194 See also: Human Rights Council, Report of the Committee of independent experts in international humanitarian and human rights laws to monitor and assess any domestic, legal or other proceedings undertaken by both the Government of Israel and the Palestinian side, in the light of General Assembly resolution 254/64 including the independence, effectiveness, genuineness of these investigations and their conformity with international standards, U.N. Doc. A/HRC/15/50, para. 30 (2010) [hereinafter: *Tomuschat Report*]: ‘The Committee believes that the gap between the expansive standards under IHRL and the less defined standards for investigations under IHL is not so significant. Several criteria under human rights law can be met within the context of armed conflict. Above all, investigators must be impartial, thorough, effective and prompt; otherwise, an investigation would be no more than a manoeuvre of artful deceit. Any investigations that meet these criteria may be called credible and genuine’.

195 *Schmitt, Investigating Violations*, *supra* note 82, at 55; See also: *Blaškić* case, *supra* note 90, at para. 417, where the Court notes that the means that the commander must use depends on the circumstances of each case.

196 See: *The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, *supra* note 32, at Article 12, which sets forth that where there is a reasonable suspicion that acts of torture have been committed in the territory of a State, that State is required to ensure that its competent authorities shall investigate the suspicions with due speed and absent of all bias. It should be noted that in the past few years, the Committee Against Torture has adopted in its decisions, in concrete cases that were brought before it, the demand for transparency in investigations (See for instance: *Danilo Dimitrijević v. Serbia and Montenegro*, Comm. No. 172/2000, U.N. Doc. CAT/C/35/D/172/2000, para 7.3 (2005) [hereinafter: *Dimitrijević* case]).

Rights Committee¹⁹⁷ and its decisions in specific cases,¹⁹⁸ and resolutions adopted by the General Assembly of the United Nations.¹⁹⁹ Other institutions that deal with this issue extensively include the European Court of Human Rights and the Inter-American Court of Human Rights.²⁰⁰ While the decisions of many of these bodies are not universally binding, they help clarify the meaning of each of the general principles for an ‘effective investigation’.

65. Before considering the practical content of each of the general principles, first in general and then in the context of armed conflict, two preliminary comments are warranted: *first*, some of the sources in the field of international human rights law indicate that there are different types of effective investigations. Criminal investigations are one, but other types may also suffice, as long as they conform to the general principles, thereby constituting an ‘effective investigation’.²⁰¹ An ‘effective

197 See for example: The Human Rights Committee’s General Interpretation of *The International Covenant on Civil and Political Rights*, *supra* note 30, at Article 6, which incorporates the right to life, in which it is noted that in circumstances in which there is a suspicion of a violation of the right to life the investigation of ‘disappeared’ or missing people must be thorough and effective; Human Rights Committee, General Comment 6, Article 6 (Sixteenth session, 1982), *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI\GEN\1\Rev.1 at 6, para. 4 (1994) [hereinafter: *General Comment 6 of the Human Rights Committee*]. See: *General Comment 31 of the Human Rights Committee*, *supra* note 42, at para. 15, which deals with the nature of the general duty placed on member States of the Covenant of Civil Rights, that the investigation of violations of the Covenant shall be independent, comprehensive, effective, and shall be conducted promptly.

198 See for example: Baboeram-Adhin v. Suriname, HRC, Comm. No. 146/83 & 148–154/83, U.N. Doc. CCPR/C/24/D/154/1983, A/40/40, at 187, para. 16 (1985); Herrera Rubio v. Colombia, HRC, Comm. No. 161/83, U.N. Doc. CCPR/C/31/D/161/1983, A/43/40, at 190, para. 10.3 (1987); Arévalo Pérez v. Colombia, HRC, Comm. No. 181/84, U.N. Doc. CCPR/C/37/D/181/1984, A/45/40, at 31, para. 10 (1989); Mojica v. Dominican Republic, HRC, Comm. No. 449/91, U.N. Doc. CCPR/C/51/D/449/1991, A/49/40 Vol II, at 142, para. 5.5 (1994) [hereinafter: *Mojica* case]; Laureano Atachahua v. Peru, HRC, Comm. No. 540/93, U.N. Doc. CCPR/C/56/D/540/1993, A/51/40 Vol II, at 108, Para. 8.3 (1996).

199 See in particular: UN Basic Principles, Use of Force and Firearms 1990, *supra* note 58, at Article 22; ESCOR Principles, Effective Prevention and Investigation 1989, *supra* note 109; UN Principles, Effective Investigation of Torture 2001, *supra* note 192.

200 See: *Rodríguez v. Honduras* case, *supra* note 108, at para. 177; *Humberto Sánchez v. Honduras*, Inter-Am.Ct.H.R., (Ser. C), No.99, para. 139 (Jun. 7, 2003) [hereinafter: *Sánchez* case]; *Myrna Mack Chang v. Guatemala*, Inter-Am.Ct.H.R., (Ser. C), No.101, para. 156 (Nov. 25, 2003); See also the rulings of the European Court of Human Rights: *McCann* case, *supra* note 42, at para. 161; *Al-Skeini* case, *supra* note 169, at para. 163.

201 For example, on the matter of investigating the use of force by law enforcement authorities, see: UN Basic Principles, Use of Force and Firearms 1990, *supra* note 58, at Article 22, where it is set forth that: ‘Governments and law enforcement agencies shall establish effective reporting and review procedures for all incidents referred to in principles 6 and 11(f). For incidents reported pursuant to

investigation' is demonstrated, *inter alia*, by the capacity to properly decide the question of responsibility for an act, and, in appropriate cases, to hold perpetrators accountable. The European Court of Human Rights characterized the obligation to investigate arising from the death of a civilian from the use of force by State agents as a duty to hold 'some form of effective official investigation',²⁰² and it went on to state that '[w]hat form of investigation will achieve the purposes of Article 2 may vary depending on the circumstances'.²⁰³ Similarly, a report prepared by the UN Special Rapporteur on Summary, Arbitrary and Extrajudicial Executions states that although as a rule, compliance with the duty of holding an investigation should be assured by the criminal law system, in certain cases it is possible that the ordinary systems will not be capable of doing justice (such as widespread killing or cases that are politically charged), and other methods should be employed, including the establishment of public commissions of inquiry.²⁰⁴ It appears from these sources that an

these principles, Governments and law enforcement agencies shall ensure that an effective review process is available and that independent administrative or prosecutorial authorities are in a position to exercise jurisdiction in appropriate circumstances. In cases of death and serious injury or other grave consequences, a detailed report shall be sent promptly to the competent authorities responsible for administrative review and judicial control'.

202 See: *McCann* case, *supra* note 42, at para. 161; *Al-Skeini* case, *supra* note 169, at para. 163; See also: *Oğur v. Turkey*, App. No. 21594/93, Eur.Ct. H.R., paras. 88, 90–93 (1999) [hereinafter: *Oğur* case]. In these cases, the European Court of Human Rights applied the standard of 'effective investigation' to non-criminal investigations, for example, to commissions of inquiry and administrative investigations. This indicates that, at least in principle, the fact that the investigation being carried out is not of a criminal nature does not automatically make it 'ineffective', but it should nonetheless comply with certain standards.

203 See: *Al-Skeini* case, *supra* note 169, at para. 165; A similar sentiment was expressed by the Court in the following cases: *Ahmet Özkan and Others v. Turkey*, App. No. 21689/93, Eur.Ct. H.R., para. 310 (Apr. 6, 2004) [hereinafter: *Özkan* case]; *İpek v. Turkey*, App. No. 25760/94, Eur.Ct. H.R., para. 169 (Feb. 17, 2004). The language of these rulings show that the Court understands the term 'accountability' as referring to an examination that is open to public scrutiny and not necessarily a criminal investigation.

Comparison, however, can be made to the position of the Inter-American Court of Human Rights, which emphasizes the importance of a criminal investigation in cases of alleged violations of the right to life; See: *Molina* case, *supra* note 52, where the Court notes that: 'In those cases alleging the arbitrary deprivation of life, the adequate remedy is the criminal investigation and trial initiated and pursued ex officio by the State to identify and punish the perpetrators'. Compare also the position of the UN Report: Juan E. Méndez, Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, A/HRC/19/61, p.69–70 (2012): 'By itself, a commission of inquiry is never sufficient to fully satisfy a State's obligations under international law with regard to torture and other forms of ill-treatment... Commissions of inquiry should therefore be considered complementary to other mechanisms, including criminal investigations and prosecution of perpetrators, the provision of reparations to victims, and extensive reforms to institutions, including the vetting of public officials'.

204 See: Philip Alston, Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary

investigation does not necessarily need to be a criminal investigation in order to be an ‘effective investigation’. Thus, for example, when facing situations that may not be properly addressed by criminal investigation, due to their nature, complexity, or scope, it is appropriate to use additional or complementary tools.²⁰⁵

66. *Second*, it is important to address the confusion with regard to the question of how the general principles relate to different institutions i.e., to judges, prosecutors, police, defense counsel, etc. Often the discussion takes place on the premise that each of the principles should be interpreted and applied uniformly to all the different officials and institutions. However, it is likely that the principles should be interpreted and applied differently, taking into account the specific functions of the official or institution.

The General Principles

1. Independence

67. It is well established that an ‘effective investigation’ must be conducted independently; however, as noted, what independence means depends upon the body, the institution, or the official by whom it is conducted. In the analysis of the case law below, it is demonstrated that prosecutors, police and defense counsel are each required to meet different degrees of independence.

68. The Geneva Conventions and the Additional Protocols offer little guidance on the precise substance of an independent investigation, though Article 84 of the Third Geneva Convention refers to the principle of

Executions: Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development, A/HRC/8/3, paras. 14, 22–23 (2008) [hereinafter: *The Alston Report 2008*].

²⁰⁵ See: *Al-Skeini* case, *supra* note 169, at paras. 174 and 176; See also, for example: Report of the *Bloody Sunday Inquiry* (HC29–I, House of Commons, 2010) (the Committee investigated an incident that took place on Jan. 30, 1972, in Northern Ireland during which thirteen people were killed by gunfire from British soldiers during a civil rights demonstration in Northern Ireland).

‘independence and impartiality’ as that which is ‘generally recognized’.²⁰⁶ Due to the paucity of guidance in international humanitarian law, consideration of international human rights law and international criminal law can be helpful.

69. One area of the investigative process where this principle becomes important is the independence of the prosecutor. The United Nations Guidelines on the Role of Prosecutors articulate several standards that are intended, *inter alia*, to ensure the independence of the prosecution in carrying out its functions, including the regulation of status, terms of employment and promotion of prosecutors.²⁰⁷ From an institutional viewpoint, the rules provide that the office of prosecutors shall be strictly separate from judicial functions.²⁰⁸ Nonetheless, the Guidelines do not contain a similar requirement with regard to investigative authorities, and it is even provided that where law or local practice permit, the prosecutors shall take an active role in the investigation of crimes and supervision over the legality of the investigations.²⁰⁹ In this context, it should be stated that various countries have adopted different institutional models on the question of the relationship between the prosecution and investigation authorities, ranging from complete separation to combining the two

206 See: The THIRD GENEVA CONVENTION, *supra* note 3, at Article 84.

207 See: United Nations, Guidelines on the Role of Prosecutors, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, *available at*: www2.ohchr.org/english/law/prosecutors.htm [hereinafter: UN Guidelines, Role of Prosecutors 1990]. Thus, for example, in the section dealing with the status and terms of employment of prosecutors, it is provided in Article 4 that States should ensure that prosecutors are able to perform their professional functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil or criminal liability; Article 5 provides that the physical safety of prosecutors and their families should be guaranteed against threats that result from their performing their jobs as prosecutors; Article 6 further provides that the State should regulate in law or public regulations prosecutors’ conditions of service, including salary, pension, promotion rules, retirement agreement, etc.; Article 7 provides that the promotion of prosecutors will be effected on the basis of objective criteria, which relate mainly to professional aspects, such as qualifications, ability, integrity, experience, and that it will be done by means of a fair and impartial procedure; Articles 8–9 further provide that prosecutors are entitled to benefit from freedom of expression and incorporation, subject to the obligations and status that derive from their jobs.

208 *Id.*, at Article 10.

209 *Id.*, at Article 11.

authorities into one body.²¹⁰ Notwithstanding the diversity of the practice, it would appear, as a rule, that none of these models necessarily conflicts with the aforesaid UN Guidelines. On the contrary, several decisions of the European Union specifically emphasize the importance of cooperation between the prosecution and the police, and the need to ensure ‘appropriate and functional’ cooperation in countries where there is a complete institutional separation between these two authorities.²¹¹

70. The Office of the Prosecutor of the International Criminal Court has also expressed the need for independence in carrying out its function. It has interpreted independence under the Rome Statute to mean acting independently of instructions from any external source. The Office of the Prosecutor articulated that ‘independence goes beyond not seeking or acting on instructions: it means that the Office decisions shall not be altered by the presumed or known wishes of any party or by the cooperation seeking process’.²¹² The Office of the Prosecutor has also specified criteria by which to evaluate the independence of national proceedings:

[I]ndependence in the proceedings at hand may be assessed in light of such indicators as, *inter alia*, the alleged involvement of the apparatus of the State, including those responsible for law and order, in the commission of the alleged crimes; the extent to which appointment and dismissal of investigators, prosecutors and judges affect due process in the case; the application of a regime of immunity and jurisdictional privileges for alleged perpetrators; political interference in the investigation; and the corruption of investigators, prosecutors and judges.²¹³

210 See: European Commission for Democracy through Law (Venice Commission): Report on European Standards as Regards the Independence of the Judicial System: Part II – The Prosecution Service, cdl-ad(2010)040, para. 8 (2010), available at: [www.venice.coe.int/docs/2010/cdl-ad\(2010\)040-e.pdf](http://www.venice.coe.int/docs/2010/cdl-ad(2010)040-e.pdf).

211 See: The Role of Public Prosecution in the Criminal Justice System: Recommendation Rec(2000)19, Article 23 (2000), available at: <https://wcd.coe.int/ViewDoc.jsp?id=376859&Site=CM>.

212 See: Draft Policy Paper on Preliminary Examinations, ICC Office of the Prosecutor, Para. 34 (Oct. 14, 2010), available at: www.icc-cpi.int/NR/rdonlyres/E278F5A2-A4F9-43D7-83D2-6A2C9CF5D7D7/282515/OTP_Draftpolicypaperonpreliminaryexaminations04101.pdf [hereinafter: *Draft Policy Paper on Preliminary Examinations*].

213 *Id.*, at para. 64.

71. The European Court of Human Rights has comprehensively addressed the importance of the principle of independence in conducting an investigation. According to the approach of the Court, the persons responsible for investigating an incident should be independent from persons implicated in the incidents, especially when those persons implicated belong to State agencies or bodies, such as the police. In *McKerr v. United Kingdom* (hereinafter: the *McKerr* case), the Court expressed the need for hierarchical and institutional independence:

For an investigation into alleged unlawful killing by State agents to be effective, it may generally be regarded as necessary for the persons responsible for and carrying out the investigation to be independent from those implicated in the events... *This means not only that there should be no hierarchical or institutional connection but also clear independence...*²¹⁴

Another example where the Court found the investigation authorities to lack independence was in *Ramsahai v. The Netherlands* (hereinafter: the *Ramsahai* case). The investigation of Dutch police officers was conducted by colleagues from their own district rather than by the State Criminal Investigation Department. The Court ruled that supervision by the suspects' own authority, no matter how independent, is an insufficient safeguard for ensuring the 'independence of the investigation'.²¹⁵ The Court emphasized the importance of independence both in practice and in law,²¹⁶ and reiterated again the Court's formula that:

[F]or the investigation to be "effective" in this sense it may generally be regarded as necessary for the persons responsible for it and carrying it out to be independent from those implicated

214 See: *McKerr* case, *supra* note 165, at para. 112 [emphasis added].

215 See: *Ramsahai v. The Netherlands*, App. No. 52391/99, Eur.Ct. H.R., paras. 294–296, 337 (2005) [hereinafter: *Ramsahai* case].

216 *Id.*, at para. 112.

in the events. This means not only a lack of hierarchical or institutional connection but also a practical independence.²¹⁷

The Court's emphasis on practical and institutional independence was developed in *Kolevi v. Bulgaria* (hereinafter: the *Kolevi* case) where the Chief Public Prosecutor was allegedly implicated in the incident under consideration. The Court was prepared to recognize various models that will satisfy the requirement of institutional independence, as demonstrated by the judgment's survey of different countries' practice.²¹⁸ It held that:

Independence and impartiality in cases involving high-ranking prosecutors or other officials may be secured by different means, such as investigation and prosecution by a separate body outside the prosecution system, special guarantees for independent decision-making despite hierarchical dependence, public scrutiny, judicial control or other measures. It is not the Court's task to determine which system best meets the requirements of the Convention. The system chosen by the member State concerned must however guarantee, in law and in practice, the investigation's independence and objectivity in all circumstances and regardless of whether those involved are public figures.²¹⁹

Moreover, the Court in the *Kolevi* case emphasized that independence is a fundamental component of an 'effective investigation' in its finding that, although the investigators performed many of the aspects of the investigation competently (for example, analyzing physical evidence and questioning bystanders), the fact that the investigation was under the control of the Chief Prosecutor (i.e., the very person the victim and his family accused) 'undermined decisively its effectiveness'.²²⁰

217 *Id.*, at para. 325; See also: *Al-Skeini* case, *supra* note 169, at paras. 167 and 172, where the Court emphasized the term 'operationally independent'.

218 See: *Kolevi v. Bulgaria*, App. No. 1108/02, Eur.Ct. H.R., paras. 138–152 (Nov. 5, 2009) [hereinafter: *Kolevi* case]; The States surveyed were Croatia, Cyprus, Estonia, France, Germany, Greece, Ireland, Italy, Malta, Russia, Spain, Sweden, Switzerland, Macedonia and the United Kingdom.

219 *Id.*, at para. 208..

220 *Id.*, at paras. 211–212.

72. In addition to the rich jurisprudence of the European Court of Human Rights on the obligation to conduct an investigation independently, it should also be noted that the 2008 report of the UN Special Rapporteur on Summary, Arbitrary and Extrajudicial Executions points out three aspects of the independence requirement (formal, practical and personal) in the context of outlining the basic conditions of a public commission of inquiry:

First, independence must be structurally guaranteed so that the commission is set up as a separate institution from the Government. This formal independence can often be assessed by examining the terms of the mandate before the commission begins its work, or through an examination of the early investigatory practices of the commission. ... Second, where formal independence has been established, actual independence may still be lacking. It is essential to look beyond the formal independence of the commission from the Government, and to assess whether the commission is capable in practice of carrying out its work independently. This may require the work of the commission to be monitored for the entire period of its operation. ... Third, a commission's members must also be judged to be individually independent and not be seen to have a vested interest in the outcome.²²¹

73. Before we turn to consider the other general principles, an important preliminary question must be addressed: can a military justice system, as such, be sufficiently independent to undertake an 'effective investigation'? The Commission emphatically answers this question affirmatively. Not only are internal investigations by military actors permitted under international humanitarian law, but those precise structures are expressly envisaged.²²² For example, Article 84 of the Third Geneva Convention

221 See: *The Alston Report 2008*, *supra* note 204, at paras. 25, 33–38.

222 See: THE FOURTH GENEVA CONVENTION, *supra* note 3, at Article 146; FIRST ADDITIONAL PROTOCOL TO THE GENEVA CONVENTIONS, *supra* note 13, at Article 87(3); For an in–depth discussion on the issue, see: *Schmitt, Investigating Violations*, *supra* note 82, at 80, para. 10; See also; *Id.*, at 81, para. 15: 'There is no obligation to conduct investigations outside military channels into possible IHL violations'.

It should be noted that international criminal law, as reflected in the *Rome Statute*, does not regard a military justice system, as such, to be unsuitable for an appropriate legal procedure. Therefore,

refers to the military justice system of States Parties as the default system in which both the State's own military personnel as well as prisoners of war should be brought to trial.²²³

A similar attitude has been expressed in *Cooper v. the United Kingdom*, where the European Court of Human Rights held that the existence of a service tribunal is not necessarily inconsistent with the principle of independence. It found that 'there is no reason to doubt the independence of the decision-making of those bodies from chain-of-command, rank or other service influence'.²²⁴

As will be demonstrated in Chapter B of this Report, and in the country reports (Annex C), the four common law countries that were surveyed by the Commission have distinct systems of military justice, all supporting the proposition that the mere existence of such a system is not, *ipso facto*, inconsistent with the accepted rules of international law.²²⁵

there is no inherent reason why a military justice system should not comply with the threshold of 'complementarity' that is enshrined in the *Rome Statute*, *supra* note 61, at Article 17. According to the Commentary on the Statute, when addressing the question of whether a State is 'shielding' a suspect according to the meaning of Article 17, the court might address various indications: 'for example, bypassing the normal criminal (*either civil or military*) procedures by appointing a special investigator who is politically aligned with persons close to the accused could also be a determining factor' [Emphasis added]; THE *ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY* 675 (Cassese, Antonio, Gaeta & Jones eds., 2002).

See also: KLEFFNER, *COMPLEMENTARITY*, *supra* note 120, at 148, who notes that: 'If a State decided to establish military or special courts for the purpose of trying core crimes, the applicable criteria for the ICC to determine whether proceedings "were not or are not conducted independently or impartially" remain the same as for ordinary courts'.

223 See: The *THIRD GENEVA CONVENTION*, *supra* note 3, at Article 84, which compares prisoner of war status with the status of the soldiers of the Detaining Power, when they are brought to criminal trial (as distinct from disciplinary proceedings): 'A prisoner of war shall be tried only by a military court, unless the existing laws of the Detaining Power expressly permit the civil courts to try a member of the armed forces of the Detaining Power in respect of the particular offence alleged to have been committed by the prisoner of war'.

224 See: *Cooper v. The United Kingdom*, App. No. 48843/99, Eur.Ct. H.R., para. 115 (Dec. 16, 2003) [hereinafter: *Cooper* case]; See also: *Grievés v. The United Kingdom*, App. No. 57067/00, Eur.Ct. H.R., para. 69 (Dec. 16, 2003); *Findlay v. The United Kingdom*, App. No. 110/1995/616/706, Eur.Ct. H.R., para. 73 (Feb. 25, 1997).

225 Notwithstanding, in the majority of military justice systems surveyed in Chapter B, the Commission identified a move towards varying levels of civilian involvement and oversight. This trend seems to have been influenced by the principle of independence.

The Commission concludes that, consistent with the Geneva Conventions and their Commentaries, decisions by tribunals, and State practice, a military justice system is not necessarily inconsistent with the principle of independence.

74. In summary, in order to achieve an ‘effective investigation’ it must be conducted independently. The principle of independence consists of both institutional independence (for example, the prosecution is separate from the judiciary) and practical independence (for example, the investigators are in no way connected to the incident under consideration).

2. Impartiality

75. The principle of impartiality is intended to ensure that an investigation is conducted objectively and in an unbiased fashion. It includes a personal requirement, such as the absence of an interest in the results of a specific investigation or proceeding, and an objective opinion towards the parties to the case. Additionally, the principle is often extended to include a requirement for a perception of impartiality.²²⁶ As noted, Article 84 of the Third Geneva Convention refers to the principle of ‘independence and impartiality’ as that which is ‘generally recognized’.²²⁷ While there is significant overlap between the principles of ‘independence’ and ‘impartiality’ (‘practical independence’ and impartiality can both involve a personal aspect) they are not synonymous. As distinct from the principle of independence, impartiality focuses on the function of the investigator, including the perception of his or her function. Thus, for example, it is clear that a judge, who in general enjoys institutional and functional independence, can be tainted by partiality in relation to one of the litigants before him or her. Due to the lack of detail in international humanitarian law on the meaning of the principle of impartiality, here too

²²⁶ See: *Girgvliani v. Georgia*, App. No. 25091/07, Eur.Ct. H.R., para. 147 (Apr. 26, 2011) [hereinafter: *Girgvliani* case].

²²⁷ See: The THIRD GENEVA CONVENTION, *supra* note 3, at Article 84.

consideration of international human rights law and international criminal law can be helpful.

76. The practical content of the principle of impartiality requires impartiality on the part of the investigative authorities as well as the evidence relied on in conducting the investigation.²²⁸ Thus, for example, the Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, demands not only that the investigators be impartial but also that the evidence (including witnesses) upon which they rely on is impartial.²²⁹

77. The European Court of Human Rights has also expressed the need for investigations to be conducted impartially. In the *Kolevi* case, the Court held that the ‘involvement [in the investigation] of persons against whom the victim and his relatives had made serious complaints based on specific facts is incompatible with the principle... of impartiality’.²³⁰ In *Girgvlani v. Georgia* the Court criticized the investigation into a high-profile murder case and found that the authorities ‘were lacking in candour in the conduct of the investigation’ and that the investigation ‘manifestly lacked’ impartiality.²³¹ The shortcomings were present at all levels of the investigation, including the selective approach to evidence by the Interior

228 See: *The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, *supra* note 32, at Article 12; *General Comment 31 of the Human Rights Committee*, *supra* note 42, at para. 15; See also: UN Principles, Effective Investigation of Torture 2001, *supra* note 192, at Article 5(a): ‘In cases in which the established investigative procedures are inadequate because of insufficient expertise or *suspected bias*, or because of the apparent existence of a pattern of abuse or for other substantial reasons, States shall ensure that investigations are undertaken through an independent commission of inquiry or similar procedure. *Members of such a commission shall be chosen for their recognized impartiality*, competence and independence as individuals. In particular, they shall be independent of any suspected perpetrators and the institutions or agencies they may serve. The commission shall have the authority to obtain all information necessary to the inquiry and shall conduct the inquiry as provided for under these Principles’ [emphases added].

229 See: UN Principles, Effective Investigation of Torture 2001, *supra* note 192, at Article 2: ‘The investigators, who shall be independent of the suspected perpetrators and the agency they serve, shall be competent and impartial. They shall have access to, or be empowered to commission investigations by, impartial medical or other experts’.

230 See: *Kolevi* case, *supra* note 218, at para. 211.

231 See: *Girgvlani* case, *supra* note 226, at para. 276.

Ministry and then by the prosecutor's office, and the unreasonable leniency towards the accused both during their detention and trial.

78. In the framework of international criminal law, the Draft Policy Paper on Preliminary Examination by the Office of the Prosecutor is useful in understanding this principle. It provides examples of partiality:

Impartiality in the proceedings at hand may be assessed in light of such indicators as, *inter alia*, linkages between the suspected perpetrators and competent authorities responsible for investigation, prosecution and/or adjudication of the crimes; public statements, awards, sanctions, promotions or demotions, deployments, dismissals or reprisals in relation to investigative, prosecutorial or judicial personnel concerned.²³²

It should be noted that these 'indicators' further demonstrate the overlap between practical independence and impartiality.

79. In summary, the analysis of the principle of impartiality demonstrates the way the investigator's personal bias or conflict of interest hinders an 'effective investigation'.

3. Effectiveness and Thoroughness

80. Effectiveness and thoroughness are part of the basic principles that relates to the realization of the purpose of the investigation, i.e., arriving at the truth. It requires that an investigation be conducted professionally. The Commentary on Article 121 of the Third Geneva Convention regarding the requisite investigation when a prisoner of war dies in the custody of a State asserts that '[t]he victim must therefore be thoroughly examined,

²³² See: *Draft Policy Paper on Preliminary Examinations*, *supra* note 212, at para. 65.

if necessary by an expert in forensic medicine, and all witnesses must be heard as well as the person who made the attack, if any'.²³³

81. International human rights sources provide substantial detail in explaining the principle of effectiveness and thoroughness. It has been generally interpreted by various human rights bodies and documents to relate to the procedures and mechanisms involved in carrying out an investigation.²³⁴ These interpretations are helpful in understanding the principle by providing concrete examples of such mechanisms. A 'thorough investigation', according to Article 9 of the Principles on the Effective Prevention and Investigation of Extralegal, Arbitrary and Summary Executions, should include 'an adequate autopsy, collection and analysis of all physical and documentary evidence and statements from witnesses'.²³⁵ The way an investigation is conducted and the quality of the evidence relied upon are also essential for achieving an effective and thorough investigation. The UN Special Rapporteur on Summary, Arbitrary and Extrajudicial Executions expressed the importance of conducting an investigation in a competent fashion and stated that professionalism allows a thorough consideration of the subject of the investigation.²³⁶

An example of the way a failure to adequately conduct an investigation undermined its effectiveness can be seen in a case before the Committee Against Torture. The Committee considered that an investigation conducted by a particular State Party's authorities was *neither effective nor thorough* due to apparent inconsistencies in evidence, inadequacies in the forensic examination, and unsuitable expert witnesses. The Committee found that

233 See: COMMENTARY ON THE III GENEVA CONVENTION, *supra* note 191, at 570.

234 See: *General Comment 6 of the Human Rights Committee*, *supra* note 197, at para. 4; See also, for example: *Mojica* case, *supra* note 198, at para. 5.2, where the Committee noted that a State is obligated to investigate claims and suspicions of a violation of the provisions of the Convention, *inter alia*, thoroughly: 'It is implicit in Article 4, paragraph 2, of the Optional Protocol and in rule 91 of the rules of procedure that a *State Party investigate thoroughly, in good faith and within the imparted deadlines, all the allegations of violations of the Covenant made against it...*' [emphasis added].

235 See: ESCOR Principles, Effective Prevention and Investigation 1989, *supra* note 109, at Article 9.

236 See: *The Alston Report 2008*, *supra* note 204, at para. 32.

such inconsistencies must be rectified in order to establish ‘a satisfactory degree of certainty’ in the evidence relied upon in an investigation.²³⁷

82. The approach adopted by the European Court of Human Rights is that the effectiveness of an investigation is not measured by its results, i.e., by finding one of the parties involved to be guilty, but it is a question of ‘means’.²³⁸ The rulings of the Court suggest general guidelines for achieving an effective and thorough investigation, including: an autopsy and necessary medical tests take place; all of the relevant evidence is collected and documented; all of the relevant witnesses are identified and interviewed thoroughly and statements are taken from them; and the process of reaching conclusions is based on a thorough analysis of all of the relevant material.²³⁹ Importantly, the Court has avoided being prescriptive about the specific details of the procedures that are necessary to ensure effectiveness. In the *McKerr* case the Court found that as long as the purpose, i.e., the holding of an effective investigation, is achieved, it did not purport to stipulate the proper procedures that States should adopt:

It is not for this court to specify in any detail which procedures the

237 See: *Radoivoje Ristić v. Yugoslavia*, HRC, Comm. No. 113/98, U.N. Doc. CAT/C/26/D/113/1998, paras. 9.4–9.6 (2001).

238 See: *Avşar v. Turkey*, App. No. 25657/94, Eur.Ct. H.R., para. 394 (2001) [hereinafter: *Avşar* case], where the Court noted, *inter alia*, that: ‘This is not an obligation of result, but of means’; See also: *Brecknell v. United Kingdom*, App. No. 32457/04, Eur.Ct. H.R., para. 66 (2007) [hereinafter: *Brecknell* case], where the Court noted that: ‘The fact that an investigation ends without concrete, or with only limited, results is not indicative of any failings as such. The obligation is of means only’.

239 See: *Avşar* case, *supra* note 238, at para. 394, where the Court stated: ‘The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including, *inter alia*, eye witness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death’; See also: *Magomed Musayev and others v. Russia*, App. No. 8979/02, Eur.Ct. H.R., para. 162 (2008) [hereinafter: *Musayev* case], where it was held that an investigation carried out by Russia did not satisfy the necessary conditions, since the evidence was not sufficiently collected or documented. The authorities, *inter alia*, did not prepare a detailed list of the dead and did not attach precise details of the location of the incident, even though these were definitely known; *Gül v. Turkey*, App. No. 22676/93, Eur.Ct. H.R., paras. 89–90 (2000) [hereinafter: *Gül* case]; The Court reviewed a series of omissions in the authorities’ investigation into an incident where a police officer opened fire on a civilian, claiming that it was in response to the civilian opening fire in the direction of the police. The omissions in the investigation included not locating the bullet that was supposedly fired by the civilian at the police, no examination of the supposed connection between the suspect and the handgun that was used to shoot at the police, no photographs taken of the firearms at the scene of the incident. On the basis of these omissions, the Court found that the investigation did not comply with the required conditions.

authorities should adopt in providing for the proper examination of the circumstances. ... Nor can it be said that there should be one unified procedure satisfying all requirements. ... [T]he court considers that the requirement of Article 2 may nonetheless be satisfied if, while seeking to take into account other legitimate interests such as national security or the protection of material relevant to other investigations, the various procedures provide for the necessary safeguards in an accessible and effective manner.²⁴⁰

The Court has continued this position in subsequent decisions where it has held that the investigation procedure that should be adopted in each particular case may vary according to the circumstances.²⁴¹ Notwithstanding this approach, the Court has articulated securing evidence as a relevant procedure in all investigations. The Court emphasized the importance of securing evidence from the beginning of the investigative process. The Court held that: '[t]hus it cannot be said that the domestic authorities took promptly any and all reasonable steps available to them to secure evidence which would have enabled

240 See: *McKerr* case, *supra* note 165, at para. 159; See also: *Hugh Jordan v. U.K.*, App. No. 24746/94, Eur.Ct. H.R. para. 143 (May. 4, 2001) [hereinafter: *Jordan* case].

241 See: *Ayşar* case, *supra* note 238, at para. 393; See also: *Jordan* case, *supra* note 240, at para. 105; App. No. 37715/97, Eur.Ct. H.R. para. 88 (2001); *Ayhan v. Turkey*, App. No. 41964/98, Eur.Ct. H.R. para. 86 (2006) [hereinafter: *Ayhan* case]. See also: *Al-Skeini* case, *supra* note 169, at paras. 163 and 165, which deals specifically with the question of the obligation to investigate in an armed conflict. See also: *Isayeva, Yusupova and Bazayeva* case, *supra* note 108, at para. 209; *Isayeva v. Russia*, App. No. 57950/00, Eur.Ct. H.R. para. 210 (2005) [hereinafter: *Isayeva* case]; These two cases examined an aerial attack that hit civilians who tried to flee from the area of the fighting. The Court examined in depth the investigation proceedings and emphasized, *inter alia*, that insufficient efforts were made to collect details about the declaration of the 'safe passage' and the identity of the officers that were responsible for coordinating the safe passage of civilians (*Isayeva, Yusupova and Bazayeva* case, at para. 222; *Isayeva* case, at para. 219). Moreover, the Court found that the District Prosecutor's request for a plan of the operation was not produced; relevant documents, such as the campaign journal, were not properly examined; and insufficient efforts were made to locate the victims of and witnesses to the incident (*Isayeva, Yusupova and Bazayeva* case, at paras. 220–225; *Isayeva* case, at paras. 219–224).

For an alternative interpretation of the issue, See: *Chevalier-Watts, Effective Investigations*, *supra* note 165, at 715–717, where the *Yusupova and Bazayeva* case and the *Isayeva* case were specifically considered, and *Chevalier-Watts* deduces that in both of these cases, the Court found that the Russian authorities had clearly fallen below the minimum standard required, and therefore the Court considered at length the manner in which the investigation was carried out. According to *Chevalier-Watts's* analysis, it appears that since the judgment in *McKerr* case, in complex political and humanitarian situations, the Court has made a more thorough examination of the manner in which the investigation was carried out; see also at 721.

them to bring light on the circumstances of the suspect death'.²⁴²

83. The Inter-American Court of Human Rights also interprets the principle of effectiveness and thoroughness to be measured by the 'means' exercised in an investigation. In *Castro v. Peru*, the Court provided useful guidance on the implementation of this principle:

[I]n order to conduct an effective and expeditious [sic] investigation, the investigating body must use all the means at its disposal to carry out all measures and investigations necessary to shed light on the fate of the victims and identify the [sic] responsible ... For this, the State will guarantee that the authorities in charge of the investigation have the logistic and scientific resources necessary to collect and process evidence, and more specifically, the power to access to [sic] the documents and information relevant to the investigation of the facts denounced and that they be able to obtain evidence of the locations of the victims.²⁴³

84. In summary, effectiveness and thoroughness concern the means of carrying out an investigation in order to achieve the intended purpose of uncovering the truth. This principle relates to general procedural measures, such as the collection and preservation of evidence, including the quality of the autopsy and witness testimony, on which an 'effective investigation' should rest.

242 See: *Eremiášová and Pechová v. The Czech Republic*, App. No. 23944/04, Eur.Ct. H.R., para. 146 (Feb. 16, 2012).

243 See: *Anzualdo Castro v. Peru*, Inter-Am. Ct. H.R., (Ser. C) No. 202, paras. 135 (Sep. 22, 2009); It should be noted that in cases concerning alleged arbitrary deprivation of life, the Inter-American Court of Human Rights has had a preference to adopt a list of minimum requirements when interpreting the principle of effectiveness and thoroughness which is based on the United Nations Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions; See for example: *Sánchez case*, *supra* note 200, at paras. 126–127; *Mapiripán Massacre v. Colombia*, Inter-Am. Ct. H.R., (Ser. C) No. 134, para. 224 (2005) [hereinafter: *Mapiripán case*], where the Court noted that: 'The State authorities in charge of an investigation must seek, at the least, *inter alia*: a) to identify the victim; b) to obtain and preserve evidence regarding the death, so as to aid any potential criminal investigation regarding those responsible; c) identify possible witnesses and receive their statements regarding the death under investigation; d) establish the cause, manner, place and time of death, as well as any pattern or practice that may have caused the death; and e) differentiate between natural death, accidental death, suicide, and homicide. It is also necessary to exhaustively investigate the crime scene, autopsies and analysis of human remains must be conducted rigorously, by competent professionals, applying the most appropriate procedures'.

4. Promptness

85. The principle of promptness dictates that an investigation should begin as soon as practically possible after the alleged incident and that unreasonable delays in the investigation must be avoided. The Commentary on Article 146 of the Fourth Geneva Convention asserts that while dealing with serious violations, States should act as quickly as possible, in order to ensure that an alleged perpetrator is arrested and brought to justice with all due speed.²⁴⁴ Human rights law also places a strong emphasis on the need for investigations to be undertaken without delay.²⁴⁵ Time is a major factor that affects the ability to collect and preserve evidence, since crime scenes change, evidence disappears, memories fade, and witnesses may be threatened or might collude. Thus, collecting evidence promptly complements the principle of effectiveness and thoroughness. Furthermore, conducting an investigation within a reasonable timeframe can contribute to the perception that the law is being enforced and justice is being done. Important fora have noted this connection between promptness and public confidence in the law.²⁴⁶

86. Human rights bodies provide guidance on the reasonable timeframe for the commencement of an investigation. The Committee Against Torture held that delays of 10–15 months between the alleged incident and the opening of the investigation were unreasonable.²⁴⁷ In the *Ramsahai* case the European Court of Human Rights noted that the State investigators

244 See: COMMENTARY ON THE IV GENEVA CONVENTION, *supra* note 22, at 593.

245 See: *The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, *supra* note 32, at Article 12; UN Basic Principles, Use of Force and Firearms 1990, *supra* note 58, at Article 22, where it is stated that: 'In cases of death and serious injury or other grave consequences, a detailed report shall be sent promptly to the competent authorities responsible for administrative review and judicial control'.

246 See: *Jordan* case, *supra* note 240, at para. 108; See also: Guidelines of the Committee of Ministers of the Council of Europe on eradicating impunity for serious human rights violations, adopted by the committee of ministers on 30 March 2011.

247 See: *Halimi–Nedzibi v. Austria*, Comm. No. 8/1991, U.N. Doc. A/49/44, para. 13.5 (Nov. 18, 1993), where it is noted that: 'The Committee considers that a *delay of 15 months* before an investigation of allegations of torture is initiated, *is unreasonably long* and not in compliance with the requirement of Article 12 of the Convention' [emphases added]; See also: *M'Barek v. Tunisia*, Comm. No. 60/1996, U.N. Doc. CAT/C/23/D/60/1996, paras. 11.5–11.7 (Jan. 24, 2000).

should be able to appear on the scene of events within, on average, no more than an hour and a half after the incident. The Court further held that the 15½ hours that passed between Ramsahai's death and the involvement of the relevant investigative authorities were an unreasonable delay.²⁴⁸ These examples allude to the legal requirement to commence an investigation as soon as the obligation to investigate arises.

87. In terms of the duration of an investigation, in *Abad v. Spain*, the Committee Against Torture held that 10 months was an unreasonable length of time for an investigation. In that case, there were gaps of one to three months between different stages of the medical examination and the ensuing reports, and the Committee found this to be an unacceptable delay.²⁴⁹ The European Court of Human Rights has similarly shown little tolerance towards pending investigations long after the incident had occurred.²⁵⁰ Thus, for example, In *Hugh Jordan v. the United Kingdom*, the Court found that the failure to conclude an investigation over eight years after the events at hand was inadequate, even though the applicant himself requested the adjournments in the investigation. The Court held:

If long adjournments are regarded as justified in the interests of procedural fairness to the victim's family, it calls into question whether the inquest system was at the relevant time structurally capable of providing for both speed and effective access for the deceased's family.²⁵¹

248 See: *Ramsahai* case, *supra* note 215, at paras. 334 and 339; See also: *Çiçek v. Turkey*, App. No. 25704/94, Eur.Ct. H.R., para. 149 (Feb. 27, 2001), where the European Court of Human Rights noted the long time that had passed until the opening of the investigation (a year and a half) and until the hearing of evidence (three and a half years) from the date of the incident.

249 See: *Encarnación Blanco Abad v. Spain*, Comm. No. 59/1996, U.N. Doc. CAT/C/20/D/59/1996, para. 8.7 (May 14, 1998).

250 For example: *Tanrikulu v. Turkey*, App. No. 23763/94, Eur.Ct. H.R., para. 109 (Jul. 8, 1999), where the Court criticized the lack of investigative activity or progress more than a year after the event.

251 See: *Jordan* case, *supra* note 240, at para. 138.

88. The requirement to conduct an investigation promptly has also been affirmed by the Inter-American Commission of Human Rights:

The Commission finds that, as a general rule, a criminal investigation should be carried out promptly to protect the interests of the victims and to preserve evidence, and that, in this case, the time elapsed without an effective investigation, prosecution, and punishment of all those responsible, constitutes unwarranted delay and is an indication of the scant probability of the effectiveness of this remedy.²⁵²

89. In summary, an ‘effective investigation’ must be conducted promptly. Delays in the commencement or the duration of an investigation may create evidentiary problems and detract from the public’s confidence that justice will be served.

5. Transparency

90. This principle concerns the need for openness, communication and accountability in the investigative process. It is derived from several rationales, including the need to ensure a culture of accountability, and public scrutiny of law enforcement and legal authorities as well as guaranteeing public confidence in the legal system and the rule of law.²⁵³

²⁵² See: Marco Antonio Servellón García et al. v. Honduras, Inter-Am. Comm. H.R. Case 12.331, Report No. 16/02, Doc. 5 rev. 1 at 348, para. 31 (2002); See also: *Molina* case, *supra* note 52, at para. 154; *Mapiripán* case, *supra* note 243, at para. 217. It should be noted that the Inter-American Commission of Human Rights, when it seeks to analyze the standard of promptness, tends to consider several criteria, including the time that has passed since the date of the incident, the stage of the investigation, the complexity of the case, procedural considerations in managing the proceeding against the parties and the conduct of the investigation authorities. Thus, the Commission held in *Molina* case, at para. 154: ‘To establish whether an investigation has been undertaken “promptly”, the Commission considers a series of factors, such as the time that has elapsed since the crime was committed, if the investigation has passed the preliminary stage, the measures adopted by the authorities and the complexity of the case’.

²⁵³ See for example: *Anguelova v. Bulgaria*, App. No. 38361/97, Eur.Ct. H.R., para. 140 (Jun. 13, 2002) [hereinafter: *Anguelova* case].

91. The Commission did not identify an explicit recognition of this principle in international humanitarian law sources.²⁵⁴ International human rights sources, however, do address the duty to maintain transparency in an investigation. These sources suggest that this duty is composed of two discrete aspects: the first is a duty to inform victims of crimes of their rights to receive information with regard to the circumstances of the said offense (or in the event that the victim was killed during the incident under investigation, that the victim's family members receive such information).²⁵⁵ This aspect derives, *inter alia*, from the concept of restorative justice.²⁵⁶ For example, in *Danilo Dimitrijevic v. Serbia and Montenegro*, the Committee for the Convention against Torture noted the failure of the prosecutor to inform the complainant whether an investigation was being conducted and, if any, the results of such investigation.²⁵⁷ The second aspect involves a duty to publish a comprehensive public report regarding investigations

254 Neither the Goldstone Report nor Schmitt consider the principle of transparency to be one of the relevant principles for conducting an investigation under international humanitarian law; See: Human Rights Council, Human Rights in Palestine and Other Occupied Arab Territories, Report of the United Nations Fact-Finding Mission on the Gaza Conflict, U.N. Doc. A/HRC/12/48, para. 121 (2009); Schmitt, *Investigating Violations*, *supra* note 82, at 83.

255 See: ESCOR Principles, Effective Prevention and Investigation 1989, *supra* note 109, at Article 16; UN Principles, Effective Investigation of Torture 2001, *supra* note 192, at Article 4; UN Guidelines, Role of Prosecutors 1990, *supra* note 207, at Article 13(d). See also: UN Principles, Remedy for Victims of Violations 2005, *supra* note 171, at Article 11(c) and 24. See: *McKerr* case, *supra* note 165, at para. 115, where the Court stated that: 'In all cases, however, the next-of-kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests'; The Court did not explain the various circumstances that may affect the scope of the family's involvement. It is possible to assume that the Court's intention was to give the investigating authority discretion to decide in cases involving incidents which, if disclosed, might frustrate the purpose of the investigation or the authority's operation.

256 There are various conceptions of 'restorative justice'. However, central to this theory of justice is a cooperative process of reparation or restoration between the offender and the victim as well as other interested parties. It aims to achieve offender accountability, reparation to the victim and full participation by those involved. Restorative justice attempts to restore the balance between the parties, repair the harm, and heal the relationships. See: John Braithwaite, *Restorative Justice*, in *The Handbook of Crime and Punishment* 323-344 (Tonry ed., 1998); See also: UNGA Res 40/34 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, Nov. 29, 1985, 96th plen mtg, (annex).

257 See for example: *Dimitrijevic* case, *supra* note 196, at para. 7.3, which concerned a Serbian citizen who was brought to a police station in Serbia, and he was beaten by police, deprived of food and water and his request for medical attention was denied. When he was released, he filed a complaint at the office of the District Prosecutor about the way the police treated him, together with medical documentation of his injuries. The Committee Against Torture held that the prosecutor's failure to inform the complainant of the opening of an investigation in his case or its results, prevented the complainant from pursuing a 'private prosecution' of his case, and that as a result, the duty to carry out an effective investigation was violated. See also: *Mr. Besim Osmani v. Republic of Serbia*, Comm. No. 261/2005, U.N. Doc. CAT/C/42/D/261/2005, para. 10.7 (May 25, 2009).

and their findings in order to guarantee credibility and public confidence in a system or an institution.²⁵⁸

92. The jurisprudence of the European Court of Human Rights has illuminated both these aspects of transparency. The Court requires that there be sufficient public accountability as well as the involvement of the victim's family during the investigation process. In relation to the former, the Court found there was no public scrutiny of an investigation because reports and their findings were not published.²⁵⁹ The Court has repeatedly stated:

[T]here must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory. The degree of public scrutiny required may well vary from case to case.²⁶⁰

In relation to the involvement of the next of kin, the rulings of the Court have elucidated what this involvement may entail. In *Güleç v. Turkey* the Court's criticism of the investigation included the fact that the complainant (the victim's father) was not given the opportunity to participate in the process and did not receive notice of the significant decisions in the examination of the case.²⁶¹ According to the Court's decisions, participation of family members extends beyond notifying the family of developments in the investigation and includes allowing family members to testify as witnesses²⁶² and giving them access to documents relevant to the investigation and court proceedings.²⁶³ In a case concerning the siege of the Dubrovka theatre, the Court interpreted this aspect of transparency more

258 See: ESCOR Principles, Effective Prevention and Investigation 1989, *supra* note 109, at Article 17; UN Principles, Effective Investigation of Torture 2001, *supra* note 192, at Article 5(b).

259 See: *McKerr* case, *supra* note 165, at para. 141.

260 *Id.*, at para. 115; *Jordan* case, *supra* note 240, at para. 109; *Isayeva* case, *supra* note 241, at para. 140; *Anguelova* case, *supra* note 253, at para. 140; *Kolevi* case, *supra* note 218, at para. 194.

261 See: *Güleç v. Turkey*, App. No. 54/1997/838/1044, Eur.Ct. H.R., para. 82 (Jul. 27, 1998).

262 See: *Gül* case, *supra* note 239, at para. 93.

263 See: *Oğur* case, *supra* note 202, at para. 92.

narrowly in determining that it must be applied in light of achieving an effective investigation:

... the materials and conclusions of the investigation should be sufficiently accessible for the relatives of the victims ... to the extent it does not seriously undermine its efficiency.²⁶⁴

93. The Inter-American Court for Human Rights has demonstrated that the two aspects of the transparency principle are discrete and are not dependant on one another:

The state must ensure the next of kin of the victims full access and the capacity to take part in all the stages of the investigation and trial of those responsible, pursuant to domestic law and the American convention. In addition, the results of the corresponding procedures should be publically disclosed thereby permitting Brazilian society to know the facts of the present case, as well as those responsible.²⁶⁵

94. In sum, the principle of transparency contributes to achieving a culture of accountability; it requires a sufficient degree of public scrutiny in order to conduct an effective investigation and addresses the right of victims to have access to information regarding the circumstances of the offense.

Summary of the General Principles

95. The general principles that apply to ‘effective investigations’ are enshrined in various international documents. Most of these sources are ‘soft law’, but it is possible (and desirable) to refer to them for interpretive guidance on this matter. In order to achieve an ‘effective investigation’, the

²⁶⁴ See: *Finogenov and Others v. Russia*, App. No. 18299/03 and 27311/03, Eur.Ct. H.R., para. 270 (Dec. 20, 2011).

²⁶⁵ See: *Gomes Lund et al. v. Brazil*, Inter-Am. Ct. H.R., (Ser. C) No. 219, para. 257 (Nov. 24, 2010); See also: *Mapiripán* case, *supra* note 243, at para. 219.

investigation must be conducted independently (both institutionally and practically), impartially (without personal bias), effectively and thoroughly (the means must achieve the intended purpose of uncovering the truth), promptly (avoiding delays in the commencement and duration) and transparently (providing public scrutiny and addressing victims' rights). Let us now turn to examine the way in which the context of armed conflict restrains or modifies the application and the implementation of these principles.

APPLICATION OF THE GENERAL PRINCIPLES TO INVESTIGATIONS IN THE CONTEXT OF AN ARMED CONFLICT

96. The question of whether the context of an armed conflict alters the implementation of the general principles for conducting an 'effective investigation' is a matter of law and of practical reality. Although there is no *fundamental* difference between the principles that should govern investigations under human rights and international humanitarian law,²⁶⁶ the existence of an armed conflict may preclude application of the principles in the same precise way as in a law enforcement context. The type of operation during armed conflict may also affect the extent to which the principles apply. In the context of armed conflict, the assumption is that the situation is governed by the rules regulating the conduct of hostilities. In law enforcement operations during armed conflict and in particular during occupation, application of the general principles will be more akin to the international human rights law regime.

97. Various international human rights fora have recognized that the implementation of the general principles depends upon the circumstances and that the existence of an armed conflict may well restrict the application of the principles for an effective investigation. The UN Human

²⁶⁶ See *supra*, at para. 63.

Rights Council International Independent Fact-Finding Mission Report (Tomuschat Report) stated:

The Committee believes that the gap between the expansive standards under IHRL [international human rights law] and the less defined standards for investigations under IHL [international humanitarian law] is not so significant... Nonetheless, there are constraints during armed conflict that do impede investigations.²⁶⁷

Furthermore, these limitations were recognized by the European Court of Human Rights in the *Al-Skeini* case:

It is clear that where the death to be investigated ... occurs in circumstances of generalised violence, armed conflict or insurgency, obstacles may be placed in the way of investigators...²⁶⁸

While the Court in *Al-Skeini* did not consider that the existence of an armed conflict precluded the applicability of the European Convention for Human Rights (see paragraph 57) it did recognize the need to pay careful attention to the reality of the armed conflict in determining the *manner* of carrying out an investigation.

In the context of armed conflict, the general principles are transferrable to varying degrees and they must be considered in light of the surrounding circumstances as well as the underlying principles governing international humanitarian law. The extent to which they apply is determined by the overall purpose of achieving an ‘effective investigation’. Let us now turn to examine how each principle applies during armed conflict.

267 See: *Tomuschat Report*, *supra* note 194, at paras. 30–32.

268 See: *Al-Skeini* case, *supra* note 169, at para. 164.

1. Independence and Impartiality

98. Although the Commission considered it important to distinguish between independence and impartiality in its earlier analysis of the general principles, for the purposes of understanding how these principles are adapted to a context of armed conflict, they can be discussed together. As previously established, the existence of a military justice system does not of itself compromise the requirement of independence,²⁶⁹ but in order to adhere to the principle of independence within such a system, an investigation must be conducted outside the chain of command. An example in the military context where the Court addressed *operational independence* is the *Al-Skeini* case:

The Court considers... that the fact that the Special Investigation Branch was not “free to decide for itself when to start and cease an investigation” and did not report “in the first instance to the [Army Prosecuting Authority]” rather than to the military chain of command, meant that it could not be seen as sufficiently independent from the soldiers implicated in the events to satisfy the requirements of Article 2.²⁷⁰

Therefore, during armed conflict, an investigator must be independent from those under investigation and certainly not subject to the same chain of command.²⁷¹

99. The principle of independence is shaped by the context of hostilities in that it is often important that the investigator possess operational and technical expertise. Schmitt provides an instructive example:

²⁶⁹ See *supra*, at para. 73.

²⁷⁰ See: *Al-Skeini* case, *supra* note 169, at para. 172.

²⁷¹ See also the ruling of the English Court of Appeal, in *Mousa* case, which examined an investigation carried out by the Iraq Historic Allegations Team (IHAT), which was established by the Ministry of Defence and charged with investigating allegations of abuse by members of the British armed forces in Iraq. The Court held that IHAT lacked practical independence, at least as a matter of ‘reasonable perception’, because of the potential involvement of the Provost Branch members of IHAT in the said events. See: *Mousa, R (on the application of) v. Secretary of State for Defence and Anr*, [2011] EWCA Civ 1334 (Nov. 22, 2011) (Court of Appeal (Civil Division)), paras. 36–38 (U.K).

While impartiality and independence are investigatory requirements, so too is *effectiveness*. An investigator who does not understand, for example, weapons options, fuzing, guidance systems, angle of attack, optimal release altitudes, command and control relationships, communications capabilities, tactical options, available intelligence options, enemy practices, pattern of life analysis, collateral damage estimate methodology, human factors in a combat environment, and so forth, will struggle to *effectively scrutinize* an air strike.²⁷²

100. Thus, an adequate understanding of the nature of the operation must be reconciled with the required separation from the chain of command. The investigator's separation from the chain of command is necessary to ensure that he has no potential involvement in the events under consideration and therefore neither possible partiality nor perception of bias in the assessment of the incident. In a situation of armed conflict, separation from the chain of command is not inconsistent with the requirement that the investigator also has sufficient operational knowledge in order to achieve an 'effective investigation'.

2. Effectiveness and Thoroughness

101. During an exchange of military hostilities in the context of an armed conflict, the relevant authorities' practical ability to conduct an investigation effectively and thoroughly is less obvious. The site of the incident may be under the control of opposing forces, resources may be limited and the means of conducting the investigation, for example, the ability to interview witnesses or conduct an autopsy, may be unavailable.²⁷³

²⁷² See: *Schmitt, Investigating Violations*, *supra* note 82, at 84 [emphases added].

²⁷³ See for example: *Tomuschat Report*, *supra* note 194, at para. 32, where it is noted that: 'The nature of hostilities might obstruct on-site investigations or make prompt medical examinations impossible. The conflict might have led to the destruction of evidence, and witnesses might be hard to locate or be engaged in conflict elsewhere'; See also: *Schmitt, Investigating Violations*, *supra* note 82, at 54, which notes that: 'Evidence may have been destroyed during the hostilities, civilian witnesses may have become refugees or internally displaced persons, military witnesses may be deployed elsewhere or be engaged in combat, territory where the offense occurred may be under enemy control, forensic and other investigative tools may be unavailable on or near the battlefield, military police may be occupied by other duties such as prisoner of war handling, legal advisers may be providing conduct of

In this regard, the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions stated that:

It is undeniable that during armed conflicts circumstances will sometimes impede investigation. Such circumstances will never discharge the obligation to investigate – this would eviscerate the non-derogable character of the right to life – but they may affect the modalities or particulars of the investigation. ... *On a case-to-case basis a State might utilize less effective measures of investigation in response to concrete constraints. For example, when hostile forces control the scene of a shooting, conducting an autopsy may prove impossible. Regardless of the circumstances, however, investigations must always be conducted as effectively as possible and never be reduced to mere formality.*²⁷⁴

While the thoroughness and effectiveness of an investigation during an armed conflict may not translate to the same evidentiary standards as during peacetime, the standards must still be high enough to reach conclusive and reliable findings. Thus, for example, the European Court held in the *Al-Skeini* case:

[T]he investigation must be effective in the sense that it is capable of leading to a determination of whether the force used was or was not justified in the circumstances and to the identification and punishment of those responsible. This is not an obligation of result, but of means. The authorities must take the *reasonable steps available* to them to *secure the evidence* concerning the incident, including *inter alia* eye-witness testimony, forensic evidence and, *where appropriate*, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death.²⁷⁵

hostilities advice, judicial bodies may be distant from the theatre of operations, communications may be degraded, travel may be hazardous, and so forth'.

274 See: Philip Alston, Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, E/CN.4/2006/53, para. 36 (Mar. 8, 2006) [emphasis added].

275 See: *Al-Skeini* case, *supra* note 169, at para. 166 [emphases added].

Despite the evidentiary constraints that may exist during armed conflict, the evidence that is available must be *thoroughly* secured and all feasible reporting must be completed.

102. In sum, although the nature of hostilities may limit the means available to conduct an investigation, reasonable measures must be taken to collect and secure accurate and credible findings for the investigation and it must be conducted professionally.

3. Promptness

103. The requirement of promptness begins as soon as the duty to investigate arises (see paragraph 85). In applying the promptness requirement to armed conflict, determining the reasonableness of a delay must be assessed according to the surrounding circumstances and according to the scope and scale of the violence. From the jurisprudence of the European Court it appears that unreasonable delays are examined against the backdrop of the surrounding circumstances of armed conflict. For example, in a number of the cases concerning the situation in the south–east region of Turkey, the Court acknowledged that the climate of violence might place difficulties on conducting an investigation, yet it asserted that such a climate should not prevent the authorities from responding actively and with reasonable expedition to an incident.²⁷⁶ Furthermore, in *Bazorkina v. Russia* the Court stated that:

[W]hile accepting that some explanation for these delays can be found in the exceptional circumstances that have prevailed in Chechnya ... the Court finds that in the present case they clearly exceeded any acceptable limitations on efficiency that could be tolerated in dealing with such a serious crime.²⁷⁷

²⁷⁶ See for example: *Ergi v. Turkey*, App. No. 66/1997/850/1057, Eur.Ct. H.R., Judgement, paras. 85 (1998) [hereinafter: *Ergi* case]; *Yaşa v. Turkey*, App. No. 63/1997/847/1054, Eur.Ct. H.R., para. 104 (Sep. 2, 1998); *Mahmut Kaya v. Turkey*, App. No. 22535/93, Eur.Ct. H.R., para. 107 (Mar. 28, 2000).

²⁷⁷ See: *Bazorkina v. Russia*, App. No. 69481/01, Eur.Ct. H.R., para. 121 (Jul. 27, 2006).

A similar sentiment was adopted in the *Al-Skeini* case, where the Court noted that ‘concrete constraints may ... cause an investigation to be delayed’.²⁷⁸

104. The Inter-American Commission on Human Rights has also examined the complexity of the circumstances of the case when determining the reasonableness of delays in investigations. In *Franklin Guillermo Aisalla Molina, Ecuador v. Colombia* (hereinafter: the *Molina* case), a case which concerned the death of a civilian in the course of a military operation carried out by Colombian forces on Ecuadorian territory, the Inter-American Commission held that international human rights law should be interpreted in light of the rules of international humanitarian law, but it emphasized that an investigation should be launched as soon as possible:

As a general rule, the Commission determines that “a criminal investigation” must be undertaken promptly to protect the victims’ interests and preserve evidence. ... When a State alleges the complexity of facts as factor [sic] to be taken into account in determining whether or not there has been an unwarranted delay and to examine whether the authorities have acted diligently in the investigations, it must explain specifically in what way this complexity and other difficulties caused the delay.²⁷⁹

105. Therefore, the reasonableness of delays must be assessed according to the surrounding circumstances and the intensity of violence. Adhering to the principle of promptness during armed conflict may be helpful in fulfilling the principle of effectiveness and thoroughness, for example, by ensuring the availability of evidence. Notwithstanding the complementary dynamic that can exist between these two principles, when an investigation *cannot* be promptly conducted, securing all available and accessible evidence becomes even more crucial.

²⁷⁸ See: *Al-Skeini* case, *supra* note 169, at para. 164.

²⁷⁹ See: *Molina* case, *supra* note 52, at paras. 154 and 157.

4. Transparency

106. As noted above, there is no explicit recognition of the principle of transparency in international humanitarian law.²⁸⁰ The above analysis suggests that the principle of transparency is composed of two aspects and although there is a relationship between these two aspects, they clearly facilitate different ends: ‘victims’ rights’ and ‘accountability via public scrutiny’.

International humanitarian law does not require that investigators and prosecutors comply with the rules of transparency that relate to specific victims’ rights. The Tomuschat Report states:

The overriding concern of IHRL to protect the rights and freedoms of individuals from the abuse of State power is not the primary focus of IHL. The latter seeks first to balance the lawful use of force with the protection of individuals. Consequently, *some human rights standards, such as the involvement of victims in investigations, while desirable, are not requisite for evaluating the inquiries into alleged IHL violations.*²⁸¹

The Commission shares the view that complying with the standard of transparency is indeed desirable, as it enhances public scrutiny and contributes to accountability. The accountability via public scrutiny aspect of the requirement of transparency contributes to the realization of some of the purposes that are central to the duty provided in international humanitarian law, namely increasing compliance and deterring the commission of future violations. This aspect of transparency may be achieved, *inter alia*, through publishing guidelines, establishing reporting mechanisms, and making publicly available relevant information such as statistics.

280 See *supra*, at paras. 63 and 91.

281 See: *Tomuschat Report*, *supra* note 194, at para. 33 [emphasis added].

107. It is noteworthy that the transparency requirement (both in its full operation in investigations regulated by human rights norms and its more limited application under international humanitarian law) must be implemented and adjusted to the circumstances. The Tomuschat Report states:

[T]he level of transparency expected of human rights investigations is not always achievable in situations of armed conflict, *particularly as questions of national security often arise*.²⁸²

Summary of the General Principles in the Context of an Armed Conflict

108. **In summary, the mere existence of an armed conflict does not negate the duty to conduct an ‘effective investigation’ in accordance with the accepted general principles. Application of these principles to the investigative process enhances accountability during armed conflict. The degree of compliance with the general principles is measured by the overall purpose of achieving an ‘effective investigation’. In adopting this approach, the Commission has relied on the *lex generalis* of international human rights law, which has more nuanced principles for investigation, to fill the *lacuna* in international humanitarian law and complementing it on the details concerning how to conduct an investigation. The precise content of the general principles has been determined carefully, with due regard for the contextual circumstances. This analysis has demonstrated the way in which each principle applies to the investigative process in the context of armed conflict.**

282 *Id.*, at para. 32 [emphasis added].

FACT-FINDING ASSESSMENT

109. As we have noted earlier, in the context of an armed conflict, there are instances in which a fact-finding assessment is required to determine whether an investigation should ensue. The main purpose of this assessment is to *collect sufficient information* about the incident. In addition, it must *facilitate* a potential investigation, and *not hinder* it. Therefore, the principles that govern the conduct of a fact-finding assessment are determined in reference to the overall purpose of the assessment.

110. Accordingly, a fact-finding assessment must be conducted by an institution or individual with sufficient operational expertise in order to facilitate a subsequent investigation. Another way that a fact-finding assessment can facilitate an investigation is by ensuring that the quality of evidence is of a high enough standard that it can be relied on in a subsequent investigation. A fact-finding assessment must be conducted in such a way as not to hinder an investigation, for example, by tainting the evidence and rendering the subsequent investigation ineffective. In *Ergi v. Turkey*, for example, the European Court of Human Rights criticized the reliability of the incident report conducted by the gendarmerie officer and the heavy reliance on it by the public prosecutor. The gendarmerie officer who conducted the incident report did not have statements from eye-witnesses, nor did he question the security forces at the time of the incident in any detail.²⁸³ Because the quality of the incident report was poor, the Court found it problematic that the prosecutor relied on it to support his findings. A fact-finding assessment lacking professionalism and expertise, which is relied on in a subsequent investigation, may render that subsequent investigation ineffective.

111. Promptness is also required for a fact-finding assessment because a failure to conduct it promptly would cause unjustified delays in a

²⁸³ See: *Ergi* case, *supra* note 276, at paras. 83–85.

subsequent investigation, rendering that subsequent investigation ineffective. While the jurisprudence of the European Court has focused on the commencement of an *investigation*, the Court has emphasized the importance of promptness at the preliminary stage as well. Similarly, In *Musayev and Others v. Russia*, the Court did not find any justification for a material delay in the *commencement of an investigation or, at least, preliminary procedures*. The Court found the large number of deaths during a Russian military operation in the context of hostilities between Russian forces and Chechen fighters as a reason to accelerate the opening of the investigative process.²⁸⁴ In addition, in *Al Skeini*, the Court emphasized the importance of a ‘prompt response by authorities’.²⁸⁵

112. In sum, the primary objective of a fact-finding assessment is to collect the relevant information about the alleged incident at a *preliminary stage*. The fact-finding assessment must be carried out in a way that fulfils its overall purpose, in other words, it must be carried out with professionalism, expertise, and promptness so that it facilitates a potential investigation and does not hinder it.

²⁸⁴ See: *Musayev* case, *supra* note 239, at para. 160.

²⁸⁵ See: *Al-Skeini* case, *supra* note 169, at para. 167; *Isayeva* case, *supra* note 241, at para. 213; *Sasita Israilova and Others v. Russia*, App. No. 35079/04, Eur.Ct. H.R, para. 111 (Oct. 28, 2010).

SUMMARY

113. The duty to conduct an investigation whenever there is a reasonable suspicion of the commission of a war crime is well established in international law. In the absence of a reasonable suspicion of a war crime there is still a duty to conduct a fact-finding assessment when the information is only partial or circumstantial, particularly where there has been an exceptional event or incident such as unanticipated civilian casualties. If a fact-finding assessment reveals circumstances that give rise to a reasonable suspicion of a war crime then a subsequent investigation is required. It is essential that the fact-finding assessment does not compromise the effectiveness of a potential investigation. It is also important to note that there is a legal duty to conduct an examination of all suspected violations of international humanitarian law that do not reach the threshold of a war crime. Confirmed violations should result in appropriate administrative, disciplinary, or penal measures, depending on the severity of the violation.

114. The specific provisions of international humanitarian law applicable to an armed conflict indicate that the death or injury of an individual does not, of itself, raise a reasonable suspicion for the commission of a war crime. Without additional information establishing such a suspicion, there is no legal obligation to conduct an investigation. In contrast, in an occupied territory, where the Occupying Power is engaged in law enforcement operations, such as maintaining public order or responding to civil disturbances and riots, the death or serious injury of an individual caused by the security forces, of itself, triggers an immediate obligation to initiate an investigation.

115. When an investigation during armed conflict is required, it must be conducted in accordance with the general principles for an 'effective investigation', i.e., independence, impartiality, effectiveness

and thoroughness, promptness, and the public scrutiny aspect of transparency. The precise content of the general principles may vary according to the specific context and the prevailing conditions, but the fundamental obligation to undertake an investigation effectively cannot be waived. Where needed, a fact-finding assessment must be conducted in a manner that achieves its purpose.

116. This chapter has outlined the obligation to examine and investigate complaints and claims of violations of international humanitarian law. The chapter established the content of this duty by reference to the relevant rules of international law.

117. The normative framework, as set out in this chapter, will form the basis for the analysis in the following chapters of the Report, which will review the manner in which complaints and claims regarding violations of international humanitarian law are examined and investigated in Israel (see below in chapter C), and the compliance of these mechanisms with the State of Israel's international law obligations (see below in chapter D). Before reviewing the Israeli practice, the Commission will first turn to a comparative study of the practice in this area of six other countries.

CHAPTER B: COMPARATIVE SURVEY OF INVESTIGATIVE SYSTEMS RELEVANT TO LAWS OF ARMED CONFLICT

INTRODUCTION

1. This chapter distils the results of a comparative survey, initiated by the Commission, of the laws, institutions and processes through which six other countries— the US, the UK, Canada, Australia, Germany and the Netherlands – investigate alleged violations of international humanitarian law – or as they are referred to in the country reports the law of armed conflict – and, where there has been a violation, bring the individuals concerned to justice.¹

The chapter draws on the detailed country reports (reproduced in Annex C) to summarize the position in other jurisdictions on some of the most relevant questions that pertain to an assessment of Israel’s current law and practice. The focus is on possible breaches of the law of armed conflict committed by members of the armed forces, rather than other security services (although the country reports do provide some limited information on the latter issue).

The introduction to the chapter explains the purpose of the comparative survey and outlines the methodology followed. It then makes some general comments on the approach of the investigative systems surveyed. The first section of the chapter outlines relevant international and domestic normative frameworks (‘why investigate and what to investigate?’). The second section identifies institutions and personnel

1 This chapter adopts the terminology of the country reports, even where the meaning of such terms differs from how they are used in the other chapters of this Report. For example, this chapter retains the term ‘law of armed conflict’ because some of the countries surveyed (particularly the US) do not use ‘international humanitarian law’ widely in their law and policies; see: Sean Watts, *Report on United States Law of Armed Conflict Investigations and Prosecution Practices*, at para. 4 [hereinafter: *The US report*]. Another example is the uniform use of the term ‘investigation’, even when referring to other inquiry processes.

involved in the investigation and (where necessary) criminal or disciplinary proceedings following complaints of violation of the law of armed conflict in the countries surveyed ('who investigates?'). In the third section we will examine in detail the processes followed in each of the countries in relation to investigation and subsequent proceedings ('when to investigate and how to investigate?'). In the fourth section we will summarize key points of the different approaches, common trends and major differences between the countries that were surveyed.

PURPOSES OF THE COMPARATIVE SURVEY

2. This inquiry is intended to compare Israel's mechanisms for investigating complaints of violation of the law of armed conflict, outlined in Chapter C, with the approaches taken in other countries with highly developed systems for investigating violations and addressing them through criminal or disciplinary proceedings. Against this background the Commission will be able to constructively assess the efficacy of Israel's mechanisms, and collate examples that might assist in considering possible reforms. The Commission is aware that the law and practice adopted by States is shaped also by domestic law, policy considerations, military culture, operational concerns, and the distinct challenges presented by the varying number and scope of investigations.² However, despite these differences, the Commission is of the view that the comparative survey is extremely beneficial; it provides a wide range of mechanisms that countries

² For statistics regarding the investigation (or other inquiries) and prosecution of alleged LOAC violations (e.g., numbers of complaints, matters investigated, charges laid, non-judicial action, trials, verdicts) see: *The US report*, *supra* note 1, at paras. 111–112; Holly MacDougall, *Canada: Investigation and Prosecution of Alleged Violations of the Law of Armed Conflict*, at paras. 136–143 and Annex A [hereinafter: *The Canadian report*]; Tim McCormack, *Australian Law and Practice relevant to Investigation and Prosecution of LOAC Violations*, at paras. 83–85 [hereinafter: *The Australian report*]; Peter Rowe, *Comparative Study of Other Systems for Investigating Alleged LOAC Breaches: The Law of the United Kingdom*, at paras. 4.22–4.24 [hereinafter: *The UK report*]; Wolff Heintschel von Heinegg & Robert Frau, *Investigation and Prosecution of Violations of the Law of Armed Conflict in Germany*, at Appendix V, paras. 24–28 [hereinafter: *The German report*]; T. D. Gill & J. J. M. van Hoek, *Netherlands: Investigation and Prosecution of Alleged Violations of the Law of Armed Conflict*, at paras. 84–85 [hereinafter: *The Netherlands report*].

may adopt in order to fulfill their obligations under international law, and it assists in critically assessing the pros and cons of each approach and its suitability to the legal and operational needs and realities in Israel.

The choice of countries surveyed has been driven primarily by the objective of examining other jurisdictions that might offer useful counterpoints to Israel's current mechanisms. Moreover, the six countries selected are among those that have sophisticated systems of investigation for law of armed conflict violations, and recent experience with these systems.³ Moreover, the Commission sought to limit its comparative survey to countries that are widely accepted as generally committed to the rule of law and therefore to the implementation and enforcement of the laws of armed conflict. By this, the Commission set a high bar which deliberately eliminates the possibility of extracting the bare minimum practices that may constitute customary international law. Finally, all of the six countries surveyed have been engaged in extensive and diverse military operations in the recent past which included complex armed conflict situations involving non-State groups, hostilities conducted in close proximity to a civilian population and situations in which the classification of the conflict (international or non-international armed conflict) was less than definitive. Some of these countries have also been involved in a range of peace operations with much greater emphasis on the maintenance of law and order rather than on exchange of military hostilities.

The countries selected include four common law countries (the US, the UK,⁴ Canada and Australia), and two civil law countries (Germany and the Netherlands). The common law countries all have distinct systems

3 Systems in four of the countries selected for comparison (the US, the UK, Canada and Australia) have already been the subject of conflicting assessments in some of the submissions received by this Commission. While these submissions have been helpful in many respects, the analysis presented in this chapter was prepared on the basis of reports by individual experts, in accordance with the process outlined in this chapter, and does not rely on assertions in submissions presented to the Commission.

4 The law examined is actually that of England and Wales, see: *The UK report*, *supra* note 2, at *fn* 3.

of military justice, albeit with considerable variation in the allocation of responsibility for decisions about investigation and subsequent proceedings. Germany and the Netherlands have no distinct system of military justice, in the sense of a capacity to try criminal offenses other than in the civilian courts (although the Netherlands has a specific Military Chamber of a civilian court that has jurisdiction where the accused is a member of the armed forces). However, in both Germany and the Netherlands military police play a role in investigating possible violations of the law of armed conflict for later prosecution (if appropriate) by civilian authorities.⁵

METHODOLOGY OF THE COMPARATIVE SURVEY

3. The comparative survey was conducted as follows: in the early stages of the survey a common questionnaire (see Annex C) was developed in order to elicit a comprehensive picture of the institutions and processes involved in each jurisdiction. The focus was on suspected violations committed by the armed forces, although some information was also sought about the law, processes and institutions relevant to investigations of violations by civilian security personnel.

The initial, general section of the questionnaire sought information on the overarching structure of national systems for investigating and prosecuting violations of the law of armed conflict, including an overview of relevant statutory and customary international law obligations, the basis of criminal jurisdiction in respect to violations of the law of armed conflict, and avenues other than prosecution that may be relevant to investigations of possible violations. The second section focused on the civilian justice

⁵ For different views on when the investigation practices of States become reflective of customary international law, see: Michael N. Schmitt, *Investigating Violations of International Law in Armed Conflict*, 2 HARV. NAT. SEC. J. 31, 56 (2011); Amichai Cohen and Yuval Shany, *Beyond the Grave Breaches Regime: The Duty to Investigate Alleged Violations of International Law Governing Armed Conflict*, in YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW, 37 (Michael N. Schmitt and Louise Arimatsu eds., 2011).

system as it pertains to the law of armed conflict, touching in particular on the status, role and independence of the Attorney–General and equivalent civilian prosecutorial authority, the civilian police and investigative authorities, and laws applicable to civilian security services such as the police and intelligence services. The third section explored in greater detail the nature and operation of the military justice system, including reporting and investigation processes, the status, role and independence of military investigators, legal advisers and prosecutors, the role of commanders in investigation and prosecution, and the administrative and disciplinary actions that may be taken alongside, or instead of, prosecution for violations of the law of armed conflict. A final section, on application of the policy in practice, sought further detail on concrete matters relevant to reporting and investigation of possible violations by the armed forces.

Experts on the law and practice in each jurisdiction were asked to prepare reports responding to the questionnaire. In some cases, after an initial review of draft reports, further information and detail were sought from the country experts on particular issues. This further information is reflected in the final reports.

This chapter is based primarily on the country reports and materials referred to therein, unless cited to another source. References to specific documents may be given in the case of direct quotation, but for the most part this chapter merely indicates the paragraphs of country reports in which relevant information and references may be found. In the event of any discrepancy between this chapter and a country report, reference should be made to the country report as the original and most detailed source of information. The country reports were received in August 2011, and while some updates were made, subsequent developments in the law and practice of individual countries have not been systematically included in this chapter.

EVOLUTIONS IN LAW AND PRACTICE IN THE COUNTRIES SURVEYED

4. Before embarking on a systemic presentation of the law and practice in the countries surveyed, it is important to note the extent to which the legal frameworks and systems of military and civilian justice relevant to the law of armed conflict have changed in recent decades, and are continuing to change.

All the countries surveyed, with the exception of the US, have made various statutory amendments in connection with ratification of the Rome Statute, some of them representing major changes to the scope of conduct that is criminalized, as well as to arrangements for prosecution. Countries that are Parties to the European Convention on Human Rights (UK, Germany, and the Netherlands) are bound to secure human rights to all individuals in their jurisdiction, an obligation that is increasingly interpreted to require extraterritorial protection of Convention rights for a range of individuals even in situations of armed conflict.⁶

Some countries have also made significant changes to their systems of military justice, whether in pursuit of best practice, or in response to concrete instances in which existing systems have not proved adequate to prevent, investigate and punish breaches of the law, or have failed to protect the rights of the accused. Canada has made various changes to its system of courts martial in order to ensure that the process complies with the right to a fair trial guaranteed by the Canadian Charter of Rights and Freedoms. Influenced in part by critical findings regarding the Canadian Forces' conduct in Somalia and difficulties in the military justice system, Canada undertook further reforms, implemented in 1999, to separate prosecutorial functions from the chain of command. A 2009 report of the Military Police Complaints Commission critical of the way in which the

⁶ See, for example: *Al-Skeini and Others v. United Kingdom*, App. No. 55721/07, Grand Chamber Eur. Ct. H.R., paras. 138 (Jul. 7, 2011) [hereinafter: *Al-Skeini* decision].

military police were operating in Afghanistan has prompted efforts to reinforce their independence. Australia embarked on a reform of its military system in 2006, involving the creation of a new Australian Military Court independent of the chain of command to replace existing systems of courts martial and Defence magistrates.⁷ The United Kingdom has reformed, over a period of years, aspects of its military justice system to ensure that it respects the right to a fair trial under the European Convention on Human Rights and the Human Rights Act 1998. The Netherlands completely overhauled its military justice system in 1991, transferring jurisdiction over criminal offenses committed by the armed forces to the civilian justice system, and in 2006 introduced the system of 'After Action Reports' that supports the process of routine factual investigation of all civilian deaths or serious injuries.

As a general rule, the trend of these changes has been towards a more specialized and professionalized process of investigation and management of criminal or disciplinary proceedings, and greater insulation from the operational chain of command. The extent and general direction of change in other countries may be relevant to the lessons that can be drawn from this comparative exercise.

⁷ However, following a judicial ruling that certain aspects of the new Australian Military Court were unconstitutional, Australia returned to a system of courts martial as an interim measure: *The Australian report*, *supra* note 2, at paras. 7–11.

A. NORMATIVE FRAMEWORK ('WHY AND WHAT TO INVESTIGATE?')

APPLICABLE INTERNATIONAL LAW

5. As noted above, much of the practice adopted in the countries surveyed concerning investigations of suspected violations of the law of armed conflict is shaped by domestic law and policy considerations, legal and military culture and operational concerns. That said, the international legal framework, and duties under the law of armed conflict, obviously set the parameters for the approach adopted. Moreover, human rights law and tribunals, and developments in international criminal law, are clearly important factors influencing recent changes to the various national approaches. This section sketches the position of the countries surveyed in relation to the law of armed conflict, international human rights law, and international criminal law.

Law of Armed Conflict

6. The countries surveyed take slightly different positions on the body of law of armed conflict that binds them. All the countries have accepted a basic core of law of armed conflict in ratifying the Geneva Conventions of 1949, and all the countries, other than the US, have ratified Additional Protocols I and II. Various sources indicate that some provisions of Additional Protocols I and II are accepted by the US as reflective of customary international law.⁸

8 *The US report, supra* note 1, at para. 7; These sources do not indicate a definitive position on the detailed requirements of Article 87, except to indicate that the US: 'support[s] the principle that the appropriate authorities... take all appropriate steps to bring to justice any persons who have willfully committed such acts... and make good faith efforts to cooperate with one another in this regard'; Michael J. Matheson, *Remarks in Session One: The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Convention*, 2 AM. UNIV. J. INT'L L. & POL'Y 419, 428 (1987).

International Human Rights Law

7. The countries surveyed have ratified some or all of the major international human rights treaties, although they take different positions on their applicability (and that of customary international human rights law) in situations of armed conflict.

The US takes the view that international human rights treaty law does not apply extraterritorially. Even if it did, the US contends that, during armed conflict, the law of war operates as a *lex specialis* displacing provisions of more general legal regimes such as international human rights law.⁹ The combined positions on the non-extraterritoriality of international human rights law and on international humanitarian law as *lex specialis* greatly reduce the extent to which international human rights law, in the view taken by the US, is applicable in situations of armed conflict, if at all.¹⁰ Canada takes the position that international human rights law applies at all times, whether in situations of peace or armed conflict, but that, in a situation of armed conflict, relevant human rights principles can only be decided by reference to the law of armed conflict as the *lex specialis*. In the event of an apparent inconsistency, the laws of armed conflict will prevail.¹¹ However, the applicability of the law of armed conflict and international human rights law in armed conflict is a complex question and will depend on the facts of the situation.¹² Australia appears not to regard international human rights law as binding extraterritorially

9 *The US report, supra* note 1, at para. 13; For the US position as of December 2011, see: The US Government fourth periodic report to the Human Rights Committee, at paras. 506–507, available at: http://ushrnetwork.org/sites/default/files/declaration-treaty/ICCPR_Fourth_Periodic_Report.pdf.

10 *The US report, supra* note 1, at para. 13.

11 In addition, human rights norms contained in common Article 3 and Article 75 of the Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 1125 U.N.T.S. 3 (1977), apply as a matter of treaty or customary law, at least in respect to detention; See: *Amnesty International Canada and British Columbia Civil Liberties Association v. Chief of the Defence Staff for the Canadian Forces et. al.*, Court File No. T-324-07, Respondent's Factum 83 (Jan. 18, 2008), available at: www.becla.org/antiterrorism/factumcrown.pdf; Kenneth Watkin, *Use of Force during Occupation: Law Enforcement and Conduct of Hostilities*, 94 (885) IRRIC Rev. 267, fn 214 (2012).

12 *The Canadian report, supra* note 2, at paras. 17–19.

in situations of armed conflict, but will, as a matter of policy, apply human rights standards to the extent that military exigencies permit.¹³

The UK, Germany and the Netherlands are in a somewhat different position. They are subject to a robust regional human rights regime, in the form of the European Convention on Human Rights, and to the jurisdiction of the European Court of Human Rights.¹⁴ The European Court of Human Rights has developed an extensive jurisprudence on when this Convention will apply extraterritorially, including in situations of armed conflict, and this is a significant factor in these States' determinations of when and to what extent human rights obligations will apply in situations of armed conflict.¹⁵

The Grand Chamber of the European Court of Human Rights has considered the applicability of the Convention to individuals who died in various circumstances in an area in Iraq in which British armed forces were operating, during the period following the end of major combat operations. With the exception of one individual, who had died while in British custody, the UK Government contended that the Court had no jurisdiction over deaths that occurred during combat operations. The Grand Chamber held that the UK armed forces had effective control of the relevant area in the period between the fall of the Ba'ath government and the accession of the Interim Government, and had assumed the exercise of some public powers usually exercised by a sovereign government, including authority and responsibility for the maintenance of security. Accordingly, the UK, through its soldiers engaged in security operations in South East Iraq, exercised authority and control over individuals killed in the course

13 *The Australian report, supra* note 2, at para. 22.

14 The US is not a Party to the American Convention on Human Rights or subject to the Inter-American Court of Human Rights. The Inter-American Commission on Human Rights has issued precautionary measures and a resolution calling on the US to close its facility at Guantánamo Bay. The US responded that the Inter-American Commission lacked jurisdiction: *The US report, supra* note 1, at para. 14.

15 *The UK report, supra* note 2, at paras. 1.29–1.32; *The German report, supra* note 2, at paras. 24–28; *The Netherlands report, supra* note 2, at para. 79.

of such security operations, such that these individuals were within the jurisdiction of the UK, and the UK was obliged to secure their rights under the Convention (and, most relevantly, obliged to investigate any alleged breach of their right to life).¹⁶

As with the UK, Germany and the Netherlands treat international human rights law as applicable extraterritorially in situations of armed conflict, insofar as individuals are within their jurisdiction.¹⁷ In Germany, the Federal Ministry of Defence is currently drafting a new internal departmental regulation on the applicability of human rights law in armed conflict. It seems likely that this regulation will confirm the applicability of human rights law, but treat the law of armed conflict as a *lex specialis* in relation to human rights law.¹⁸ The Netherlands applies the European Convention on Human Rights, as a matter of policy, in all situations in which the Netherlands armed forces are deployed on a mission abroad, even where it might not, as a matter of law, be applicable.¹⁹

International Criminal Law

8. The countries surveyed have all, with the exception of the US, ratified the Rome Statute, and enacted legislation to ensure that they are in a position to investigate and prosecute individuals for the offenses set out in the Rome Statute. In many of these countries, ratification and the desire to ensure that the country is in a position to try its own nationals, should that be necessary, served as a catalyst for amendment and development of legislation setting out offenses of war crimes and other violations of the law of armed conflict.²⁰

16 *Al-Skeini* decision, *supra* note 6, at 149; For a discussion of the decision, see: *The UK report*, *supra* note 2, at para. 1.25.

17 *The German report*, *supra* note 2, at para. 25.

18 *Id.*, at para. 26.

19 *The Netherlands report*, *supra* note 2, at para. 15.

20 See: *The Australian report*, *supra* note 2, at para. 4; *The UK report*, *supra* note 2, at para. 1.18; *The Netherlands report*, *supra* note 2, at para. 12; *The German report*, *supra* note 2, at paras. 4–8. In Canada, ratification of the Rome Statute of the International Criminal Court, 2187 U.N.T.S 3, Article

APPLICABLE DOMESTIC LAW

9. The countries surveyed differ somewhat as regards the interaction of international law and the domestic legal order. In some cases, treaties, once ratified, become a part of federal law, while in some other systems implementing legislation is required. Regardless of these variations, the central issue for investigation and prosecution (at least of war crimes; more minor violations may be dealt with in other ways) is the existence of domestic criminal offenses. In all cases, the countries surveyed have enacted legislation setting out specific offenses of war crimes (whether or not designated as such), and in most cases, the countries surveyed have enacted provisions dealing with the issue of ‘command responsibility’, that is, criminal liability for the failure to exercise authority to stop crimes committed by subordinates.

Even in relation to war crimes, the general criminal law and codes of military discipline (rather than offenses pertaining directly to violations of the law of armed conflict) may be relevant, particularly as some countries have a policy of prosecuting conduct by charging alleged offenders serving in their own armed forces with offenses under the general criminal law or military code, rather than with offenses relating specifically to war crimes or violation of the laws of armed conflict. We will now briefly identify the main domestic laws applicable to violations of the law of armed conflict.

28 (1998), prompted changes to arrangements for cooperation between the police and Department of Justice in war crimes investigations; See: *The Canadian report, supra* note 2, at para. 16.

Specific Provisions Relating to War Crimes and Violations of the Law of Armed Conflict

10. Some of the countries surveyed have criminalized a wider range of violations of the law of armed conflict than others. In what follows, we note the main classes of offenses that were adopted in each of the countries. It should be noted that the term ‘war crimes’ is not universally applicable to designate those violations giving rise to criminal liability, and different countries include different offenses as prosecutable crimes.

The US federal criminal code defines ‘war crimes’ as a confined list of conduct, including grave breaches of the Geneva Conventions of 1949 and any Protocols thereto to which the US is a Party (currently only Additional Protocol III); conduct prohibited by Articles 23, 25, 27, and 28 of the Annex to Hague Convention IV; ‘grave breaches of Common Article 3’ when committed in the context of an armed conflict not of an international character; and conduct of a person who, in relation to an armed conflict and contrary to the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II to the Convention on Certain Conventional Weapons), willfully kills or causes serious injury to civilians.²¹ However, there is uncertainty with respect to the scope of ‘war crimes’. Some US Army field manuals state that all violations of the law of armed conflict amount to war crimes, while other material from the Department of Defense and the Navy suggests a distinction between war crimes and a larger class of other violations of the law of armed conflict.²² Military manuals enumerate some acts additional to those deemed offenses under the criminal code as representative of ‘war crimes’, including maltreatment

21 War crimes, 18 U.S.C. § 2441(c); Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II), 1342 U.N.T.S. 168; *The US report, supra* note 1, at para. 8; note the narrow US definition of ‘grave breaches’ of Common Article 3.

22 *Id.*, at para. 8.

of dead bodies, misuse of the Red Cross emblem, and compelling prisoners of war to perform prohibited labor.²³

In Canada, a manual on the law of armed conflict defines war crimes as serious violations of the laws and customs of war.²⁴ The Crimes Against Humanity and War Crimes Act 2000 defines war crimes as acts or omissions committed during an armed conflict that, at the time and place of commission, constitute war crimes under customary or conventional international law applicable to armed conflicts. An interpretive provision provides that crimes under Articles 6, 7 and 8(2) of the Rome Statute are crimes under customary international law.²⁵ The Geneva Conventions Act also creates a range of offenses encompassing all grave breaches of the Geneva Conventions and Additional Protocol I.²⁶

In Australia, the Criminal Code Act 1995 now contains offenses corresponding to all offenses set out in the Rome Statute.²⁷ The Australian legislation uses ‘war crimes’ to refer to a set of offenses that correspond to those in Article 8 of the Rome Statute.

English criminal law includes a number of offenses relevant to the law of armed conflict, such as commission of grave breaches of the Geneva Conventions 1949 or of Additional Protocol I and misuse of protected emblems. In addition, war crimes as set out in Article 8 of the Rome Statute (as well as genocide as set out in Article 6 and crimes of humanity as set out in Article 7) are offenses according to the International Criminal Court Act 2001.²⁸

23 *Id.*, at para. 9.

24 *The Canadian report, supra* note 2, at para. 9.

25 *Id.*, at para. 10.

26 *Id.*, at para. 11.

27 *The Australian report, supra* note 2, at para. 4.

28 *The UK report, supra* note 2, at para. 1.14.

In Germany, in drafting relevant provisions of the Code of Crimes against International Law, the legislator sought to incorporate into German law the whole of international customary law regarding war crimes, as well as those codified in Article 8 of the Rome Statute.²⁹ The provisions of the *Völkerstrafgesetzbuch*, unlike some of the other war crimes provisions surveyed here, make almost no distinction between the laws applicable to international and non-international armed conflict, and do not differentiate between 'grave breaches' and other war crimes, instead structuring provisions around the protection of different interests (persons, property, humanitarian operations, emblems, and so forth).³⁰

In the Netherlands, the International Crimes Act³¹ contains offenses of grave breaches of the Geneva Conventions of 1949 and of Additional Protocol I, as well as other serious violations of the law of armed conflict relating to both international armed conflict and non-international armed conflict, and other violations of the laws and customs of war. Many offenses under the International Crimes Act correspond to 'war crimes' included in Article 8 of the Rome Statute, even though the term 'war crimes' is not used in the Act,³² and it also contains other offenses which are not included in the Rome Statute. Examples of such offenses include simple non-aggravated assault on a prisoner of war or detained person without danger of serious injury or amounting to cruel, inhuman or degrading treatment, or the theft of a personal item from such an individual.³³

11. Besides adopting offenses to criminalize violations of the law of armed conflict, most of the countries surveyed have also enacted provisions dealing with 'command responsibility'. Commanders or those in positions of authority may have some degree of criminal liability in connection

29 *The German report, supra* note 2, at para. 111.

30 *Id.*, at para. 110.

31 *Wet Internationale Misdrifven* or WIM.

32 *The Netherlands report, supra* note 2, at para. 8.

33 *Id.*

with the acts of their subordinates, as accessories (for example, where the commander or superior aided or abetted the conduct of subordinates³⁴) or in their own right (for example, where the commander ordered the offenses or failed to supervise and his conduct constituted dereliction of duty or another like offense³⁵). Article 28 of the Rome Statute, however, establishes a distinct ground of criminal responsibility for military commanders and civilian superiors. In general terms, these individuals are liable for a separate offense where two conditions were fulfilled: first, they knew or should have known that subordinates were committing or about to commit crimes within the jurisdiction of the Court (military commanders), or knew or consciously disregarded information which clearly indicated that subordinates were committing or about to commit crimes (political or other superiors); Second, they failed to take all reasonable measures to prevent the crimes or submit matters to competent authorities for investigation and prosecution. Of the countries surveyed, the five that have ratified the Rome Statute have introduced provisions to similar effect into their criminal law, albeit with some variations to accommodate existing law on the alternative grounds for criminal responsibility. One effect of these enactments is to expand the possible grounds for criminal liability of civilians involved in making decisions about the conduct of armed conflict.

In Canada, the relevant provisions create a separate indictable offense that may be committed by commanders and superiors, rather than making them liable for subordinates' crimes. It only applies where commanders know or are negligent in failing to know that subordinates are committing or about to commit relevant offenses.³⁶ In Australia, the relevant provisions allow for commanders and superiors to be criminally liable for the crimes of subordinates, and also include, as grounds of liability

34 *The UK report, supra* note 2, at para. 1.45.

35 *The US report, supra* note 1, at para. 21; For an example of charges laid against a commanding officer for negligently failing to perform a duty, see: *The UK report, supra* note 2, at para. 1.21, and the charge sheet referred to in *fn* 45.

36 Crimes Against Humanity and War Crimes Act, at Articles 5(1), 7(1) (S.C. 2000, c. 24); *The Canadian report, supra* note 2, at para. 31.

for commanders, recklessness as to the commission of relevant offenses.³⁷ In the UK, the relevant provisions track the text of Article 28 of the Rome Statute almost exactly, but there is a further provision to the effect that a person responsible for an offense under the relevant provisions is regarded as aiding, abetting, counseling or procuring the commission of the offense (i.e., as an accessory).³⁸ In Germany, according to the Code of Crimes against International Law, a military commander or civilian superior who omits to prevent relevant offenses by subordinates shall be punished in the same way as the perpetrator of the offense. For constitutional reasons, this approach stops short of providing for criminal liability in cases of negligence (although negligence may ground criminal liability for separate offenses of failure to supervise or to report).³⁹ In the Netherlands, the relevant provisions appear to have a similar effect to Article 28.⁴⁰

In the US, there is no single provision establishing ‘command responsibility’ as a distinct ground of criminal liability. However, military legal manuals do affirm the existence of criminal liability of this kind, and there is military and civilian case law relying on it.⁴¹

General Criminal Law, Codes of Military Conduct and Charging Practices

12. In many cases, conduct constituting a violation of the law of armed conflict will also constitute an offense under domestic criminal law (such as murder or assault), or an offense under codes of military conduct (either a specific offense or a general offense of conduct prejudicial to good order and discipline, or something similar).

37 *The Australian report, supra* note 2, at para. 33.

38 *The UK report, supra* note 2, at para. 1.46.

39 *The German report, supra* note 2, at paras. 115–119.

40 *The Netherlands report, supra* note 2, at para. 28.

41 *The US report, supra* note 1, at paras. 23–25.

With the exception of certain offenses like war crimes, which by their nature are often committed abroad and expressly have an extraterritorial application, most national criminal law usually applies only to conduct committed within the territory of the State. However, in many cases there are provisions extending the application of domestic criminal law to members of the armed forces, even when serving abroad. In those countries with military justice systems, at least some offenses against the domestic criminal law may be tried within the military justice system.

Issues concerning the allocation of responsibility for investigation and subsequent proceedings between the civilian and military justice systems, where relevant, are addressed in section B (‘who investigates?’), which deals with the institutions and actors engaged in these matters (paragraphs 19–30). This section (‘what to investigate?’) focuses on the applicable normative frameworks. It briefly identifies the main statutory codes of military conduct applicable in the countries surveyed, and notes provisions extending the application of the criminal law to members of the armed services deployed abroad. Finally it discusses, for each jurisdiction, the policy and practice regarding when and how to charge individuals serving in the armed forces following incidents that may constitute violations of the law of armed conflict.

United States

13. The US Uniform Code of Military Justice (UCMJ) is a federal statute, applying to various categories of persons, regardless of the nationality of the perpetrator or the territory in which the offense was committed. Such persons include members of the armed forces and reservists on active service, as well as persons accompanying or serving with the armed forces during war or ‘contingency operations’ such as employees of security agencies or military contractors.⁴²

⁴² Contingency operations are military operations designated by the Secretary of Defense as those in which a participant may become involved in military actions, operations or hostilities, or that result

The UCMJ contains a list of offenses, some of which (such as murder, manslaughter, assault) resemble offenses under domestic criminal law, and some of which (such as absence without leave and disrespect for a superior commissioned officer) could only be committed by a member of the armed forces. Additionally, a general Article incorporates ‘crimes and offenses not capital’ (along with disorders and neglects to the prejudice of good order and discipline, as well as conduct of a nature to bring discredit on the armed forces) into the jurisdiction of the court martial. This has the effect of bringing violations of the federal criminal code within the military justice system.⁴³

The domestic criminal law may be applicable extraterritorially even to those who are not subject to the UCMJ, pursuant to provisions that extend US federal criminal law to various sites overseas (‘Special Maritime and Territorial Jurisdiction’). These provisions extend the jurisdiction of federal courts to felony offenses under Special Maritime and Territorial Jurisdiction, where the offenses are committed by civilians accompanying the armed forces, or civilians or contractors supporting the mission of the Department of Defense overseas.⁴⁴ Special Maritime and Territorial Jurisdiction has been used, for example, to charge a CIA contractor in connection with the death of a detainee on a military base in Afghanistan.⁴⁵

As to charging practices, US prosecutors tend not to charge members

in an order preventing active duty service members from separating from service: *Id.*, at para. 78; It seems that the recent amendment to cover civilians accompanying the armed forces on ‘contingency operations’ was aimed mainly at private security contractors: *Id.*, at para. 78; There may be some doubt about the constitutionality of subjecting civilians to military justice: *Id.*, at para. 54.

43 *Id.*, at para. 19; There has apparently been no instance in which this was used to try offenses under war crimes legislation at court martial.

44 *Id.*, at paras. 17–18.

45 *Id.*, at para. 59; In this case, concerning the fatal beating of a detainee, charges were brought for assault with a dangerous weapon and assault resulting in bodily injury. The accused, David Passaro, was convicted and ultimately sentenced to imprisonment for six years and seven months. It appears that Passaro could also have been charged with war crimes (the War Crimes Act applies to conduct of US nationals anywhere in the world and does not depend on SMTJ provisions).

of the armed forces with offenses relating specifically to war crimes. Military prosecutors are instructed to charge service members with an offense under the general criminal law corresponding to the underlying conduct of the alleged war crime, or a disciplinary offense.⁴⁶

Canada

14. The Canadian *Code of Service Discipline* is contained in Part III of the National Defence Act. The Code applies to members of the Canadian Forces, including reserve forces, but also to civilians who accompany any unit or element of the Canadian Forces on service or active service in certain circumstances (including where they participate in the carrying out of any of the unit or element's movements, manoeuvres, duties in aid of the civil power, duties in a disaster or warlike operation), and to civilians serving with the Canadian Forces who have agreed to be subject to the Code.⁴⁷ As with the US UCMJ, the Canadian Code of Service Discipline sets out a number of offenses particular to the armed forces, alongside incorporating offenses against the general criminal law into the set of offenses subject to military jurisdiction. However, the Code of Service Discipline does effectively provide for extraterritorial application of the general criminal law to members of the armed forces, providing that any act taking place outside Canada that would, had it taken place in Canada, be punishable under the Criminal Code or other statute, constitutes an offense under the relevant Division of the National Defence Act.

As in the US, the charging practice in Canada appears to be to prosecute violations of the law of armed conflict by members of the armed forces as general criminal law offenses or military offenses under the Code of Service Discipline, rather than as specific offenses relating to the law of armed conflict.⁴⁸

46 *Id.*, at para. 9.

47 *The Canadian report*, *supra* note 2, at paras. 58, 88.

48 See, e.g., the case of Captain Samrau. Samrau's conduct in shooting an unarmed and wounded

Australia

15. The *Defence Force Discipline Act 1982* (DFDA) applies to ‘defense members’ (members of the permanent or regular forces, or members of the reserves rendering continuous fulltime service, or on duty or in uniform) and ‘defense civilians’ (persons who, with authority, accompany a part of the Defence Force outside Australia or on operations against the enemy, or who have consented in writing to subject themselves to Defence Force discipline).⁴⁹ Consent to Defence Force discipline may be required, for example, when civilians are admitted to certain operational areas.⁵⁰

As with the US and Canada, the Australian DFDA contains a number of offenses particular to the armed forces. As in Canada, the DFDA does effectively provide for extraterritorial application of the general criminal law to members of the armed forces. A defense member or a defense civilian is guilty of an offense under the DFDA if they commit any act which, if committed in a particular Commonwealth territory, would be an offense against the law applicable there, and is liable to the punishment fixed for that offense or, where a range of punishments is available for the offense, punishment that is not more severe than the maximum punishment.⁵¹

To date, Australia has not prosecuted any members of its armed forces for violations of the law of armed conflict, whether under a specific offense pertaining to the law of armed conflict or the general criminal law.⁵²

insurgent may well have constituted a war crime, but he was charged with second degree murder; attempted murder with a firearm (alternate charge to second degree murder); negligently performing a military duty, and behaving in a disgraceful manner: *Id.*, at fn 7, fn 12; Annex A. A further example is the case of Captain Gapp. The accused had stolen the headdress of a dead person. He was charged with conduct prejudicial to good order and discipline in respect of a failure to follow a code of conduct prohibiting looting; this charge was stayed and he was ultimately found guilty on an alternate charge relating to failure to comply with theatre standing orders concerning artifacts and trophies of war: *Id.*, at Annex A.

49 *The Australian report*, *supra* note 2, at para. 30.

50 *Id.*, at para. 58.

51 *Id.*, at para. 30.

52 In a recent court martial, charges of manslaughter by criminal negligence were laid against two members of the armed forces, but in that case the Director of Military Prosecutions never alleged

In the event that a violation of the law of armed conflict was investigated and prosecuted, charges could be laid for offenses against the general criminal law (or disciplinary offenses), rather than for offenses against the specific provisions relating to war crimes. This would reflect the common practice in other jurisdictions with military justice systems.⁵³

United Kingdom

16. The Armed Forces Act 2006 sets out requirements for persons subject to ‘service law’ and civilians subject to ‘service discipline’. Persons subject to service law include members of the regular forces, and members of the reserve forces in particular circumstances, such as permanent or full-time service, or undertaking any training or duty.⁵⁴ Civilians subject to service discipline include Crown servants in designated areas working in support of the armed forces.⁵⁵

The Armed Forces Act specifies a range of offenses, some of which may only be committed by those subject to service law, and some of which (such as looting) may be committed by both persons subject to service law and civilians subject to service discipline. Both persons subject to service law and persons subject to service discipline commit an offense under the Armed Forces Act if they do any act that would, if done in England or Wales, be punishable by the law of England or Wales, thus effectively providing for extraterritorial application of domestic criminal law.⁵⁶ The Court Martial has jurisdiction in respect of offenses under the Armed

that a violation of international humanitarian law had been perpetrated. The Chief Judge Advocate dismissed the charges on the basis that the legal duty of care inherent in the offense of manslaughter by criminal negligence did not exist in a battlefield context: *Id.*, at para. 52.

53 This practice may be motivated by the fact that it is easier for the prosecution to discharge its evidentiary burden without having to establish the existence of a further element, namely, the existence of an armed conflict; and the fact that it may be more difficult to secure a conviction under a specific offense pertaining to violation of the law of armed conflict, because of the stigma attached to ‘war crimes’; *Id.*, at para. 13.

54 *The UK report, supra* note 2, at paras. 3.13, 3.21–3.22.

55 *Id.*, at para. 3.13.

56 *Id.*, at para. 1.02.

Forces Act. The Service Civilian Court has jurisdiction in respect of minor, non-indictable offenses against the criminal law of England committed by service civilians, but may only exercise this jurisdiction outside the territory of England.⁵⁷

In the UK, one prosecution has been brought against a member of the armed forces on a charge of ‘inhuman treatment’ under domestic legislation incorporating offenses set out in the Rome Statute.⁵⁸ The charge related to the fatal beating of a detainee (Baha Mousa, whose case was one of six at issue in the House of Lords case *R (Al-Skeini) v. Secretary of State for Defence*,⁵⁹ and also the subject of a public inquiry). The individual pleaded guilty and was sentenced to 12 months’ imprisonment, reduction in rank and dismissal from the armed forces.⁶⁰

Germany

17. Members of the armed forces and certain civilian actors, mainly civilians within the chain of command, are subject to the Code of Law for Members of the Armed Forces,⁶¹ the Code of Crimes Committed by Members of the Armed Forces,⁶² and the Military Discipline Regulation.⁶³ However, these do not contain criminal offenses pertaining to violations of the law of armed conflict.⁶⁴ Criminal offenses relating to violations of the law of armed conflict are provided in the generally applicable law: the Code of Crimes against International Law (which applies extraterritorially) and, insofar as the general criminal law does not contradict this statute, the general

57 *Id.*, at para. 3.22.

58 *Id.*, at para. 1.21.

59 *R (Al-Skeini) v. Secretary of State for Defence* [2007] UKHL 26. This case was also referred to the Grand Chamber of the European Court of Human Rights, See: *Al-Skeini* decision, *supra* note 6. See also: Chapter A, para. 53.

60 However, other members of the armed forces charged in relation to this episode had charges against them dropped, or were acquitted.

61 *Soldatengesetz* or SG.

62 *Wehrstrafgesetzbuch* or WStG.

63 *Wehrdisziplinarordnung* or WDO.

64 *The German report*, *supra* note 2, at para. 18.

criminal law (which may apply extraterritorially in certain circumstances).⁶⁵

In Germany there have been investigations of members of the German armed forces for violations of the law of armed conflict, but none resulted in indictment.⁶⁶

Netherlands

18. In the Netherlands, members of the armed forces and certain categories of civilians, including those designated by the Crown as performing vital functions within the Netherlands Armed Forces, are subject to a Military Criminal Code containing criminal offenses for those subject to it,⁶⁷ as well as a Military Discipline Justice Act⁶⁸ that sets out less serious disciplinary infractions which are not criminal offenses.

The Military Criminal Code provides that members of the armed forces are subject to all criminal legislation in force in the Netherlands even while serving abroad.⁶⁹ Although offenses are prosecuted in a designated court forming part of the civilian justice system, the penalty of military detention is available to persons subject to military law, and may take the place of imprisonment (though not for sentences longer than six months).⁷⁰

The Netherlands does not appear to have ever prosecuted any members of its armed forces for conduct relating to violations of the law of armed conflict, although there have been a number of investigations. It has been noted that there may be justifications for charging less serious violations of the law of armed conflict as offenses under the Military

65 *Id.*, at paras. 16–18; 128–132.

66 *Id.*, at paras. 133–147.

67 *Wetboek van Militair Strafrecht* or MSr; *The Netherlands report*, *supra* note 2, at paras. 58–59.

68 *Wet Militair Tuchtrecht* or WMT.

69 *The Netherlands report*, *supra* note 2, at paras. 26, 57.

70 *Id.*, at para. 60.

Criminal Code, rather than as offenses specifically pertaining to violation of the law of armed conflict under the International Crimes Act.⁷¹

⁷¹ *Id.*, at the responses to questions.

B. THE MECHANISMS THAT EXAMINE AND INVESTIGATE COMPLAINTS AND CLAIMS OF VIOLATIONS OF THE LAWS OF ARMED CONFLICT ('WHO INVESTIGATES?')

19. As noted, the countries surveyed have different political, legal and institutional structures, and differences in these structures have a bearing on the way in which potential violations of the law of armed conflict are investigated and prosecuted. This section gives, for each of the countries, an overview of the different institutions and personnel involved in investigation and subsequent proceedings relating to violations of the law of armed conflict. In light of the fact that countries which have a distinct system of military justice tend to investigate and prosecute violations of the law of armed conflict through military justice mechanisms (see above paragraphs 13–15), the overview of institutions in these countries will focus on their military justice systems. The emphasis will be on institutions other than the relevant operational chain of command, although, as will be seen, commanders play an important role in some countries.

We will first present the relationship between the civilian and military justice systems in the countries surveyed, and following that we will discuss each of the countries separately.

RELATIONSHIP BETWEEN CIVILIAN AND MILITARY JUSTICE SYSTEMS

20. The US, Canada, Australia and the UK have systems of military justice that operate in parallel to the system of civilian justice and are capable of investigating and prosecuting criminal offenses without reliance on the civilian justice system (although there may be some overlap in the personnel serving in the two systems, such as, in the UK, civilian judges serving as Judge Advocates in the Court Martial). In Germany and the

Netherlands, there is no distinct military justice system. Criminal violations of the law of armed conflict are prosecuted and judged within the civilian court system (though in the Netherlands, there is still a distinct military chamber designated to hear cases in which the accused are members of the armed forces).⁷² However, there remains a disciplinary system internal to the armed forces, and, even for criminal matters that will ultimately be prosecuted in civilian courts, the military police play a major role in investigations of suspected violations.⁷³

As noted above, in some cases, conduct may constitute a specific criminal offense relating to violation of the law of armed conflict, an offense against the general criminal law, and/or a military offense under an applicable code of military discipline, giving rise to a range of avenues for investigation and, where necessary, prosecution. In those countries which have a distinct military justice system, military and civilian authorities may thus have concurrent jurisdiction, and a preliminary issue will be whether investigation and prosecution is pursued through military or civilian channels. Generally, it seems that possible violations of the law of armed conflict committed by serving members of the armed forces outside the territory of these countries are most likely to be investigated and, if necessary, prosecuted, through the military justice system. Once there has been a conviction or acquittal in a military justice proceeding, the civilian courts would usually no longer have jurisdiction to prosecute in respect of the same conduct.⁷⁴

⁷² *Id.*, at paras. 52–53.

⁷³ *The German report*, *supra* note 2, at paras. 44–46; *The Netherlands report*, *supra* note 2, at paras. 46–49.

⁷⁴ In the US, where particular conduct is subject to trial by court martial, it may not, under the double jeopardy clause of the Constitution, be tried again in a federal criminal proceeding: *Grafton v. United States*, 206 U.S. 333 (1907); *The US report*, *supra* note 1, responses to questions. In Canada, a finding of guilty or not guilty by a service tribunal bars any subsequent proceeding in a civil court for the same conduct (and vice versa): *The Canadian report*, *supra* note 2, at para. 5. In Australia, individual decisions of general courts martial are reviewable, at least on a question of law, by the Defence Force Discipline Appeal Tribunal, the Federal Court of Australia, and ultimately (with leave) the High Court of Australia. In the UK, a conviction or acquittal for an offense under the general criminal law, tried in the military system, bars subsequent prosecution for that offense in the civilian courts. However, where new and compelling evidence comes to light, there may be a retrial even following acquittal in either military or civilian proceedings, provided it is in the public interest: *The UK report*,

In the US, Memoranda of Understanding between the Department of Justice and the Department of Defense provide that, in most cases, prosecutions for federal crimes (including war crimes) by a serving member of the armed forces will be pursued through the military justice system, and investigations of crimes on military installations or by serving members of the armed forces will usually be conducted by military authorities rather than civilian authorities.⁷⁵

In Canada, there are no formal arrangements in place concerning the exercise of jurisdiction by military or civilian officials. The circumstances and location of the relevant incident, the interests of military discipline, and whether military or civilian agencies have the better resources to accomplish the task will determine whether the investigation proceeds in the military or civilian systems. Existing authority suggests that violations of the law of armed conflict by members of the Canadian Forces will be prosecuted in the military justice system.⁷⁶

In Australia the Director of Military Prosecutions (DMP) signed a Memorandum of Understanding (MoU) with all nine Australian Directors of Public Prosecutions (DsPP) (Federal, State and Territory) which states that the DMP will consult the relevant DPP where the DMP is of the view that, while the alleged conduct is a breach of service discipline, it may also constitute an offense which should be dealt with by the civilian justice system. It is understood that to date the DMP has not referred any serious service offenses to a DPP pursuant to the MoU.⁷⁷

In the UK, in cases of an alleged violation of the law of armed conflict by a member of the armed forces, the practice has been to exercise Service jurisdiction and, where applicable, lay charges to be tried by Court

supra note 2, at para. 1.09.

75 *The US report, supra* note 1, at paras. 5, 19, 94–96.

76 *The Canadian report, supra* note 2, at para. 6.

77 *The Australian report, supra* note 2, at para. 5.

Martial.⁷⁸ In one instance in which (prior to the Armed Forces Act 2006) a commander dismissed charges, barring prosecution in the military justice system, the case was referred to the Attorney–General, and proceedings were commenced in the civilian justice system.⁷⁹

UNITED STATES

Military Justice System

21. The main institutions of the military justice system are ‘military criminal investigative organizations’ (MCIOs) and military police, the Judge Advocate–General Corps of each service, courts martial and appellate courts.

(1) *MCIOs*, namely the US Army Criminal Investigation Command, the Naval Criminal Investigative Service, and the Air Force Office of Special Investigations, carry out investigations of serious offenses.⁸⁰ MCIO personnel are generally drawn from regular service ranks, with advanced educational qualifications, and often with policing experience. Although they are members of the armed forces, MCIOs have separate reporting chains, usually to the Chief of Staff and Secretary of the relevant service.⁸¹ Operational commanders may not interfere with investigations initiated by MCIOs, nor do MCIOs require outside command approval to investigate. Commanders can request that MCIOs initiate such an investigation, but MCIO commanders are not bound by such requests.⁸²

(2) *Provost marshals and military police* at US military installations may also be involved in investigations. Provost marshals are frequently members of commanders’ staffs and they, and military police investigators,

⁷⁸ *The UK report, supra* note 2, at para. 1.08.

⁷⁹ *Id.*, at para. 1.07.

⁸⁰ *The US report, supra* note 1, at para. 65.

⁸¹ *Id.*

⁸² *Id.*

are considered assets at the disposal of the installation or commander to which they are assigned.⁸³

(3) *The Judge Advocate–General (JAG)* of each service has authority and functions set out in statute, and typically reports to the relevant service Chief of Staff.⁸⁴ The Judge Advocates–General may also be subject to technical supervision by the civilian General Counsel of their service.⁸⁵ There are statutory provisions aimed at ensuring the independence of JAGs and members of the JAG Corps in their provision of advice.⁸⁶ The JAGs of each service are responsible for providing advice and legal services, including in relation to the law of armed conflict, to the armed forces, and they typically do so through field offices led by Staff Judge Advocates. Although the JAG corps is the primary source of legal advice for each service, lawyers within the Department of Defense or, more rarely, the Department of Justice, may also provide advice supplementing or even superseding that of the JAG corps.⁸⁷ Similarly, although the vast majority of interpretation of the law of armed conflict for the executive branch is done by the JAG corps, the Department of State may also have a role, and the Department of Justice is the final arbiter of the legal position taken within the executive branch.⁸⁸

83 *Id.*, at para. 91.

84 The term Chief of Staff here refers to a position (i.e., heads of the services), and not to a function.

85 *Id.*, at paras. 84, 86.

86 Provisions prohibit officers or employees of the Department of Defense from interfering with the ability of the JAG to give independent legal advice to the Secretary or the Chief of Staff of the relevant service, or from interfering with the ability of judge advocates to give independent legal advice to commanders: 10 USC § 3037(e) (Army); 10 USC § 5148(4)(e) (Navy); 10 USC § 5046(c) (Marine Corps); 10 USC § 8037(f) (Air Force). These were introduced following tensions between civilian attorneys and the JAG Corps regarding the treatment of detainees. The signing statement accompanying the statute which inserted these provisions states that they shall be interpreted by the executive branch so as to be consistent with, among other things, the statutory grant to the Secretary of Defense of authority, direction, and control over the Department of Defense, the statutory authority of the Attorney–General and the general counsel of the Department of Defense as its chief legal officer to render legal opinions that bind all civilian and military attorneys within the Department of Defense: Statement on Signing the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005 (Oct. 28, 2005), in *Weekly Compilation of Presidential Documents* 2673 (Nov. 1, 2004).

87 *The US report*, *supra* note 1, at para. 85.

88 *Id.*

The JAGs of each service are also responsible for the supervision and administration of military justice in their service.⁸⁹ Beneath them are distinct hierarchies for trial judges and defense counsel (for example, the Army JAG appoints a Chief Trial Judge, responsible for supervision and administration of the Army trial judiciary, and a Chief of Trial Defense, who supervises and controls trial and appellate defense counsel).⁹⁰

Although in the US system commanders retain a major role in courts martial processes, including referral of charges, the JAG corps of each service are also involved in both courts martial themselves and, in some cases, the ‘pre-trial investigations’ required to inquire into the truth of the charges and gather information to assist the commander’s disposition of the case. Pre-trial investigations will be carried out by investigating officers, usually of the grade of Major or higher, appointed by a court martial convening authority, and lawyers from the JAG corps may be involved in more serious cases.⁹¹

(4) *Courts martial* are presided over by Judge Advocates drawn, along with prosecutors and defense counsel, from the JAG corps. Judge Advocates are assigned exclusively to judicial duties for the period of their appointment and they fall outside the operational chain of command for that period. Military judges do not have tenure as such, and they may be reassigned to operational legal duties following a period of service as a judge.⁹² A ‘panel’ of members of the armed forces sits as the equivalent of a jury. Members of the panel are to exercise independent judgment, and there is a statutory prohibition on using panel members’ participation in a court martial in a subsequent evaluation or efficiency report.⁹³ The entire court martial process is subject to a prohibition of ‘unlawful command

89 *Id.*, at para. 84.

90 *Id.*, at para. 73.

91 *Id.*, at para. 68.

92 *Id.*, at para. 89.

93 *Id.*

influence’, namely improper use of authority that interferes (or gives the appearance of interfering) with the military justice process.⁹⁴

(5) *The Court of Criminal Appeals for the Armed Forces (CAAF)* (consisting of civilian judges appointed for 15 year terms by the President of the United States) reviews all cases in which the convicted individual was sentenced to death. Decisions of the CAAF are subject to review by the Supreme Court on a writ of certiorari.⁹⁵

Civilian Justice System

22. As noted above, the US civilian justice system will only rarely be involved in investigation and prosecution of violations of the law of armed conflict by serving members of the armed forces. However, there have been several instances of prosecution in the civilian justice system, concerning individuals who had been discharged prior to their offenses coming to light.⁹⁶ If the civilian justice system is engaged, cases concerning violations of the law of armed conflict are likely to come within federal jurisdiction and proceed through federal, rather than state, agencies and courts.⁹⁷ The main institutions of the federal civilian justice system are the Federal Bureau of Investigation (FBI),⁹⁸ the Attorney–General and US Attorneys,⁹⁹ and the federal court hierarchy.¹⁰⁰

94 *Id.*, at paras. 87–88; In a recent case, charges of failure to accurately report and investigate alleged murders committed by Marines in Iraq were dismissed on the basis that a military lawyer’s involvement in both investigation of the incident, and later in advising on charges to the convening authority, tainted the proceedings: *Id.*, at paras. 88, 112(a).

95 *Id.*, at para. 93; A final mechanism is the Presidential pardon power.

96 For example, the case of former Marine Jose Luis Nazario Jr, indicted on charges of voluntary manslaughter for the killing of four unnamed civilians in Fallujah, Iraq, in November 2004, but ultimately acquitted; and the case of former soldier Steven Green, convicted of rape, conspiracy and multiple charges of murder in respect of the rape of a young girl and the murder of the girl and her family in Mahmoudiya, Iraq, in March 2006: see *Id.*, at paras. 56–57.

97 *Id.*, at paras. 29–31.

98 *Id.*, at paras. 37, 97.

99 *Id.*, at paras. 39, 40–47.

100 *Id.*, at paras. 49–50.

CANADA

Military Justice System

23. The main institutions of the military justice system are the Canadian Forces Military Police and their special investigative branch, the Canadian Forces National Investigation Service, the Judge Advocate–General, the Director of Military Prosecutions, the Director of Defence Counsel Services, courts martial and appellate courts.

(1) *The Canadian Forces Military Police and Canadian Forces Provost Marshal* that heads them have powers set out in statute. Internal policy states that military police investigations shall not be influenced by the chain of command, and a letter from the Chief of Defence Staff states that, effective 1 April 2011, the Canadian Forces Provost Marshal is to have full command of all military police who are directly involved in policing. This letter is one result of a recent investigation by the Military Police Complaints Commission that made findings regarding the need for structural and other reforms of the military police.¹⁰¹

(2) *The Canadian Forces National Investigation Service (CFNIS)* is the branch of the Canadian Forces Military Police that deals with more serious and complex investigations. The CFNIS is under a commanding officer who reports directly to the Canadian Forces Provost Marshal, in order to protect the ability of CFNIS to conduct investigations independently of any command influence.¹⁰² Additionally, all military police are subject to a Military Police Code of Conduct and a professional standards organization, as well as the oversight of the Military Police Complaints Commission (MPCC). The MPCC is an independent civilian body with quasi-judicial status, established to provide greater public accountability by military

¹⁰¹ *The Canadian report, supra* note 2, at para. 101.

¹⁰² *Id.*, at paras. 102, 106.

police and the chain of command in relation to military police investigations. Among other things, it plays a role in maintaining military police independence. Any member of the military police who believes a member of the Canadian Forces or a senior official of the Department of National Defence has interfered with or attempted to influence a military police investigation may file a complaint with the Commission.¹⁰³ Additionally, complaints about the adequacy of military police investigations may be brought to the Professional Standards directorate of the Military Police, or the MPCC. While the CFNIS is not subject to the control of the Director of Military Prosecutions (DMP) or the Judge Advocate–General, the DMP may request, in the exercise of his duties in an individual case, that the CFNIS carry out additional investigations.¹⁰⁴

(3) *The Judge Advocate–General (JAG)* is responsive to the chain of command for the provision of legal services, but responsible to the Minister of National Defence for performance of his duties.¹⁰⁵ The JAG has duties set out in statute. These include serving as the legal adviser to the Governor–General, the Minister of National Defence, the Department of National Defence, and the Canadian Forces on matters relating to military law, and superintending the administration of the military justice systems in the Canadian Forces.¹⁰⁶ The JAG is a source of legal advice concerning the law of armed conflict for the Government of Canada as a whole, and will be consulted on matters concerning law of armed conflict, but alongside legal advisers from the Department of Justice and the Department of Foreign Affairs and International Trade. The powers exercised by the JAG as a legal advisor are not in derogation of the authority of the Minister of Justice and the Attorney–General of Canada.¹⁰⁷

103 *Id.*, at paras. 104–105.

104 *Id.*, at para. 106.

105 *Id.*, at para. 97.

106 *Id.*, at para. 90.

107 *Id.*; National Defence Act, at Article 10(2).

(4) *The Director of Military Prosecutions (DMP)* is appointed by the Minister of National Defence for a term of four years, renewable, and is a barrister or advocate of at least ten years' standing. The duties of the DMP are set out in statute and include referring all charges for trial by court martial, conducting prosecutions at court martial, and representing the Minister on criminal appeals to the Court Martial Appeal Court of Canada and the Supreme Court of Canada.¹⁰⁸ In addition to these statutory duties, the DMP provides legal advice in relation to criminal and disciplinary investigations undertaken by the Canadian Forces National Investigation Service.¹⁰⁹ The DMP acts under the general supervision of the JAG. However, this relationship, like the relationship between the Federal Director of Public Prosecutions and the Attorney-General, is subject to certain safeguards aimed to ensure the DMP's independence, both in common law and in the institutional structures established by statute. For example, while the JAG may issue to the DMP instructions and guidelines in relation to a particular prosecution or prosecutions in general, for example, the JAG must give a copy of such instructions to the Minister of National Defence, and the DMP must ensure that such instructions are made public (except where the DMP decides that such release to the public would not be in the best interests of the administration of military justice).¹¹⁰

(5) *The Director of Defence Counsel Services (DDCS)*, like the DMP, is appointed by the Minister of National Defence for a renewable term of four years, and is a barrister or advocate of at least ten years' standing. The DDCS' duties include providing, supervising and directing provision of legal services to accused persons. Legal officers assigned to Defence Counsel Services represent clients in accordance with DDCS and JAG policies and professional codes of conduct pertaining to all lawyers. Communications between accused and legal officers of Defence Counsel Services are protected by solicitor-client privilege. The DDCS is statutorily

108 *Id.*, at para. 92.

109 *Id.*

110 *Id.*, at para. 98.

independent from other Canadian Forces and Department of National Defence authorities. While the DDCS acts under the general supervision of the JAG, the JAG may only issue instructions or guidelines of a general kind, rather than in respect of particular defenses or courts martial. The DDCS must make these instructions and guidelines public.¹¹¹

(6) *Military justice procedures* include summary trials and courts martial. Summary trials are held in the unit, by unit authorities. For summary trials and minor offenses an accused is provided with an assisting officer, to assist the accused in preparation for the case, and during the trial. Offenses against the Crimes Against Humanity and War Crimes Act, Geneva Conventions Act and most general criminal law offenses triable in the military justice system must be tried at court martial.¹¹²

Courts martial are convened by a Court Martial Administrator from the Office of the Chief Military Judge. There are two types of court martial: General and Standing. General Courts Martial, convened for serious offenses punishable by imprisonment for life,¹¹³ comprise a military judge from the Office of the Chief Military Judge, and a panel of Canadian Forces members sitting as the equivalent of a jury. Standing Courts Martial comprise a military judge sitting alone.¹¹⁴ In either case the prosecutor will be from the office of the DMP, and defense counsel is provided by Defence Counsel Services or, at the accused's expense, from among civilian lawyers.¹¹⁵

(7) Courts martial decisions are subject to *appellate review*, first in the Court Martial Appeal Court (CMAC), and then, on a question of law if

111 *Id.*, at paras. 93, 99.

112 *Id.*, at para. 79; For the vast majority of service offenses, the accused may also elect to be tried at court martial rather than by summary trial.

113 Or by choice of the accused, providing the offense in question is punishable at least by imprisonment for two years.

114 *Id.*, at para. 86.

115 *Id.*, at para. 84.

a judge of the CMAC dissents or if the Supreme Court gives leave, to the Supreme Court of Canada.¹¹⁶

Civilian Justice System

24. As in the US, the civilian justice system in Canada will rarely be involved in the investigation and prosecution of violations of the law of armed conflict by serving members of the armed forces. If the civilian justice system is engaged, the main institutions are the Royal Canadian Mounted Police,¹¹⁷ the Attorney–General,¹¹⁸ the Director of Public Prosecutions,¹¹⁹ and the courts.¹²⁰

AUSTRALIA

Military Justice System

25. The main institutions of the military justice system are the Australian Defence Force Investigative Service (ADFIS), the Judge Advocate–General, the Director of Military Prosecutions, courts martial and appellate courts, and the Australian Defence Force Legal Services. The Inspector–General of the Australian Defence Force also plays a role in military justice.

(1) *ADFIS* is responsible to the Chief of the Defence Force, and headed by a Provost Marshal, appointed by the Chief of the Defence Force for a fixed term. ADFIS operates outside the immediate chain of command. In relation to the conduct of its investigations, ADFIS acts independently and not under the command of unit or local military commanders, although they may be advised by the Legal Officer posted to ADFIS to amend an

116 *Id.*, at para. 112.

117 *Id.*, at paras. 1, 38–39, 49–52.

118 *Id.*, at paras. 40, 44–45, 55.

119 *Id.*, at paras. 46, 48.

120 *Id.*, at para. 41.

investigation report in which more evidence is required, and they may also be requested by the Director of Military Prosecutions to seek further evidence.¹²¹

(2) *The Judge Advocate-General (JAG)* is appointed by the Governor-General for a fixed term of office. Although holding the rank of two stars the JAG stands outside the military chain of command, and reports to the Minister of Defence. The holder of the office must be a judge of the Federal Court or a State Supreme Court. The JAG may be a Defence member, and the current (2011) and previous JAGs have been two-star General ranking officers of the Reserve Forces.¹²² The functions and powers of the JAG are set out in statute and include the making of procedural rules for service tribunals, participating in the appointment of Judge Advocates, Defence Force Magistrates, Presidents and members of courts martial, and reporting on the operation of various laws relating to discipline in the ADF. The JAG does not have command or administrative responsibility for legal officers. The JAG has general oversight of the operation of the military justice system but does not review decisions of courts martial or Defence Force magistrates (other than in situations in which the Chief of the Defence Force or a service chief undertakes a further review of a service tribunal proceeding and requires a legal report¹²³). The JAG does not have any relationship with investigators or any role in prosecution. Nor does the JAG function as a legal adviser to either the ADF or the Government, as

that would be inconsistent with judicial office. This function is performed by the Director-General of ADF Legal Services.¹²⁴

(3) *The Director of Military Prosecutions (DMP)* is appointed by the Minister of Defence for a fixed term, at the rank of Brigadier-General.

121 *The Australian report, supra* note 2, at para. 51.

122 *Id.*, at para. 60.

123 *Id.*

124 *Id.*, at para. 62.

The DMP stands outside the military chain of command, and reports to the Minister of Defence. The DMP enjoys statutory independence and it is a criminal offense to interfere with the DMP in relation to a decision to prosecute. The DMP is a statutory office and its functions include carrying on prosecutions for service offenses in proceedings before a court martial or Defence Force magistrate, and representing the service chiefs in proceedings before the Defence Force Discipline Appeal Tribunal.¹²⁵

(4) *Trials of 'service offenses' take place before a 'service tribunal'*. There are three kinds of 'service tribunal': a summary authority, a Defence Force magistrate, and a court martial. Summary authorities (a class of officers within the chain of command) may only deal with less serious offenses.¹²⁶ Defence Force magistrates and courts martial deal with the more serious offenses.

(5) There is an automatic review of all convictions by service tribunals, and penalties imposed must be approved by a reviewing authority within the chain of command. Convictions in courts martial or before a Defence Force magistrate may also be appealed to the Defence Force Discipline Appeal Tribunal on a question of law (or, with leave, a question of fact). The Tribunal members are judges of the Federal Court, and the Tribunal President is the current JAG. Questions of law arising in Tribunal proceedings may be referred, and appeals from the Tribunal on questions of law may be made, to the Federal Court of Australia.

(6) *Military legal services* are organized under the Director-General of ADF Legal Services (DGADFLS). The DGADFLS acts as the principal legal adviser in the areas of military administrative law, military operations law (including law of armed conflict) and military discipline

¹²⁵ *Id.*, at para. 61.

¹²⁶ For example, they cannot try any criminal offense for which a person is liable to more than two years imprisonment.

law. Under the DGADFLS are, *inter alia*, the Directorate of Operations and International Law (the advisory branch) and the Directorate of Military Justice Reform.¹²⁷

(7) Finally it is important to note *the office of the Inspector-General of the ADF (IGADF)*. IGADF is intended to provide the Chief of the Defence Force with a mechanism for internal audit and review of the military justice system, independent of the ordinary chain of command, and with an avenue by which failures and flaws in the military justice system can be exposed and examined so that causes of injustice (systemic or otherwise) can be remedied. The duties of the IGADF include inquiring into matters concerning the military justice system; conducting performance reviews of the system, including internal audits, as the IGADF considers appropriate; advising on matters concerning the military justice system, including making recommendations for improvements; and promoting military justice values across the ADF. The IGADF may initiate inquiries on his own motion, or be requested to do so by the Chief of the Defence Force, a service chief or any other individual. The IGADF has adopted a practice of conducting random audits of military justice practices, procedures, processes, training and competencies in ADF units and, while it investigates such matters as abuse of authority and lack of procedural fairness, the IGADF may also look into instances of cover-up or failure to act.¹²⁸

Civilian Justice System

26. As in the other countries with military justice systems, the civilian justice system in Australia will rarely be involved in the investigation and prosecution of violations of the law of armed conflict by serving members of the armed forces. If the civilian justice system was engaged, the main

127 *Id.*, at para. 62.

128 *Id.*, at para. 66.

institutions would be the Australian Federal Police,¹²⁹ the Director of Public Prosecutions,¹³⁰ and the courts.¹³¹

UNITED KINGDOM

Military Justice System

27. The main institutions of the military justice system are the service police (in practice, usually the Royal Military Police), the Director of Service Prosecutions, the Judge Advocate–General, Courts Martial and appellate courts, and the legal branches of each service.

(1) Each of the three services has a *military police force* (the Royal Military Police, Royal Air Force Police, and Royal Navy Police). Most allegations of violations of the law of armed conflict to date have involved Army soldiers, so the Royal Military Police have played the most significant role in these investigations.¹³² The governance structure for each force is similar. Each Service police force is headed by a Provost Marshal outside the operational chain of command; the Army Provost Marshal is responsible to the Army Board of the Defence Council (comprising senior officials from the Ministry of Defence and Government ministers). Service police are subject to discipline by the relevant Provost Marshal and not the operational chain of command, and are required by the Queen’s Regulations to investigate independently of the chain of command.¹³³ Since 2011, the Provost Marshals are appointed by the Queen rather than the Minister of Defence, and will have a duty to seek to ensure that all investigations carried out by the force are free from improper interference, namely an attempt by a person who is

129 *Id.*, at para. 35.

130 *Id.*, at para. 36.

131 *Id.*

132 *The UK report, supra* note 2, at para. 3.05.

133 *Id.*, at paras. 3.46–3.47.

not a service policeman to direct an investigation that is being carried out.¹³⁴ The Service police are subject to inspection by Her Majesty's Inspectorate of Constabulary (HMIC) to ensure standards, and since 2011, the HMIC will report to the Secretary of State on the independence and effectiveness of investigations carried out by the service police.¹³⁵

Each of the Services has a legal branch, the head of which is part of the chain of command, but subject to an 'invisible wall' dividing their role as an officer in the chain of command from their professional obligations as a lawyer.¹³⁶ The Service legal branches are the primary source of advice to the armed forces on law of armed conflict. Generally, the Service legal branches will not be a primary source of advice to the government; the Government has civilian lawyers in the Ministry of Defence and Foreign and Commonwealth Office to provide it (via the Attorney-General) with advice.¹³⁷

(2) *The Director of Service Prosecutions (DSP)*, who may be a civilian, heads the Service Prosecution Authority (SPA). He is appointed by the Queen,¹³⁸ and is responsible for the decision whether to lay charges in a particular case. The staff of the SPA are members of one of the Service legal branches but, in their prosecution duties, are responsible to the DSP.¹³⁹ The SPA, like civilian prosecutorial authorities, is subject to inspection by the Queen's Crown Prosecution Inspectorate. The Attorney-General has, through custom and practice, taken on a supervisory role in relation to the military legal system, and this appears likely to continue to apply in relation to the new office of DSP (pursuant to the Armed Forces Bill 2011). Additionally, the Attorney-General is answerable to Parliament for the

134 *Id.*, at paras. 3.20, 3.44.

135 *Id.*

136 *Id.*, at para. 3.29.

137 *Id.*, at paras. 2.06, 3.31.

138 *Id.*, at paras. 3.19, 3.32.

139 *Id.*, at para. 3.47.

SPA, both in relation to its work generally and in relation to particular cases,¹⁴⁰ and must also give his consent for the prosecution of any person, whether a member of the armed forces or a civilian, for offenses under the International Criminal Court Act.¹⁴¹ The Attorney-General has stepped in to activate civilian criminal proceedings in one case in which a commanding officer dismissed charges against a serviceman, which at the time precluded the exercise of military jurisdiction, but in the usual course of events the Attorney-General will not be involved in military prosecutions.¹⁴²

(3) *The Judge Advocate-General (JAG)* is responsible for the Judge Advocates who act as judges in proceedings before Courts Martial. All are civilians, and are not part of the Service legal branches. The advice of a Judge Advocate is confined to matters appertaining to trial by the Court Martial.¹⁴³

(4) *The Court Martial* comprises a Judge Advocate as the judicial officer, together with a panel of Service officers and warrant officers (between three and seven, depending on the case) sitting as the equivalent of a jury.¹⁴⁴ Decisions of the Court Martial may be appealed to the Court Martial Appeal Court.¹⁴⁵

(5) There is also a process for *summary hearings before commanding officers* for less serious offenses, and where the individual concerned holds a middle to junior rank.¹⁴⁶ The accused is not legally represented. However, the accused may elect for the trial to be held before a Court Martial rather

140 *Id.*, at paras. 3.34, 3.36.

141 *Id.*, at para. 3.19.

142 *Id.*, at paras. 2.05, 1.07.

143 *Id.*, at para. 3.33.

144 *Id.*, at para. 3.17.

145 *Id.*, at para. 3.50.

146 *Id.*, at para. 3.18.

than in the summary forum. Decisions reached in summary proceedings may be appealed to the Summary Appeal Court.¹⁴⁷

Civilian Justice System

28. In the event that the civilian justice system is engaged in suspected violations of the laws of armed conflict, the main institutions are the relevant civilian police force,¹⁴⁸ the Director of Public Prosecutions¹⁴⁹ and the courts.¹⁵⁰

GERMANY

Civilian Justice System

29. The civilian justice system is the only system for criminal prosecution of violations of the laws of armed conflict in Germany, but, at least insofar as offenses are committed outside Germany, the military police are likely to play the main role in investigation.¹⁵¹ Serious disciplinary (rather than criminal) violations are adjudged in tribunals within the Ministry of Defence.

Violations of the law of armed conflict will be handled by federal authorities, while other criminal matters are generally handled by the states (*Länder*).¹⁵² The main institutions involved in investigation and prosecution of violations of the law of armed conflict are the military police; in some cases, the civilian federal police;¹⁵³ the Federal Prosecutor–

147 *Id.*, at para. 3.50.

148 *Id.*, at paras. 2.03, 3.08, 2.10.

149 *Id.*, at paras. 2.04, 2.12.

150 *Id.*, at paras. 2.01–2.02.

151 *The German report*, *supra* note 2, at paras. 44–46.

152 *Id.*, at paras. 37–40.

153 *Bundeskriminalamt* or BKA.

General;¹⁵⁴ and the courts. For other criminal offenses, institutions of the *Länder* will play a role.

(1) *The military police* are a special branch of the German military, with independence and their own chain of command. Members of the military police are specially trained for policing work.¹⁵⁵

(2) *The civilian federal police* may be requested to assist the Federal Prosecutor–General, for example, in the investigation of a violation of the law of armed conflict under the Code of Crimes against International Law. If requested to do so, they must assist, although they will often face difficulties in operating overseas.¹⁵⁶

(3) *The Federal Prosecutor–General* reports to the federal Minister for Justice. Although the Minister can issue orders to the Prosecutor–General, the Minister must comply with all laws and regulations. Prosecutorial independence is secured by a principle of mandatory prosecution, except in the case of exemptions set out in law.¹⁵⁷

(4) As regards other criminal matters, there is an *Attorney–General* for each of the 24 higher regional court districts in Germany. The Attorneys–General are organs of the state. They each have an Office of the Prosecutor supporting them. The allocation of jurisdiction among these Attorneys–General is complex but they have agreed between them that the Office of the Prosecutor in Potsdam will refer matters involving crimes committed abroad by or against the German armed forces, to either the Office of the Prosecutor in the district of

154 *Generalbundesanwalt* or GBA.

155 *The German report*, *supra* note 2, at para. 46.

156 *Id.*, at para. 44.

157 *Id.*, at paras. 42–43; 61; 72–73.

the last post of the accused in Germany, or to the Federal Prosecutor-General.¹⁵⁸

The higher regional courts¹⁵⁹ have jurisdiction in relation to offenses under the Code of Crimes against International Law.¹⁶⁰

(5) Serious disciplinary (not criminal) offenses may be heard before a *Truppendienstgericht*. This is a tribunal established within the Ministry of Defence, involving a civilian lawyer as a presiding judge and soldiers who were chosen by their respective military commanders and the administration of the courts to serve in proceedings as associate judges. In these proceedings, military lawyers serve as indicting authorities.¹⁶¹

In Germany, civilian lawyers within the Ministry of Defence provide advice to the Ministry and to the military on the law of armed conflict and other matters. Other departments are advised by their own lawyers. In relation to provision of advice on law of armed conflict to the government, lawyers from the Foreign Office play an important role, alongside lawyers from the Ministry of Defence, and any legal position developed in the Ministry of Defence must be cleared with the Foreign Office.¹⁶²

NETHERLANDS

Civilian Justice System

30. As in Germany, the civilian justice system is the only system for

¹⁵⁸ *Id.*, at para. 14.

¹⁵⁹ *Oberlandsgerichte*.

¹⁶⁰ *The German report*, *supra* note 2, at paras. 36, 84.

¹⁶¹ *Id.*, at para. 53; Appendix V.

¹⁶² *Id.*, at para. 52.

criminal prosecution of violations of the laws of armed conflict, but, at least insofar as offenses are committed outside the Netherlands, the military police are likely to play the main role in investigation.

The main institutions involved in investigation and prosecution of violations of the law of armed conflict are the National Police Corps¹⁶³ and the National Investigation Service,¹⁶⁴ the Royal Military Constabulary,¹⁶⁵ the National Prosecutorial Authority,¹⁶⁶ the District Prosecutor of Arnhem¹⁶⁷ and the District Court in The Hague and Arnhem, and the Military Legal Service of the Armed Forces.

(1) *The National Police Corps* falls under the Ministry of Security and Justice, and under the general instruction of the Public Prosecution Service in matters relating to the investigation of criminal offenses (specifically, under the direction of the branch of the Public Prosecution Service dealing with particular offenses). The National Investigation Service is a branch of the National Police Corps charged with investigating offenses including those against the International Crimes Act. It includes a special team of investigators and advisers charged with investigating suspected offenses of an international character, including offenses under the International Crimes Act. The National Investigation Service is under the direction of the National Prosecutorial Authority.¹⁶⁸

(2) *The Royal Military Constabulary* is a branch of the armed forces charged with the investigation of all offenses under military law. In all matters relating to the investigation of possible criminal offenses they act under the instructions and responsibility of the Chief Prosecutor in the

163 *Korps Landelijke Politiediensten.*

164 *Dienst Nationale Recherche.*

165 *Koninklijke Marechaussee* or KMar.

166 *Landelijk Parket.*

167 *Hoofddofficier van Justitie.*

168 *The Netherlands report, supra* note 2, at paras. 2, 33.

District of Arnhem (see below), rather than the military authorities or the Department of Defence.¹⁶⁹ However, where the Royal Military Constabulary are carrying out investigations in the context of a military mission, there can be a certain degree of dependence on the operational commander for communications, logistical support and force protection, as well as military expertise in areas such as mine and explosive clearance.¹⁷⁰

(3) *The National Prosecutorial Authority* is a part of the Public Prosecution Service,¹⁷¹ the organ charged with investigation and prosecution of all offenses under Dutch criminal law.¹⁷² The Public Prosecution Service falls within the Ministry of Security and Justice. It is organized along territorial and functional lines. Within the Public Prosecution Service, the National Prosecutorial Authority is responsible for the investigation and prosecution of certain offenses including organized national and transboundary crime, terrorism, violations of the law of armed conflict and in particular offenses against the International Crimes Act, which implements the Rome Statute.¹⁷³

(4) *The District Prosecutor of the Court in Arnhem* deals with offenses committed by members of the armed forces (including offenses under the International Crimes Act), and the investigation and prosecution of criminal offenses is allocated to the Military Affairs Section of the District Office in Arnhem.¹⁷⁴ The District Prosecutors are under the supervision of the College of Procurers—General discussed in further detail below. The Military Affairs Section consists of civilian prosecutors and supporting staff, a liaison officer from the Royal Military Constabulary, and two liaison officers from the military legal service of the armed forces.¹⁷⁵ The

169 *Id.*, at para. 63.

170 *Id.*, at para. 64.

171 *Openbaar Ministerie* or OM.

172 *The Netherlands report*, *supra* note 2, at para. 1.

173 *Id.*

174 *Id.*, at paras. 3, 52–54.

175 *Id.*, at para. 53.

Military Affairs Section also draws on the advisory services of an Expertise Centre for Military Criminal Law.¹⁷⁶ In practice, the investigation of a possible violation of the law of armed conflict by a serving member of the armed forces would be conducted with close cooperation between the District Prosecutor in Arnhem and the National Prosecutorial Authority.¹⁷⁷

On appeal, military criminal matters are handled by the Advocate-General¹⁷⁸ for the relevant Appeals District, effectively the prosecutor at the appellate level. The Advocate-General and his staff are all civilians.¹⁷⁹

There is no equivalent in the Netherlands to the Attorney-General in other systems, namely an office with ultimate responsibility for both provision of legal advice, and oversight of law enforcement and prosecution. Prosecutorial oversight rests with the College of Procurers-General,¹⁸⁰ a body of three to five senior prosecutorial magistrates. The College establishes general guidelines for prosecutorial policy and can issue instructions and general directives to Chief Prosecutors of each District, which are published in the Official Gazette, although prosecutors have a large degree of autonomy in day to day decision-making.¹⁸¹ The College does have a statutory power to intervene in matters of national importance and ensure that a suspected violation is investigated and brought to trial, if the College takes the view that the prosecutor responsible for investigating the violation in question was not sufficiently diligent in pursuing the investigation.¹⁸² The portfolio for military affairs is handled by the Chairman of the College.¹⁸³

176 *Id.*, at para. 54.

177 *Id.*, at paras. 3, 52.

178 *Advocaat-general*.

179 *The Netherlands report, supra* note 2, at para. 54.

180 *College van procureurs generaal*.

181 *The Netherlands report, supra* note 2, at paras. 34, 76.

182 *Id.*, at para. 34.

183 *Id.*, at para. 55.

Although the armed forces have no direct involvement in investigation and prosecution, there are various means by which concerns or issues specific to the armed forces may be raised with prosecutors. Military authorities who believe that the interests of the armed forces have not received sufficient attention in the context of a criminal investigation may offer advice to the Public Prosecution Service. The Ministry of Defence may also provide advice. In practice there are various forms of consultation between the Ministry of Defence and the Public Prosecution Service, enabling the former to advise the Public Prosecution Service on matters relating to the armed forces, and specific operations, and discussion of matters relating to prosecutorial policy. It is for the Public Prosecution Service to decide what to do with any advice received.¹⁸⁴

(5) There are 19 District Courts competent in the first instance to deal with all criminal matters involving felony offenses (which would include breaches of the law of armed conflict).¹⁸⁵ The District Court in The Hague is designated as the court of first instance for the trial of persons under the International Crimes Act.¹⁸⁶ The District Court in Arnhem has a Military Chamber with jurisdiction over all offenses committed by members of the armed forces, including offenses as laid down in the International Crimes Act.¹⁸⁷ Two of the three judges, including the President, are civilians, and the remaining judge is drawn from the legal service of the branch of the armed forces of which the accused is a member.¹⁸⁸ The tenure of the military judge is for periods of

184 *Id.*, at para. 56.

185 *Id.*, at para. 32.

186 *Id.*, at para. 2.

187 *Id.*, at para. 52; There are limited exceptions to this: when an offense is committed in an area subject to the Commander of the Caribbean Area, in which case the matter will be within the jurisdiction of a District Court in the Antilles; and where an offense is committed by more than one person, and one or more of the other persons involved is a civilian, in which case the matter will proceed before a court other than the Military Chamber.

188 *Id.*, at para. 53.

four years, and may be extended.¹⁸⁹ For minor matters conducted before a single judge, the judge is a civilian.¹⁹⁰

Appeals from the Military Chamber are to the Military Chamber of the Arnhem Court of Appeals, also consisting of two civilian judges and one military judge. Further appeals, on points of law only, may be made to the (civilian) Supreme Court.¹⁹¹

Courts of Appeal also have jurisdiction in respect of complaints (by a person or organization that has a direct interest in the matter) that the Public Prosecution Service has erred in not bringing a particular matter to trial. When deciding on such a complaint, the Court of Appeal will review the evidence and hear both the plaintiff and the Public Prosecution Service to determine whether there are grounds for an order to open or continue investigation. The Courts of Appeal may order further investigation in such a case, or order that a matter be brought to trial.¹⁹²

(6) *The Military Legal Service of the Armed Forces*¹⁹³ comprises some 130 lawyers, all of whom have received postgraduate training in relevant areas of law and completed a specialized programme in military law.¹⁹⁴ The service provides advice to operational commanders in all relevant areas of law, including the law of armed conflict. Military legal advisers are responsible to operational commanders and functionally directed by the military legal adviser at the next highest level in the chain of command.¹⁹⁵ They have no role in investigation or prosecution of suspected criminal

189 *Id.*, at the responses to questions.

190 *Id.*, at para. 53.

191 *Id.*

192 *Id.*, at paras. 30, 36, 68.

193 *Militair Juridische Dienst Krijgsmacht* or MJDK.

194 *The Netherlands report*, *supra* note 2, at para. 98.

195 *Id.*, at para. 62.

offenses.¹⁹⁶ Members of the Military Legal Service may, however, sit as judges in the Military Chamber in the District Court of Arnhem.¹⁹⁷

Advice to the government on matters relating to the law of armed conflict may come from various agencies including the Directorate of Legal Affairs of the Ministry of Defence (which is largely a civilian body but has among its staff a varying number of military lawyers who are part of the Military Legal Service, including the Head of the Military Legal Service who holds the rank of Brigadier-General, and is the third person in the hierarchy of the Directorate); the Ministry of Foreign Affairs; the Netherlands Red Cross, universities and research institutes.¹⁹⁸

196 *Id.*, at para. 61; The two military liaison officers assigned to the District Prosecutor in Arnhem serve on detachment, and do not form part of the Public Prosecution Service.

197 *Id.*, at para. 3.

198 *Id.*, at the responses to questions.

C. PROCESSES OF INVESTIGATION AND SUBSEQUENT PROCEEDINGS (‘WHEN AND HOW TO INVESTIGATE?’)

31. This section sets out the law and practice in each of the countries surveyed regarding when and how to investigate possible violations of the law of armed conflict by members of the armed forces. For each country, there is a discussion of ‘when to investigate?’ (the circumstances calling for reporting and initiation of investigations of different kinds), and ‘how to investigate?’ (who undertakes the different kinds of investigation, and what these investigations involve). The discussion of ‘how to investigate?’ is divided into routine processes, which are applied in every instance, and *ad hoc* mechanisms, such as public inquiries, which are initiated occasionally, and to subsequent proceedings.

UNITED STATES

When to Report and Investigate: Routine Processes

32. One of the central reporting regimes relates to ‘reportable incidents’, namely a ‘possible, suspected or alleged violation of the law of war, for which there is credible information, or conduct during military operations other than war that would constitute a violation of the law of war if it occurred during an armed conflict’.¹⁹⁹ All military and US civilian employees, contractors and subcontractors assigned to or accompanying the armed forces, are required to report any ‘reportable incident’ through the chain of command. Reports may also be made through other channels, including the military police, a judge advocate, or an inspector–general, which must all forward any report received through their chain of command.²⁰⁰ Higher authorities have reporting responsibilities to a range of military and civilian officials.²⁰¹ The US Army has additional reporting requirements

199 *The US report, supra* note 1, at para. 106.

200 *Id.*, at para. 103.

201 *Id.*, at para. 100.

for ‘war crimes’ such as mistreatment of enemy prisoners of war, detainees, displaced persons, retained persons or civilian internees; violations of the Geneva Conventions; and atrocities. War crimes are categorized as ‘category 1 serious incidents’ and require reports, with copies for commanders and legal advisors at each level, to be submitted to Headquarters, Department of the Army.²⁰²

The US Army Special Assistant for Law of War Matters advises military lawyers that the reporting process is designed to be over-inclusive and that, when in doubt, they should report.²⁰³

Reportable incidents give rise to obligations to investigate (either through administrative or criminal systems). There are also obligations to investigate arising in circumstances that may not reach the threshold of a reportable incident; for example, where there has been a suspected offense against the UCMJ. Taken together, the different regimes appear to impose the obligations set out below. Importantly, these obligations need not be fulfilled sequentially – if the circumstances are such that US personnel may be involved in or responsible for a reportable incident, the commander is required to inform the relevant military criminal investigation organisation (MCIO) and commence a formal command investigation immediately; he need not do a ‘preliminary inquiry’ first.

1. If a commander receives information:
 - a. of a suspected offense against the UCMJ committed by command personnel; and/or
 - b. information about a ‘reportable incident’ that is alleged to have been committed by command personnel (including civilians,

²⁰² *Id.*, at para. 102.

²⁰³ *Id.*, at para. 101.

contractors and subcontractors assigned to or accompanying the force);

The commander is required to conduct a *preliminary inquiry*.²⁰⁴ In the case of information about a reportable incident, the preliminary inquiry should determine whether US personnel may be involved in or responsible for a reportable incident.²⁰⁵

2. If US personnel (i.e., command personnel, civilians, contractors or subcontractors) may be involved in or responsible for a reportable incident the commander must both initiate a formal investigation by command investigation in accordance with Service regulations, and at the same time notify the relevant MCIO (which will then determine whether to conduct a criminal investigation).²⁰⁶ If not already reported, the incident should be reported as required (see above).²⁰⁷
3. If it does not appear that the conduct is sufficiently serious to qualify as a reportable incident, inquiries might still proceed through the MCIO or the military police if they are particularly complex (the level of complexity or technical sophistication required for the investigation determining which of the two is the most appropriate),²⁰⁸ otherwise, they may be pursued through administrative investigation, and lead to administrative penalties or non-judicial punishment.

In addition to these general directives and instructions, there may be stricter theatre-specific orders on the initiation of particular kinds of investigations. One example would be the orders reported to have been given by the Deputy Commander of US forces in Iraq in 2006, requiring

204 *Id.*, at paras. 64, 105.

205 *Id.*, at para. 105.

206 *Id.*

207 *Id.*, at para. 106.

208 *Id.*, at para. 129.

investigations of any use of force against Iraqis that resulted in death, injury, or property damage greater than 10,000 US Dollar.²⁰⁹

A Department of Defense directive states that it is Department policy that on-scene commanders ensure that measures are taken to preserve evidence of reportable incidents pending transfer to appropriate authorities. This presumably applies, at the latest, from the point at which a commander has determined that US personnel have been involved in a reportable incident (which, to recall, includes a ‘possible, suspected or alleged violation of the law of war, for which there is credible information’). There are no publicly available guidelines giving further detail on how preservation of evidence should be achieved in a conflict context. Recent reviews of military operations have emphasized the need for better practices in this regard (although this has been motivated largely by a desire to facilitate prosecution of insurgents, rather than investigation of US personnel).²¹⁰

How to Investigate: Routine Processes

33. It follows from the foregoing that a number of different types of investigation may be relevant:

1. Operational reviews are conducted after nearly every operation.
2. Administrative investigations are generally preliminary investigations that gather information and can result in either administrative consequences or criminal investigations.
 - a. A ‘preliminary inquiry’ required under the DoD Implementation of Law of War Program to determine whether US personnel may be involved in or responsible for

²⁰⁹ *Id.*, at para. 108.

²¹⁰ *Id.*, at paras. 136–137.

a reportable incident, and/or required under the UCMJ;

- b. A 'formal investigation by command investigation', to be undertaken if US personnel may be involved in or responsible for a reportable incident (but which will only continue insofar as it does not hinder any investigation commenced by an MCIO);
3. Criminal investigations are MCIO investigations.
4. 'Pre-trial investigations' under the Rules of Court Martial precede all charges referred to a general court martial, including war crimes.

We will now discuss these types of investigations in order.

1. Operational Reviews

34. Routine operational reviews, called 'operational debriefings', 'hot washes', or 'after action reviews' (AARs), are conducted after nearly every military operation to capture tactical, technical and operational lessons. AARs are distinct from the criminal and administrative investigations considered here, although statements made or information collected during AARs may trigger the reporting of an incident or may form the basis for initiating either criminal or administrative investigations. Statements or information given in the course of AARs are not protected by any form of immunity (as may be the case in some safety investigations).²¹¹

²¹¹ *Id.*, at para. 125.

2. Administrative Investigations

35. Administrative investigations are common for minor or technical breaches, for example, incidents involving losses or destruction of property.²¹² They are often used to gather information for preliminary decisions on criminal charging or administrative corrective measures.²¹³ All military leaders are empowered to prescribe retraining or corrective processes related to such deficiencies in conduct. Commanders may also initiate more formal administrative procedures resulting in reassignment, changes in duties, or reduction in rank of lower enlisted persons. Administrative corrective measures promote good order and discipline and include ‘counseling, admonitions, reprimands, exhortations, disapprovals, criticisms, censures, reproofs, rebukes, extra military instruction, and administrative withholding of privileges’.²¹⁴ Often, administrative measures, such as suspension from eligibility for promotion, are imposed before criminal proceedings are resolved.²¹⁵ Accordingly, concurrent administrative and criminal investigations into the same incident or activity are not precluded but criminal investigations by MCIOs enjoy primacy over administrative investigations when conflicts arise.²¹⁶ Preliminary inquiries and formal command investigation are sub-categories of administrative investigations which we will now discuss.

2.A. ‘Preliminary Inquiry’

36. There is no definitive guidance regarding the conduct of a ‘preliminary inquiry’ to determine whether US personnel may be involved in or responsible for a reportable incident. It is typically very informal and

²¹² *Id.*, at paras. 62, 70.

²¹³ *Id.*, at paras. 70, 79.

²¹⁴ *Id.*, at para. 79.

²¹⁵ *Id.*, at para. 63; Though administrative penalties are more often imposed only following the conclusion of criminal proceedings: *Id.*, at para. 135.

²¹⁶ *Id.*, at paras. 104–105, 107, 134.

conducted by the commander personally or by a member of the command.²¹⁷ The form taken by such an inquiry is likely to depend on the personnel and assets available to undertake it. A preliminary inquiry will usually be undertaken by a single, low-ranking officer, working alone, and the scope of the inquiry will usually be limited to the unit members and the unit's area of operations. The inquiry would not be expected to detract significantly from the investigating officer's other duties, indicating that, if a significant time commitment or expertise were required, the inquiry would probably be closed with a recommendation for further investigation.²¹⁸

The current Special Assistant to the Judge Advocate-General for Law of War Matters has stated that a preliminary inquiry may take the form of the preliminary inquiry required for a suspected offense against the UCMJ, or an informal administrative investigation.²¹⁹ The Manual for Courts-Martial (MCM) provides that the preliminary inquiry for a suspected offense against the UCMJ should gather all reasonably available evidence bearing on guilt or innocence and any evidence relating to aggravation, extenuation, or mitigation. While preliminary inquiries are usually carried out by the commander or command personnel, the MCM indicates that, in serious or complex cases, the commander should consider whether to seek the assistance of law enforcement personnel. The effect of this is that preliminary inquiries by commanders alone will be reserved for the simplest violations.²²⁰

An informal administrative investigation may also be used to gather additional information about an alleged incident. Pursuant to regulations applicable to the Army,²²¹ an appointing authority (usually a battalion

217 *Id.*, at para. 64.

218 *Id.*, at paras. 126–128.

219 See: Dick Jackson, *Reporting and Investigation of Possible, Suspected, or Alleged Violations of the Law of War*, 11(6) THE ARMY LAWYER 95, 99 (2010) [hereinafter: *Jackson, Reporting and Investigation*]; *The US report*, *supra* note 1, at para. 127.

220 *The US report*, *supra* note 1, at para. 64.

221 Army Regulation 15–6: Procedures for Investigating Officers and Boards of Officers (Oct. 2, 2006).

commander or higher) will appoint an officer uninvolved in the incident to conduct the inquiry, sort out facts, and make a recommendation to the commander regarding steps to be taken. The procedures would allow for expedited evidence gathering, and consideration of sworn statements and routine reports.²²²

If it is clear that a matter requires criminal investigation, because of its gravity or complexity, the preliminary inquiries may be simple and quick.²²³ As mentioned above, if it is apparent that US personnel may be involved in or responsible for a reportable incident, commanders are obliged to notify the MCIO and initiate a formal investigation.

2.B. 'Formal Investigation by Command Investigation'

37. The procedures for a formal investigation are based in service-specific regulations. Formal investigations are initiated by a commander in accordance with these regulations and at the same time the commander notifies the MCIO who is responsible for subsequent criminal incident reporting.²²⁴ One example of a formal investigation is the procedure for 'Formal Boards of Officers' in the Army. The Board of Officers procedure is intended to ascertain facts and make recommendations. Individuals subject to a Board of Officers are entitled to be represented by counsel, and the Board itself may have a legal adviser as a non-voting member to advise it in relation to evidentiary, legal or procedural matters.²²⁵

These formal investigations may occur in parallel with MCIO investigations, but (as detailed below), MCIO investigations take precedence.²²⁶

222 See: *Jackson, Reporting and Investigation*, *supra* note 219; *The US report*, *supra* note 1, at para. 127.

223 *The US report*, *supra* note 1, at para. 132.

224 *Id.*, at para. 105.

225 *Id.*

226 *Id.*

Self-incriminating statements made to administrative investigators, or evidence traceable to such statements, may not be introduced in subsequent court martial proceedings. Notwithstanding this doctrine, regulations instruct administrative investigators to issue warnings regarding the right not to answer questions where there is a suspicion of a criminal offense.²²⁷

3. Criminal Investigation – MCIO Investigation

38. Once it has received a report of a ‘reportable incident’, the MCIO has authority to determine whether to investigate. Although there are extensive arrangements to protect the independence of the MCIOs in determining whether or not to investigate, there do not appear to be any precise criteria on which decisions to open an investigation are made (or at least, none that are publicly available).²²⁸

The MCIO’s decision to investigate a possible ‘reportable incident’, may be a result of a notification or request from a commander, the request of the Department of Defense Inspector–General, or on its own initiative. Investigations by the MCIO have primacy over any other investigations conducted by commanders, safety investigators, and other organizational entities, and such investigations shall not interfere or otherwise hinder criminal investigations. If a commander objects to the initiation of an MCIO investigation, he may report this up the chain of command to the Secretary of the relevant service. Only the Secretary (and, for investigations requested by the Inspector–General, only the Inspector–General) may order delay, suspension or termination of an investigation.²²⁹

Once investigations have commenced, MCIOs are required under policies and regulations to coordinate with theater level commander and

²²⁷ *Id.*, at para. 134.

²²⁸ *Id.*, at paras. 65, 130.

²²⁹ *Id.*, at para. 65.

staff, the theater Provost Marshal, and the relevant US Embassy.²³⁰

Upon the conclusion of a MCIO investigation, the MCIO provides the results of the investigation to commanders, and commanders are then responsible for determining whether to initiate administrative actions, or military discipline procedures through court martial. Commanders retain significant discretion in decisions about charging.²³¹ Although in practice they will usually consult a staff judge advocate, they are only required to do so if a charge is referred for trial by a general court martial.²³²

4. Pre-Trial Investigation

39. If charges are pursued through a court martial (whether following criminal investigation by the MCIO, or administrative or command investigation), it must be preceded by a pre-trial investigation. This is governed by the Rules for Court Martial (RCM). The ‘pre-trial investigation’ aims to inquire into the truth of the charges and gather information to assist the commander’s disposition of the case. These investigations resemble trials to some extent, in that they involve witnesses, and the accused may have legal counsel and be present for witness testimony. Pre-trial investigations may use evidence or statements gathered in the process of an MCIO investigation, although the pre-trial investigation remains a distinct process.²³³ At the end of the investigation the investigating officers will make a recommendation on each charge, although this is not binding on the court martial convening authority.²³⁴ The convening authority then has discretion regarding whether to refer charges to court martial.

²³⁰ *Id.*, at para. 66.

²³¹ *Id.*, at para. 67.

²³² Rules for Court-Martial, Rule 406; *The US report*, *supra* note 1, at the responses to questions.

²³³ *The US report*, *supra* note 1, at para. 133.

²³⁴ *Id.*, at para. 68.

Occasional and Ad Hoc Investigative Mechanisms

40. The US Congress may, as part of its oversight of the executive branch, inquire into matters including potential violations of the law of armed conflict. This oversight is undertaken primarily by the committee system. The Senate Committee on Armed Services has, for example, undertaken a detailed inquiry into allegations of abuse of detainees in US custody.²³⁵ Detainee policy also remains on the agenda of the House Committee on Armed Services.²³⁶

In the US, public and criminal inquiries may be handled concurrently. Although it is possible that Congressional inquiries could give rise to allegations of unlawful command influence, or tainting of panel pools, in the hearings dealing with My Lai and events at Abu Ghraib, neither case posed significant barriers to criminal prosecution.²³⁷

Proceedings Following Investigation

41. There are three broad categories of measures that may be taken in the event of a violation of the law of armed conflict. More serious violations are most likely to be dealt with in court martial proceedings, with military or criminal sanctions if proceedings result in a conviction and the commander approves the sentence imposed.²³⁸ Commanders may also impose administrative corrective measures (including such measures as reprimands, extra instruction, and administrative withholding of privileges) and ‘non-judicial punishment’ (varying in accordance with the rank of those imposing the discipline and subject to it, but including measures such as reduction in pay and extra duty).²³⁹

²³⁵ *Id.*, at paras. 15, 52.

²³⁶ *Id.*, at para. 52.

²³⁷ *Id.*, at para. 53.

²³⁸ *Id.*, at para. 62.

²³⁹ *Id.*, at paras. 79–81.

Some of the general characteristics of a court martial proceeding have been described above (in paragraphs 19–30). Following completion of a court martial, commanders, as court martial convening authorities, review records of trial, hear matters in mitigation submitted by the accused, and take action on the findings and sentence. This action can only operate to the benefit of the accused: the commander may not impose findings of guilt where such findings have not been made by the court martial, nor impose a heavier sentence, but may disapprove findings of guilt or reduce, suspend or vacate sentences. Guidance in the Manual for Courts–Martial indicates that action following court martial is taken in ‘the interests of justice, discipline, mission requirements, clemency, and other appropriate reasons’.²⁴⁰ In making decisions about action following court martial the commander is exercising a command prerogative, and has sole discretion. However, the Manual for Courts–Martial requires that, prior to taking any such decisions, the commander receive advice and a recommendation from a Staff Judge Advocate (SJA) or other legal adviser (not involved in the original court martial proceedings), and take into consideration the result of the trial, the recommendation of the SJA or legal officer, and material submitted by the accused in mitigation.²⁴¹ The Judge Advocate–General of each service also reviews court martial proceedings, but this review is directed to ensuring that convictions have a basis in law, and that sentences are appropriate.²⁴²

If a commander does not refer charges to a court martial, the commander may still impose a range of administrative punishments, of which ‘non–judicial punishment’ is more serious. Non–judicial punishment (NJP) may be imposed by commanders for ‘minor offenses’ under the punitive articles of the UCMJ. The categorization of an offense as ‘minor’ depends on matters such as the nature and circumstances of the offense, the offender’s age, rank, duty assignment, record and experience, and the

²⁴⁰ *Id.*, at para. 75.

²⁴¹ Rules for Court–Martial, Rule 1107(b)(3); *The US report*, *supra* note 1, at para. 75.

²⁴² *The US report*, *supra* note 1, at para. 84.

maximum sentence that would apply to the offense if it were charged at court martial. Usually, offenses carrying a maximum sentence of less than a year would be considered minor.²⁴³

CANADA

When to Report and Investigate: Routine Processes

42. There are various reporting requirements that may be relevant to a possible violation of the law of armed conflict (as well as other offenses).²⁴⁴

The Queen's Regulations and Orders (QRO) require that officers and non-commissioned members report to the 'proper authority' (presumably, including the chain of command or police) any infringement of relevant statutes, regulations, rules, orders and instructions governing the conduct of a person subject to the Code of Service Discipline. For officers, this applies only when the officer cannot 'deal adequately with the matter' (likely to be the case for possible violations of the law of armed conflict). For a violation of the law of armed conflict, the proper authority would normally be the military police or CFNIS.²⁴⁵

Rule 11 of the Code of Conduct for Canadian Forces Personnel requires any breach of the law of armed conflict to be reported, whether to superiors in the chain of command, the military police, a chaplain, legal officer or any other person in authority.²⁴⁶

²⁴³ *Id.*, at para. 80.

²⁴⁴ In addition to the existence of criminal offenses for failure to report war crimes, it is an indictable offense under the Crimes Against Humanity and War Crimes Act for a military commander or superior to fail to take, as soon as practicable, necessary and reasonable measures within their power to submit, inter alia, alleged commission of war crimes within the meaning of that statute to the competent authorities for investigation and prosecution: *The Canadian report*, *supra* note 2, at para. 116.

²⁴⁵ *Id.*, at para. 108.

²⁴⁶ *Id.*, at para. 115.

Additionally, there may be theatre-specific orders on reporting. One such order, Joint Task Force Afghanistan Standing Order 304 requires that any ‘significant incident’ (including ‘actions by [Canadian Forces] members that may undermine public values, or lead to the discredit of Canada at home or abroad’) must be reported immediately.²⁴⁷

These reporting requirements appear to be triggered when war crimes have been committed (for example, Crimes Against Humanity and War Crimes Act); when laws or rules have been breached (QRO; Code of Conduct for Canadian Personnel); or when an action that may undermine public values or lead to the discredit of Canada has occurred (Standing Order 304). Notwithstanding this, there are no reporting obligations that directly address whether to report a possible or merely suspected breach, particularly one of a law of armed conflict violation. Much therefore turns on the circumstances in which investigations are required.

The Queen’s Regulations and Orders require that an investigation shall be conducted as soon as practical when a complaint is made or when there are other reasons to believe that a service offense²⁴⁸ may have been committed.²⁴⁹ A provision to the effect that a frivolous or vexatious complaint need not be investigated suggests that, if there are grounds beyond the frivolous or vexatious, there should be an investigation.

Although this does not appear to be recorded formally, it has been the ‘invariable practice’ in Afghanistan and many other theatres of operation that Canadian commanders order an investigation of some kind, whether administrative or criminal, in all cases of death or injury, including collateral death or injury, and even including deaths of enemy combatants.²⁵⁰

247 *Id.*, at para. 117.

248 An offense under the National Defence Act (including the Code of Service Discipline), the Criminal Code or any other Act of Parliament, committed by a person while subject to the Code of Service Discipline.

249 *The Canadian report*, *supra* note 2, at para. 122.

250 *Id.*, at para. 125.

At least in Afghanistan, the practice has been followed regardless of the intensity of hostilities.²⁵¹ The CFNIS mandate to investigate serious and sensitive matters means that they are the investigatory body, at least until a determination can be made that no criminal/disciplinary culpability exists.²⁵² Property damage, on the other hand, is not always investigated, particularly if the facts are clear or the damage is slight.²⁵³

There has also been some discussion of the duty to investigate applying to the military police, in the context of an investigation by the Military Police Complaints Commission into allegations that, among other things, military police failed to investigate injuries to a small group of detainees, due to over-hasty processing at Kandahar Airfield. The Military Police Complaints Commission investigation found that there had been a failure to investigate injuries inflicted on one of the detainees.²⁵⁴ The Commission concluded that there was no intention to cover-up the injuries but rather the military police succumbed to the pressure from the chain of command for the maximum haste of the transfer of detainees generally. The Commission recommended that consideration be given to further enhance the independence of the military police. This recommendation was accepted by the Provost Marshal and a new military police command and control structure was subsequently put in place by the Chief of Defence Staff.²⁵⁵

251 *Id.*, at the responses to questions.

252 *Id.*, at para. 125.

253 *Id.*, at para. 126.

254 See: *Id.*, at para. 135(c).

255 See: Military Police Complaints Commission, *Afghanistan Public Interest Investigation*, available at: www.mpcc-cppm.gc.ca/300/afghanistan/index-eng.aspx.

How to Investigate: Routine Processes

43. There are two types of investigation that are relevant, ‘administrative’ and ‘disciplinary’ investigations, each of which has some variations. Possible violations of the law of armed conflict are most likely to give rise to disciplinary investigations. A ‘disciplinary’ offense under the Canadian Codes of Service is fundamentally part of a criminal law system.

As noted above, there is also a practice of having CFNIS conduct initial investigations in all cases of death or injury, at least until it can be confirmed that there is no disciplinary/criminal liability. These investigations, while involving CFNIS, would presumably not be full disciplinary investigations in the form discussed below, and are thus considered separately here. There is, however, no specific requirement that mandates an investigation into such cases.

Administrative Investigations

44. Investigations conducted by commanders at all levels for the effective and efficient administration of their units are generally categorized as administrative investigations.²⁵⁶ There is no single definition of an ‘administrative’ investigation, and there are three possible avenues: informal investigations, summary investigations, and boards of inquiry.

1. Informal investigations have no specific authority or methodology. Such investigations are premised on residual command authority vested in those who command units or elements of the Canadian Forces, and permit a commanding officer to maintain situational awareness until

²⁵⁶ *The Canadian report*, *supra* note 2, at para. 66.

he is able to determine the appropriate course of action.²⁵⁷

2. Summary investigations are authorized in the Queen's Regulations and Orders. They have fixed terms of reference.²⁵⁸
3. Boards of Inquiry are authorized in statute, for the purpose of investigating and reporting on any matter connected with the government, discipline, administration or functions of the Canadian Forces or affecting any officer or non-commissioned member on which it is expedient that the Minister of National Defence, the Chief of Defence Staff, or officers in the command, be informed. For example, there have been several boards of inquiry convened to investigate the treatment and transfer of detainees in Afghanistan.²⁵⁹ Boards of Inquiry have fixed terms of reference.²⁶⁰

Importantly, under Defence Administrative Orders and Directives (DAOD), neither a summary investigation nor a board of inquiry may be convened if the sole or primary purpose is to obtain evidence for a disciplinary purpose or assign criminal responsibility.²⁶¹ One reason for this is that compelled evidence would not be admissible in a disciplinary proceeding.²⁶² These two types of investigations (administrative and disciplinary) are clearly distinct. If an administrative investigation or board of inquiry receives evidence that it reasonably believes relates to an allegation of a criminal act or a disciplinary offense, the investigators must stop the investigation and seek the assistance of the unit legal adviser, in order to avoid posing difficulties for subsequent disciplinary or criminal investigations. A DAOD prescribes the inclusion of a paragraph to this effect in the terms of reference of boards of inquiry.²⁶³

257 *Id.*, at para. 67.

258 *Id.*

259 *Id.*, at para. 27.

260 *Id.*

261 *Id.*, at paras. 26, 68, 120, 124.

262 *Id.*, at paras. 26, 124.

263 *Id.*, at para. 124.

Routine Investigations in Cases of Civilian Death

45. As indicated above, in cases of civilian death during armed conflict CFNIS has the initial mandate to conduct an investigation, and pursue the investigation at least until it can be determined that there is no criminal or disciplinary culpability involved.²⁶⁴ If there is a suspicion of such culpability, the investigation will be a disciplinary investigation.

Investigations by CFNIS of cases of civilian death serve a different purpose and are conducted as totally separate processes from any operational debriefings or internal processes that focus on whether the operation was optimally conducted.²⁶⁵

Disciplinary Investigations

46. ‘Disciplinary investigations’ are investigations which, as noted above, are to determine whether a service offense (violation of any law, including the Code of Service Discipline contained in the National Defence Act) has been committed. The purpose of investigating a service offense is to reconstruct events, gather evidence, identify elements of the alleged offense and also identify those responsible.²⁶⁶ A disciplinary investigation must, at minimum, collect all reasonably available evidence bearing on the guilt or innocence of the individual concerned.²⁶⁷

Disciplinary investigations may be carried out by CFNIS, the civilian police, base or wing military police, or, in the cases of minor breaches of discipline, unit authorities. CFNIS will usually undertake investigations of serious or sensitive offenses. These are offenses which, by the nature of the allegation, or through those who are or may be implicated, could

²⁶⁴ *Id.*, at para. 125.

²⁶⁵ *Id.*, at para. 127.

²⁶⁶ *Id.*, at para. 61.

²⁶⁷ *Id.*

have a strategic impact. CFNIS is thus most likely to be responsible for investigating violations of the law of armed conflict.²⁶⁸ For non-serious or non-sensitive cases, or cases in which CFNIS has waived jurisdiction, the regular military police (or possibly civilian police) will conduct the investigation. Unit investigations will usually only be used for minor breaches of discipline.

Occasional and Ad Hoc Investigative Mechanisms

47. The Canadian House of Commons and Senate have both standing committees and special committees, appointed to undertake specific inquiries. For example, the Special Committee on the Canadian Mission in Afghanistan held hearings on, among other things, the transfer of detainees to the custody of Afghan officials, but so far there has been no report on the issue.²⁶⁹

The government may order a public inquiry into important events and issues. There is legislation establishing the manner in which such inquiries may be called, their powers and responsibilities. A public inquiry might be undertaken in order to investigate a possible violation of the law of armed conflict of particular concern. The closest example of an inquiry of this kind is the Commission of Inquiry into the Deployment of the Canadian Forces in Somalia (1994–1997). This Commission investigated various events that occurred during the mission, including the alleged torture and murder of a Somali prisoner by Canadian Forces personnel.²⁷⁰

The Military Police Complaints Commission (MPCC) is empowered to conduct an investigation into a complaint and hold hearings, if the

²⁶⁸ *Id.*, at para. 62.

²⁶⁹ *Id.*, at paras. 22, 143.

²⁷⁰ *Id.*, at para. 24; The final report was highly critical of senior military and civilian personnel, and of existing systems of military justice, and resulted in the disbanding of the Canadian Airborne Regiment.

Chairperson considers an investigation is advisable in the public interest. A public interest investigation was held in response to complaints concerning alleged abuse of Afghan detainees in the custody of Military Police.

There is no legal prohibition on holding a parliamentary or public inquiry concurrently with a criminal investigation, although doing so may compromise the capacity to conduct the criminal investigation and proceed with a prosecution, if appropriate. The government must make such choices when deciding whether to initiate a public inquiry, and setting the terms of any such inquiry. However, in some circumstances it is possible to manage concurrent inquiries without jeopardizing potential criminal proceedings. The MPCC investigation into the treatment of Afghan detainees provides an example. Given that an investigation into the handling of detainees was being undertaken by the CFNIS at the same time, and given the risk that witnesses or evidence might be compromised inadvertently by the MPCC investigation, the MPCC and the CFNIS agreed on a protocol whereby CFNIS provided to the MPCC copies of documents the CFNIS had obtained (subject to the MPCC holding these documents in confidence), and the MPCC waited to interview witnesses until the CFNIS had concluded its investigation, or given consent to particular interviews.²⁷¹

Proceedings Following Investigation

48. Charges may be laid by members of CFNIS and by unit authorities (commanding officers, and officers and non-commissioned members authorized by a commanding officer). In the event that an investigation is conducted by base or wing military police, the case is referred to the unit for the laying of charges.²⁷²

The authorities empowered to lay charges have discretion as to

²⁷¹ *Id.*, at para. 57.

²⁷² *Id.*, at para. 74.

whether to do so, but in general, charges should be laid unless there are some legitimate and compelling public interest reasons why jurisdiction ought not be exercised in a particular case. The authorities will normally be in the best position to assess public interest reasons and, in particular, what the interests of unit discipline require. Notwithstanding their discretion, the authorities are still required to obtain legal advice before laying most charges (i.e., for all charges where a court martial election must be offered).

Once laid, charges must be referred to the commanding officer of the accused; the commanding officer of the base, unit or element in which the accused is present at the time of laying the charge, or to a delegated officer empowered to act in one of these capacities.²⁷³

The officer to which the charges are referred then determines whether he or she has jurisdiction to preside over a summary trial of the offenses alleged, having regard to matters such as the rank of the accused, whether the accused has elected to be tried by court martial, and whether he or she has not conducted or supervised the investigation, laid or caused charges to be laid, or issued a search warrant (in which case, he or she would be precluded from presiding over a summary trial).²⁷⁴

If an officer has jurisdiction to preside over a summary trial he or she must still consider whether or not to exercise the discretion to do so, having regard to factors such as the punishment that may be imposed at summary trial (the maximum punishment for summary trial before a commanding officer being detention for 30 days) and whether it is appropriate to try the case having regard to the interests of justice and discipline.²⁷⁵

²⁷³ *Id.*, at para. 76.

²⁷⁴ *Id.*

²⁷⁵ *Id.*

Where the charges require trial by court martial (or the accused has elected to be tried by court martial, or the commander has chosen not to preside over a summary trial), the charge is referred to a ‘referral authority’ (a class of officers legally empowered to refer a charge to the DMP). This referral authority must either forward the charge to the DMP, adding any appropriate recommendations regarding disposition and whether to proceed, or, in circumstances in which a commanding officer forwarded the charge to the referral authority in the belief that he lacked the requisite powers of punishment to try the accused in a summary trial and the referral authority disagrees with this view, direct the commanding officer to try the accused by summary trial.²⁷⁶

Once the DMP receives charges, the DMP reviews the charge for issues such as sufficiency of evidence, and the public interest of the Canadian Forces in prosecution. The DMP may require additional investigation from CFNIS (see above), before determining that the offense should be dealt with at court martial (on charges he or she believes are supported by evidence), or that he or she is satisfied that it may be referred back to an officer with jurisdiction to try the accused by summary trial.²⁷⁷

A decision by the DMP not to prosecute may be subject to judicial review, but courts will only undertake such a review of the exercise of prosecutorial discretion in extraordinary cases, where there has been a clear abuse of process.²⁷⁸

²⁷⁶ *Id.*, at para. 81.

²⁷⁷ *Id.*, at para. 82.

²⁷⁸ *Id.*, at paras. 100, 111.

AUSTRALIA

When to Report and Investigate: Routine Processes

49. Possible violations of the law of armed conflict will be subject to requirements for incident reporting and possibly also to a ‘quick assessment’ process, unless it is clear from the outset how the investigation should proceed.

Members of the ADF must report ‘notifiable incidents’ immediately. Notifiable incidents include any incident that raises a reasonable suspicion of an offense against the disciplinary code (other than a minor offense), or against Australian or foreign criminal law involving Defence personnel, property or premises. However, it also includes death, serious injury or disappearance of non–Defence personnel (other than enemy combatants) involving any Defence activity, property or premises, *even where there may be no reasonable suspicion of an offense*. If there is a death, serious injury or disappearance of an enemy combatant while in the custody or effective control of Defence personnel, then this too qualifies as a notifiable incident. Notifiable incidents also include any other incident deemed by commanders or managers to be serious, sensitive or urgent, for example events that might bring Defence into disrepute, or attract media or Parliamentary attention. If there is doubt as to whether a matter is a notifiable incident, it should be reported.²⁷⁹

The reporting chains vary slightly depending on the nature of the notifiable incident. Incidents of death or serious injury to civilians (or to enemy combatants in the custody of Defence personnel) must be reported to the chain of command (the operational commander, who then provides it to theatre command and the Commander Joint Operations in Australia

²⁷⁹ *The Australian report*, *supra* note 2, at para. 48.

(CJOPS)) and to a Defence Investigative Authority (ADFIS or the service police) for action, and to the service provost marshal for information.²⁸⁰

The incident report is based on information from the operational log. It must contain, as a minimum, the date, time, location and nature of the incident, details of those involved, and involvement of media or civil authorities.²⁸¹

In the event of a notifiable incident, commanders and managers have various responsibilities, including, after consulting with the appropriate Defence Investigative Authority (usually ADFIS or the relevant service police), taking all reasonably available steps to preserve potential evidence in order to ensure that it is not lost, destroyed, or compromised; and prevent interference with witnesses or the construction of false defenses. They are also required to afford all reasonable assistance to personnel of the relevant Defence Investigative Authority. Where it is necessary for mission accomplishment or the safety of personnel, access of investigators to an area may be restricted, but this is to be for the minimum period necessary.²⁸²

When ADFIS or the relevant service police receive a notifiable incident report concerning reasonable suspicion of an offense against the DFDA, they must decide whether to attend the incident site, commence an independent investigation, or refer the matter to another party (a more appropriate investigative authority, the civilian authorities, the initiating authority or another area of Defence) for investigation or action. If the incident has occurred in an operational area, ADFIS or the service police must consult with the relevant operational commander to determine whether there are safety, security or operational issues that might impact on the commencement of an investigation.²⁸³

280 *Id.*

281 *Id.*

282 *Id.*

283 *Id.*

When ADFIS or the relevant service police receives a notifiable incident report concerning civilian death, serious injury or disappearance, that does not, in itself, raise a suspicion that an offense has occurred, ADFIS or the service police are required to respond as necessary to render immediate assistance, contact civilian police, and ensure the securing of the incident area and preservation of evidence.²⁸⁴

‘Quick Assessment’

50. The ‘quick assessment’ (QA) process interlocks with reporting obligations. Quick assessments may be undertaken on the initiative of a commander or supervisor, or they may be initiated following an incident report. A QA should be completed within 24 hours and transferred to the Commander Joint Operations (CJOPS) in order for him to decide whether to continue an administrative investigation or to initiate a criminal investigation. It comprises a brief statement of the facts, without formal statements, and (if the individual preparing the QA is directed to make recommendations) recommendations for future actions, together with a written endorsement or decision of a commander in response. The officer undertaking the QA would usually speak to the personnel involved in the incident to understand what occurred, and the relevant context.²⁸⁵

Any member of the ADF may be directed to conduct a QA, but objectivity and impartiality is necessary, so individuals in the chain of command or line management of the person(s) involved in the incident may only be selected if they have no involvement or personal interest in the matter.²⁸⁶

The QA may be conducted when other inquiries are occurring,

284 *Id.*

285 *Id.*, at para. 49.

286 *Id.*

but must not interfere with such other inquiries or investigations.²⁸⁷ If, in the course of a QA, it becomes evident that a notifiable incident may have occurred, this must be reported to the commander or supervisor immediately and reported accordingly. The QA must still be completed but the individual undertaking the QA is required to liaise with investigators from ADFIS to ensure that he does not interfere with investigations.²⁸⁸

On the basis of the incident report and QA, the CJOPS decides whether a ‘full administrative inquiry’ is warranted. It is current policy that a full administrative inquiry will be undertaken in the event of a death of a member of the ADF, significant destruction of property, and civilian deaths (other than deaths of individuals taking a direct part in hostilities).²⁸⁹

If either a QA or a full administrative inquiry raises the possibility that there has been a violation of the law of armed conflict, the CJOPS (in consultation with the Chief of the Defence Forces, and the Chief of the relevant service) instructs the ADF Investigative Service to conduct a criminal investigation (if ADFIS has not commenced such an investigation already).

How to Investigate: Routine Processes

51. As noted above, QAs are not considered investigations in their own right, but they may give rise to investigations, most relevantly, for the purposes of this Report, ‘full administrative inquiries’ and ‘criminal investigations’. The decision to launch an administrative inquiry lies with the ADF executive leadership and the decision over whether to launch a criminal investigation is at the discretion of the ADF Provost Marshal, the head of the ADFIS organization. There is no publicly accessible statement of ADFIS policy on the triggering thresholds for the initiation

²⁸⁷ *Id.*

²⁸⁸ *Id.*

²⁸⁹ *Id.*, at para. 50.

of a criminal investigation, nor is there any publicly accessible statement of ADF policy on the triggering thresholds for an administrative inquiry in response to a report of a notifiable incident and subsequent QA. In the absence of any access to a clearly articulated policy, it is impossible to know whether there is any consistency of approach and, if so, the bases for such consistency.²⁹⁰

Australia has not had any prosecutions arising out of alleged violations of the law of armed conflict, although a court martial was recently convened to hear charges of criminal negligence in connection with conduct on the battlefield. This case provides an example of a situation in which both a QA and a full administrative inquiry were used. The incident giving rise to the charges involved five Afghan children who were killed during a night raid on a compound in Oruzgan when soldiers posted a grenade into a room from which they were receiving fire. The inquiries culminated in charges including involuntary manslaughter by criminal negligence, but the court martial upheld objections to the charges on the basis that there was no legally enforceable duty of care owed by ADF members in the context of combat operations, and the trial did not proceed.²⁹¹

‘Full Administrative Inquiry’

52. In relation to incidents where there is no suspicion of an offense, a range of administrative inquiries are open. For more serious incidents, there is a graduated scale of inquiries requiring escalated levels of authorization.²⁹² The main forms of such administrative inquiries are: Minister of Defence General Court of Inquiry, Chief of the Defence Force Commissions of Inquiry, Boards of Inquiry, and Inquiry Officer inquiries. Each of these is conducted under statutory authority and in accordance with established procedures.

²⁹⁰ *Id.*, at para. 77.

²⁹¹ *Id.*, at para. 52.

²⁹² *Id.*, at para. 50.

An inquiry into civilian death or injury (in the absence of a reasonable suspicion of a violation of the law of armed conflict) would usually be conducted by an Inquiry Officer. An inquiry of this kind involves the drafting of terms of reference and the appointment of an Officer (usually an ADF Officer) and supporting staff either by the commanding officer in the theatre of operations or by CJOPS in Australia. The inquiry team is deployed to the theatre of operations and may be based there for the duration of the inquiry. The Inquiry Officer interviews all key participants in relation to any incident and prepares a draft inquiry report explaining what the Inquiry Officer believes happened during the incident, the context in which the incident occurred and any recommendations for subsequent action. The draft is distributed to key participants who are provided an opportunity to comment on the Inquiry Officer's proposed recommendations. The Inquiry Officer then finalises the report and files it with CJOPS.²⁹³ Inquiry Officer inquiries are generally conducted in private, without formal hearings. However, some reports of inquiries have been made public (with appropriate redactions).²⁹⁴

Criminal Investigation

53. A criminal investigation would be opened by ADFIS in the case of a suspected law of armed conflict violation. ADFIS deploys its own investigators to the theatre of operations, interviews participants in the incident and gathers evidence in order to produce a brief of evidence for the DMP. At the conclusion of a criminal investigation, a copy of the brief of evidence is provided to the commander or manager, together with details of the action taken (such as referral to the DMP). On the basis of that brief of evidence, the DMP makes a decision regarding the appropriate course of action – further specific inquiries by ADFIS, the

²⁹³ *Id.*

²⁹⁴ *Id.*

laying of charges and/or the initiation of criminal proceedings. The DMP too is required to keep commanders or managers informed of progress on the matter.²⁹⁵

In conducting criminal investigations, ADFIS is required to investigate independently, free of influence from the chain of command or line management, but any investigation will require close consultation between commanders or managers and ADFIS. Only the Provost Marshal of ADFIS (and the provost marshals of the service police) have the authority to suspend or terminate an investigation. It must be noted, however, that because the Head of ADFIS reports to the Chief of the Defence Force, it is possible that an ADFIS decision to investigate could be overruled by the chain of command at the highest level. The Chief of the Defence Force, CJOPS, Vice Chief of the Defence Force and the service chiefs may request that an investigation be suspended, but such requests must be in writing and recorded in the Defence Policing and Security Management System (a database holding all notifiable incident reports and investigation reports), and a decision to suspend or terminate the investigation, and reasons for the decision, must likewise be recorded in DPSMS.²⁹⁶ Any decision of the DMP to lay or not to lay charges may be reviewed by the High Court of Australia pursuant to the general provision of section 75(v) of the Constitution – the writ of mandamus to compel the performance of a public duty or the exercise of a public official’s discretion according to law. It should be noted that no such action has ever been initiated against the DMP in response to her decision to lay or not to lay charges.²⁹⁷

295 *Id.*, at para. 51.

296 *Id.*

297 *Id.*

Occasional and Ad Hoc Investigative Mechanisms

54. Australia has broadly similar systems of parliamentary committees to the US, the UK and Canada. Moreover, the Government may initiate public inquiries of various kinds to inquire into matters including potential violations of the law of armed conflict. Thus for example, the Senate Foreign Affairs, Defence and Trade Committee undertook a limited inquiry in 2005, following press coverage regarding abuse of detainees in Iraq. The inquiry addressed questions about whether Australian personnel had been present during interrogation of detainees; whether knowledge or concerns about treatment of detainees was reported by Australian personnel to Australian government agencies; and what action followed such reports. The Committee lamented the poor quality of the evidence it received. The Committee concluded that ineffective record keeping, haphazard reporting processes, and poor communication networks indicated that the reporting and communication processes with the Department of Defence were inadequate in some respects.²⁹⁸

In relation to *ad hoc* internal inquiries, it is appropriate to mention again the audit and investigation work of the IGADF (Inspector-General of the ADF, discussed above, paragraph 25). The IGADF may initiate inquiries on his own motion (or be requested to do so by the Chief of the Defence Force, a service chief or any other individual), and has previously inquired into the conduct of an investigation of allegations of unlawful killing involving Special Air Services personnel in East Timor. The report was highly critical of the investigative process (although the finding was not that the investigation had not been thorough; rather it had been overly prolonged and collected significant material, but not material that would be admissible).²⁹⁹ The IGADF also conducts routine, random audits

298 *Id.*, at para. 28; See also: Senate Foreign Affairs, Defence and Trade Committees, *Duties of the Australian Personnel in Iraq* (Aug. 18, 2005), available at: www.aph.gov.au/Senate/committee/fadt_ctte/completed_inquiries/2004-07/iraq/report/index.htm.

299 *The Australian report*, *supra* note 2, at para. 29.

of military justice practices and procedures in units, checking for such problems as abuse of authority, but also failure to pursue proceedings in cases of wrongdoing. These audits are part of a systematic programme, so they are not strictly speaking *ad hoc* internal inquiries in the way that parliamentary inquiries are, nor are they part of a routine response to every case of civilian death or suspicion of a criminal offense.³⁰⁰

Proceedings Following Investigation

55. The DMP, a commanding officer or an ADF member authorised in writing by a commanding officer,³⁰¹ has the discretion to lay charges of service offenses against an ADF Member (or against a defense civilian). If charges are laid in respect of a criminal offense, the case will be tried before a ‘service tribunal’; for most serious offenses (for example, offenses carrying a penalty of imprisonment for more than two years), the case will be tried before a court martial or a Defence Force magistrate. Details of these institutions are provided above, in paragraph 25.

Currently³⁰² there is no permanent standing military court, and convictions in service tribunals are all subject to review by ‘reviewing authorities’ (offices appointed for this purpose). Reviewing authorities have various powers, including a power to quash the conviction, but only on specific grounds (such as if it appears to him that the conviction is unreasonable or cannot be supported having regard to the evidence). Reviewing authorities rely on reports from legal officers in the exercise of their functions and are bound by such reports on questions of law.³⁰³ Most punishments must also be approved by a reviewing authority before they take effect. In addition to this procedure for approval, a reviewing

300 *Id.*, at para. 66.

301 *DFDA*, at Article 87(1).

302 For a discussion of the historical developments of the Australian military justice system see: *The Australian report*, *supra* note 2, at paras. 1, 7–11.

303 *Id.*, at para. 56.

authority may quash punishments that he considers are wrong in law, or excessive.³⁰⁴

UNITED KINGDOM

When to Report and Investigate: Routine Processes

56. Once a commanding officer becomes aware of an allegation or circumstances that would indicate to a reasonable person that a ‘Schedule 2 offence’ has or may have been committed by a person under their command, the commanding officer must as soon as is reasonably practicable ensure that a service police force is aware of the matter.³⁰⁵ Schedule 2 offenses include general criminal law offenses of murder and manslaughter, as well as any alleged breach of the International Criminal Court Act 2001 (genocide, crimes against humanity or war crimes).³⁰⁶ Because such offenses are almost certainly investigated by service police, a commander’s powers to investigate alleged breaches of the law of armed conflict are very limited.³⁰⁷

There is a regime for investigation of suspected Service offenses that may become relevant in the event of conduct which would not constitute a ‘Schedule 2 offence’. In such a case, if a reasonable commanding officer would take the view that a Service offense has, or may have, taken place, the commanding officer must investigate, or ensure the relevant service police are aware of the matter.³⁰⁸ If the service police do not investigate, the commander may still opt not to investigate himself and instead nominate another officer of equal rank from outside the immediate operational chain of command to investigate.

304 *Id.*

305 *The UK report, supra* note 2, at para. 4.11.

306 *Id.*, at para. 3.09.

307 *Id.*

308 *Id.*, at para. 3.49.

It seems that the decision of the Grand Chamber in *Al-Skeini and Others v. United Kingdom* (hereinafter: the *Al-Skeini* decision)³⁰⁹ will require the armed forces to take on additional responsibilities for preservation of the scene of any alleged breaches of Articles 2 or 3 of the European Convention on Human Rights.³¹⁰

How to Investigate: Routine Processes

Service Offenses Investigation

57. An investigation of suspected Service offenses may be carried out by anyone under the command of the commanding officer, and is subject to detailed guidance.³¹¹ There is some evidence that, even for suspicion of offenses falling short of Schedule 2 offenses, the practice is to appoint a commanding officer who is outside the operational command structure of the subordinates suspected, in order to consider whether an investigation is warranted.³¹²

Criminal Investigation

58. Criminal investigations are conducted into alleged Schedule 2 offenses. There is very limited scope for operational level or unit level investigations of possible law of armed conflict violations. Investigations of breaches of standing orders or of other operating procedures may, of course, be conducted at this level. It is possible, however, in exceptional circumstances where, for operational reasons, no service police are available to attend the scene and investigate, a commanding officer may begin to investigate a Schedule 2 offense. If this occurs, it is nevertheless

309 *Al-Skeini* decision, *supra* note 6.

310 *Id.*, at para. 1.26.

311 *Id.*, at para. 3.49, *fn* 214.

312 *Id.*, at para. 3.10.

a departure from normal procedure and commanding officers are urged to involve the service police as soon as is reasonably practicable.³¹³

Once possible violations of the law of armed conflict are reported to Service police by commanders (or other parties), the Service police have control of the investigation. If the Service police consider that there is sufficient evidence to charge a person with a Schedule 2 offense, they are required to refer the case to the Director of Service Prosecutions (DSP).³¹⁴ If they decide that there is not sufficient evidence, they must still consult the DSP.³¹⁵ Where there is not sufficient evidence to bring a charge, the case may be referred back to the commanding officer to determine whether the individual should be charged with a service offense which is not a Schedule 2 offense.³¹⁶

When a case is referred to the DSP, the Service police inform the commanding officer of the relevant individual.³¹⁷ The Prosecutors' Pledge of the Service Prosecuting Authority includes notifying victims if a prosecution is not to be brought.³¹⁸ The DSP has exclusive responsibility for deciding whether or not to lay charges. If charges are laid they will be tried in the Court Martial. The consent of the Attorney-General is required for prosecution of offenses under the International Criminal Court Act.³¹⁹ A decision of the DSP not to prosecute could be subject to judicial review in the High Court, as with a decision of the Director of Public Prosecutions.³²⁰

313 *Id.*

314 *Id.*, at para. 4.05.

315 *Id.*, at para. 3.20.

316 *Id.*

317 *Id.*, at para. 3.09.

318 *Id.*, at para. 3.19.

319 *Id.*

320 *Id.*

Occasional and Ad Hoc Investigative Mechanisms

59. Parliamentary committees in the UK may inquire into a range of matters. In the UK, it is a constitutional requirement that legislation governing the armed forces must be renewed every five years, and in practice the quinquennial review serves as an opportunity to examine the operation of the armed forces, including the military justice system. Ordinarily, a Select Committee is established to consider the draft bill and hold hearings, before debate is conducted in the House.³²¹

Public inquiries may also be initiated, and legislation sets out the powers and duties of such inquiries. There have been several such inquiries dealing with matters touching on the law of armed conflict. For example, one such public inquiry was established to investigate the death of Baha Mousa, an Iraqi citizen, while in the custody of the British armed forces in Basra in 2003. This matter was previously the subject of investigations by the Royal Military Police, and gave rise to the conviction of one individual by Court Martial on a charge of inhuman treatment. The final report was published on 8 September 2011. In relation to the circumstances surrounding Baha Mousa's death, the inquiry discussed the failure to report what had been seen at the detention facility and recommended the prohibition of interrogation techniques. The Government accepted all but one of the recommendations of the Report.³²² Another relevant public inquiry is the Al Sweady Inquiry which is investigating allegations of unlawful killing and abuse of detainees at Camp Abu Naji and the Shaibah Logistics Base in Southern Iraq in 2004.³²³

Parliamentary or public inquiries may jeopardize future criminal proceedings, and in light of this, inquiries will usually not commence until related criminal proceedings have been finalized. In the Baha Mousa case,

³²¹ *Id.*, at para. 3.50.

³²² *Id.*, at para. 4.28.

³²³ *Id.*, at paras. 1.33–1.35.

the public inquiry did not begin until after court martial proceedings against accused individuals had concluded.³²⁴ In the case of the Al Sweady Inquiry, however, the inquiry has proceeded (following unsatisfactory earlier investigations by the Royal Military Police) and the Attorney-General has provided an undertaking to witnesses that no evidence provided to the Inquiry will be used in criminal proceedings against them, or for the purposes of determining whether to commence criminal proceedings (other than for offenses related to the giving of false evidence to the public inquiry and the like).³²⁵

Litigation in relation to the investigation obligations arising under the European Convention on Human Rights may play a role in determining whether public inquiries are initiated. In the Al Sweady case, relatives of the dead sought, as a remedy, the opening of an independent and impartial investigation into the deaths. The Secretary of State asserted, *inter alia*, that such an investigation was not required, as there had already been an adequate investigation by the Royal Military Police. In the event, the claim for judicial review was stayed, and a public inquiry was initiated, but a judgment of the High Court of Justice expressed significant criticism of the Royal Military Police investigations.³²⁶

In addition to public inquiries, the armed forces may themselves initiate investigations into particular matters. The British Army has, for example, commissioned an inquiry into incidents of unlawful killing and detainee abuse in Iraq in the period 2003–2004. The report, prepared by Brigadier Aitken, Director of Army Personnel Strategy, noted various measures taken since 2003 to prevent recurrence of killings and abuses, and made further recommendations.³²⁷

³²⁴ *Id.*, at paras. 1.33, 2.14–2.16.

³²⁵ *Id.*, at para. 2.14.

³²⁶ *R (on the application of Al-Sweady and Others) v. Secretary of State for the Defence* [2009] EWHC 2387.

³²⁷ *The UK report*, *supra* note 2, at para. 1.36.

The Ministry of Defence has also established an Iraq Historic Allegations Team (IHAT), led by a retired civilian senior police officer. The Team was charged with investigating allegations of abuse by members of the British armed forces in Iraq, with a view to ensuring that further criminal proceedings can be initiated if appropriate. The High Court [Divisional Court] declined to hold that a full public inquiry into these allegations was required under the European Convention on Human Rights, at least pending completion of the work of IHAT. It had been argued that IHAT lacked the requisite independence (among other things, because it included individuals from the Special Investigations Branch of the Royal Military Police, and members of the other branch of the Royal Military Police, responsible for General Police Duties, who may have been implicated in wrongdoing). This was accepted by the Court of Appeal [Civil Division] in *Mousa* which held that the involvement of the Provost Branch in Iraq led to the perception that IHAT lacked independence.³²⁸

Proceedings Following Investigation

60. In relation to suspected Service offenses falling short of Schedule 2 offenses, the commanding officer may, in theory, lay any charges necessary. However, the commanding officer is always at liberty to refer these matters to the Director of Service Prosecutions.³²⁹ The *Manual of Service Law* states that, in cases of any form of violence or abuse against a victim who is not a member of the UK armed forces, or who is being held in service custody, the commanding officer should refer the matter to the DSP, unless he or she is completely satisfied, having taken legal advice, that he should bring the charge.³³⁰

Service offenses which can be dealt with at a summary hearing include,

³²⁸ *The Queen (on the application of Ali Zaki Mousa) v. Secretary of State for Defence* [2010] EWHC 3304 (Admin); on appeal to the Court of Appeal, [2011] EWCA Civ 1334; See: *The UK report, supra* note 2, at paras. 1.34, 2.16.

³²⁹ *The UK report, supra* note 2, at para. 3.49, *fn* 214.

³³⁰ *Id.*, at para. 3.18, *fn* 161.

of those most relevant to law of armed conflict, looting, disobedience to a lawful command, and negligent performance of a duty, as well as offenses under the general criminal law such as criminal damage and assault occasioning actual bodily harm.³³¹ Punishments that may be imposed at a summary hearing are limited to detention in a military barracks or training unit for up to 90 days, a fine of up to 28 days' pay, and reduction in rank.³³²

Other offenses must be tried before a Court Martial, a standing body described in more detail above, in paragraph 27.

GERMANY

When to Report and Investigate: Routine Processes

61. Aside from the obligations to report suspected criminal offenses to civilian prosecutorial authorities, there do not appear to be distinct reporting obligations in Germany of the kind that exist in some other systems.³³³ Operational debriefings have no impact on investigations and are regularly ignored.³³⁴

Violations of the law of armed conflict may constitute malfeasances subject to disciplinary measures under the Code of Law for Members of the Armed Forces, and are thus subject to the investigative processes used for malfeasances. A commander is obliged to initiate an investigation as soon as facts become known to him that justify the suspicion of a malfeasance.³³⁵ However, if a commander believes there has been a criminal offense, the

331 *Id.*, at para. 3.18.

332 *Id.*

333 *The German report*, *supra* note 2, at Appendix V.

334 *Id.*, at para. 56.

335 *Id.*, at para. 48.

matter must immediately be transferred to the civilian prosecutorial authorities.

How to investigate: Routine Processes

Malfeasance Investigation

62. Usually, a commander will ask his legal adviser to investigate, with the support of the military police.³³⁶

In the usual course of events, members of the armed forces are required to answer and tell the truth if interrogated about an incident. If being questioned about a disciplinary matter which may entail sanctions imposed by the superior officer, they may choose whether or not to answer, but if they answer, they must tell the truth. These requirements do not apply in court proceedings, either in the military disciplinary court or in a regular criminal proceeding.³³⁷

If the investigation reveals sufficient grounds for suspicion that a criminal offense has been committed, the commanding officer must put the disciplinary process on hold and submit the results of the investigation to a civilian prosecutor's office (as noted above, it is often difficult to determine which prosecutor is relevant, but the practice is that the Office of the Prosecutor in Potsdam will be the first point of contact for crimes committed abroad by or against members of the armed forces, and may then refer the matter to the Federal Prosecutor-General, if the alleged conduct may amount to a war crime under the Code of Crimes against International Law, or to another prosecutor in whose district the accused had his last post in Germany).³³⁸

³³⁶ *Id.*

³³⁷ *Id.*, at para. 55.

³³⁸ *Id.*, at paras. 57, 95.

As soon as the criminal matter is resolved, the malfeasance proceedings may continue. Proceedings for serious disciplinary offenses are brought in tribunals established within the Ministry of Defence, and these tribunals are bound by the factual findings of the criminal court.

Routine Investigation in Cases of Civilian Death

63. It is a policy that, in every instance in which a civilian is killed by members of the German armed forces, an investigation is commenced.³³⁹ The investigation undertaken resembles the investigation of a disciplinary offense, and involves the Federal Prosecutor-General, along with military police.³⁴⁰

Criminal Investigation

64. In most cases concerning alleged violations of the law of armed conflict, the commanding officer notifies a civilian prosecutor in the early stages of the investigation. Civilian prosecutors have no authority over military authorities and thus no formal authority regarding the conduct of the military investigation, but they may express views regarding an eventual prosecution and inform military authorities accordingly.³⁴¹ The prosecutor has no opportunity to investigate on the relevant site; at most, he may be consulted by military authorities as they investigate. This may create difficulties in establishing the facts.³⁴²

Once a matter concerning violation of the Code of Crimes against International Law has been submitted to the prosecutor and evidentiary thresholds for prosecution are satisfied, the matter must be prosecuted unless a specific exemption applies.³⁴³ Many of these exemptions

339 *Id.*, at para. 47.

340 *Id.*

341 *Id.*, at para. 58.

342 *Id.*, at paras. 49–50 (for difficulties in the Colonel Klein case, see at para. 97).

343 As to which see: *Id.*, at para. 72.

are designed to prevent the use of the German legal order as a forum for investigation and prosecution in circumstances in which alleged war criminals are not German and their conduct is not connected with Germany.³⁴⁴ A decision of the prosecutor to rely on these exemptions is not subject to judicial review, but a decision to terminate proceedings because of a lack of evidence may be subject to challenge.³⁴⁵

Occasional and Ad Hoc Investigative Mechanisms

65. There is a possibility of a parliamentary inquiry in Germany. For example, the federal parliament (*Bundestag*) conducted an inquiry into wrongdoings associated with ‘the Colonel Klein affair’ (an air strike near Kunduz in September 2009, which resulted in a considerable number of civilian casualties). The parliamentary inquiry limited its role to considering allegations against senior individuals, including the Minister of Defence, the Joint Chief of Staff and Chancellor, of lying to the public and mismanaging the investigation in Afghanistan. It did not consider the possibility of any breaches of the laws of war by the individuals concerned.³⁴⁶ This is based on the fact that the decision whether or not an act is a criminal offense is decided by the courts and cannot, for reasons of the constitutional separation of powers, be established by any other body.

Proceedings Following Investigation

66. Criminal offenses by members of the armed forces, including violations of the Code of Crimes against International Law, will be tried in the civilian courts.

344 As was the case in complaints against Chinese President Jiang Zemin, the then–Vice President of Chechnya, and the then–Secretary of Defence of the US, although the interpretation of these exemptions has not been without controversy: *Id.*, at paras. 74–81.

345 *Id.*, at paras. 82–83.

346 *Id.*, at para. 98.

More serious disciplinary offenses must be tried before *Truppendienstgericht*, discussed in paragraph 29, and may carry sanctions of reductions in pay and pensions, prohibition of promotion, reduction in rank and discharge. Less serious disciplinary offenses may be sanctioned by the commander, who is empowered to impose censure, fines up to a certain limit, curfew and detention, and detention for a period of up to three weeks.³⁴⁷

NETHERLANDS

When to Report and Investigate: Routine Processes

67. Under the code of criminal procedure which applies to offenses by civilians and members of the armed forces alike, anyone can make a complaint regarding suspected wrongdoing, with any law enforcement officer (regular civilian police or the Royal Military Constabulary). The complaint will then be transferred to the appropriate prosecutorial authority.³⁴⁸

All members of the armed forces are obliged to report any knowledge of possible violations of the law of armed conflict to the responsible authorities.³⁴⁹

If there are no grounds for suspecting a criminal offense, a commander (or the Ministry of Defence or Public Prosecution Service) can initiate an internal investigation into any incident. If a reasonable suspicion arises that a criminal offense may have been committed, the commander is required to make an official report without delay

³⁴⁷ *Id.*, at para. 95.

³⁴⁸ *The Netherlands report*, *supra* note 2, at paras. 70–72.

³⁴⁹ *Id.*, at para. 71.

to the Royal Military Constabulary, and to terminate the internal investigation.³⁵⁰

As a matter of practice rather than law, there is a special reporting and investigation procedure to account for uses of force and their consequences. After any use of force (whether a discharge of a warning shot or a full-scale engagement of several days' duration) has occurred, an 'After Action Report' must be submitted by the commander on location.³⁵¹ This report is both part of the operational information provided to the Commander of the Armed Forces, and a mechanism for ensuring legal oversight and accountability for any use of force.³⁵² A copy of the report is made available to the Public Prosecution Service by the commander of the Royal Military Constabulary detachment accompanying the mission. The Public Prosecution Service determines as soon as possible, on the basis of this report, whether criminal investigation or fuller factual investigation is called for.³⁵³

There are no fixed criteria in law or policy to which the Public Prosecution Service has reference in deciding whether a fuller factual investigation is required, although factors such as the nature of the incident and the seriousness of the consequences appear to play a role. In practice, a fuller factual investigation will be undertaken whenever civilian death or serious injury results from the actions of the Netherlands armed forces.³⁵⁴ This policy applies regardless of the intensity of hostilities, although the way in which it is applied may vary with the nature of the operation and the factual circumstances in the area of deployment.³⁵⁵ The standards for admissibility of evidence in Dutch criminal procedure constitute the paradigm for evidence collection, although it will not always be possible to

350 *Id.*, at paras. 74–75, 77.

351 *Id.*, at paras. 50, 79–80, 88.

352 *Id.*, at paras. 50, 80.

353 *Id.*, at para. 50.

354 *Id.*, at para. 79.

355 *Id.*, at the responses to questions.

meet these standards in operational circumstances. Finally, it is important that the investigation record states how the investigation was conducted and how the circumstances had influenced its conduct.³⁵⁶

This practice of conducting a factual investigation in all cases of civilian death or serious injury is based, in part, on the requirements of the European Convention on Human Rights, which the Netherlands applies, as a matter of policy, whenever its armed forces are operationally deployed.³⁵⁷

How to Investigate: Routine Processes

Internal Investigation

68. Internal investigations may be carried out by commanders. Internal investigations are aimed at obtaining the best possible picture of the facts surrounding an incident, and determining whether there are grounds for suspecting criminal conduct.³⁵⁸ As noted above, a fuller factual investigation is carried out by the Royal Military Constabulary in cases of death or serious injury to civilians. An internal investigation may continue while a fuller factual investigation is in progress. For example, in January 2008, following a ‘friendly fire’ incident in Uruzgan province, Afghanistan, both the Ministry of Defence and the Public Prosecution Authority sent teams to the area to conduct factual investigations. The two teams, while having different responsibilities, cooperated and the Public Prosecution Service was able to use the results of the Ministry of Defence investigation in its report.³⁵⁹

356 *Id.*; In one case, the Court of Appeals, in considering a case involving a decision not to bring a prosecution in relation to a checkpoint incident, has referred to the difficulties in gathering evidence in operational contexts, see: *Id.*, at para. 93.

357 *Id.*, at paras. 79–80.

358 *Id.*, at para. 77.

359 *Id.*, at para. 78; Factual investigations were also carried out in relation to, for example, reports that Netherlands Air Force Apache helicopters had caused civilian casualties when firing on two vehicles in the Chenartu District, Uruzgan Province; and in relation to the deployment of a Netherlands Air Force F16 in Helmand Province, resulting in the deaths of a number of civilians, including children: see: *Id.*, at para. 96.

If, in the course of the internal investigation, a reasonable suspicion arises that a criminal offense has been committed, the commander must terminate any internal investigation. The individuals involved will be treated as suspects and the investigation will from that point be conducted as a criminal investigation.³⁶⁰

‘Fuller Factual Investigation’

69. Fuller factual investigations are carried out by the Royal Military Constabulary under supervision by the District Prosecutor. The procedure for factual investigation is not regulated by law, but is rather a matter of policy. During a factual investigation the persons involved can be heard as witnesses but are not required to answer questions which could result in self-incrimination. The commander will usually be involved in order to provide a complete situational picture, although this is not required.³⁶¹

As noted above, if there is a reasonable suspicion that a criminal offense has been committed, the investigation immediately becomes a criminal one.

Criminal Investigation

70. A criminal investigation will be conducted by the Royal Military Constabulary, in accordance with the same rules applicable to the investigation of suspected criminal offenses by civilians, and in consultation with, and under the general supervision of, the Public Prosecution Service. When a unit is outside the territory of the Netherlands and there is no Royal Military Constabulary present or readily available, commanders may

³⁶⁰ *Id.*, at paras. 47, 75, 77.

³⁶¹ *Id.*, at para. 74.

exercise powers of investigation given to the adjunct assistant prosecutors or police officers.³⁶²

In a criminal investigation, the commander must be heard as a witness in order to obtain an accurate picture of the operational situation.³⁶³

Occasional and Ad Hoc Investigative Mechanisms

71. Inquiries may be initiated by the Dutch parliament into matters including possible violations of the law of armed conflict. The government may also initiate an independent inquiry into situations involving potential violations of the law of armed conflict, or other matters related to military operations in which the armed forces were or had been involved.³⁶⁴

There are precedents for both parliamentary and government-initiated inquiries into military matters. For example, after the fall of Srebrenica in July 1995 and the ensuing genocide, the government (with parliamentary approval) initiated an investigation by the Netherlands Institute of War Documentation into the circumstances of the fall of Srebrenica and the role of the Netherlands contingent (DUTCHBAT) in the UN peacekeeping force. A report produced in 2002 led indirectly to the fall of the government. The lower chamber of the Parliament subsequently initiated an inquiry, conducting public hearings and questioning witnesses, culminating in a report in early 2003. There were also other investigations by NGOs and lobby groups, as well as litigation by family members of victims of the Srebrenica massacres.³⁶⁵

There are also examples of other public inquiries in relation to allegations of torture of Iraqi detainees by the Military Intelligence Service

³⁶² *Id.*, at para. 47.

³⁶³ *Id.*, at para. 75.

³⁶⁴ *Id.*, at para. 22.

³⁶⁵ *Id.*, at para. 23.

(rather than the armed forces), including factual investigation by an independent commission and an investigation by the Oversight Committee for the Intelligence Services.³⁶⁶

If there was a reasonable suspicion of criminal conduct, parliamentary or other public inquiries would refrain from addressing questions pertaining to potentially criminal conduct, or the inquiries would be suspended to allow criminal inquiries to take their course.³⁶⁷

Proceedings Following Investigation

72. Violations of the International Crimes Act are to be tried in the District Court in The Hague unless the crime has been committed by a member of the armed forces. In such a case, the offenders are to be tried in the Military Chamber of the District Court in Arnhem.

A decision by the prosecutorial authorities not to bring a particular matter to trial may be subject to judicial review.³⁶⁸

³⁶⁶ *Id.*, at para. 90.

³⁶⁷ *Id.*, at paras. 22, 38.

³⁶⁸ *Id.*, at para. 30.

D. KEY POINTS EMERGING FROM THE COMPARATIVE SURVEY

73. This section summarizes findings from the comparative survey on some key points which the Commission has chosen to emphasize. The discussion corresponds to the structure of the analysis throughout this Report (i.e., ‘what to investigate?’, ‘when to investigate?’, ‘who investigates?’ and ‘how to investigate?’). It highlights some common trends and divergences in the countries surveyed for each of these categories.

WHAT TO INVESTIGATE?

74. *Legislating violations of the law of armed conflict*

- a. The US has criminalized grave breaches of the Geneva Conventions 1949 and a small number of additional war crimes. All of the other countries surveyed have gone further by enacting domestic legislation criminalizing at least the war crimes set out in Article 8(2) of the Rome Statute.
- b. The US is the only country out of the six surveyed that does not have an explicit provision in domestic criminal legislation imposing responsibility on commanders and superiors, however, arguably the doctrine of command responsibility exists in the US. All the other countries have gone further by enacting specific provisions on the responsibility of commanders and superiors that are similar in effect to Article 28 of the Rome Statute, rendering commanders or civilian superiors liable in certain circumstances in which, *inter alia*, war crimes are committed by subordinates.³⁶⁹

³⁶⁹ In addition to war crimes, Article 28 of the Rome Statute is concerned with all crimes within the jurisdiction of the International Criminal Court (genocide, crimes against humanity and aggression).

- c. In some countries members of the armed forces are not charged under specific offenses pertaining to violations of the law of armed conflict. The US and Canada, as a matter of policy and practice respectively, charge members of their own armed forces with violations of the ordinary criminal law (whether found in a civilian or military code). The Netherlands and Germany have not indicted any members of their armed forces since the relevant legislation was enacted. In the one Australian case, involving charges for breaches of Australian military law incorporating criminal offenses, the DMP charged the accused with negligent manslaughter and not violations of the laws of war. The UK, on the other hand, has prosecuted a former serving member of its armed forces for ‘inhuman treatment’ under domestic legislation incorporating offenses set out in the Rome Statute.

WHEN TO INVESTIGATE?

75. In the majority of the countries surveyed there are distinct reporting and investigative duties. Incidents are reported by various mechanisms and they result in ‘investigative processes’. This section will highlight specific issues relevant to the Commission’s analysis which relate to the opening of various types of investigations. It begins by discussing the reporting duties in the different countries, which includes the kinds of incidents that need to be reported and the requirements concerning preservation of potential evidence. The section then discusses the thresholds for opening investigations. These investigations can be administrative or criminal and may also involve an initial fact-finding assessment.

76. Reporting Duties

1. Reporting Systems

Most of the countries surveyed have a comprehensive reporting system. Incidents that require reporting generally give rise to obligations to investigate (either through administrative or criminal systems). There are also obligations to investigate arising in circumstances that may not reach the threshold of an incident that must be reported.

- a. In the US, if personnel may be involved in, or responsible for, a 'reportable incident', the incident must be reported through the chain of command. The reporting process is designed to be over-inclusive and, when in doubt, incidents should be reported. A reportable incident is a 'possible, suspected or alleged violation of the law of war, for which there is credible information, or conduct during military operations other than war, that would constitute a violation of the law of war if it occurred during an armed conflict'.
- b. In Canada, there are various reporting requirements that may be relevant to a possible violation of the law of armed conflict. Queen's Regulations and Orders require that officers and non-commissioned members report to the 'proper authority' any infringement of relevant rules governing the conduct of persons subject to the Code of Service Discipline. Rule 11 of the Code of Conduct for Canadian Forces Personnel requires any breach of the law of armed conflict to be reported, whether to superiors in the chain of command, the military police, a chaplain, legal officer of any other person in authority. Additionally, there may be theatre-specific orders on reporting any 'significant incident'.
- c. In Australia, members of the ADF must report 'notifiable incidents' immediately. Notifiable incidents include any incident that raises a reasonable suspicion of an offense against the disciplinary code

(other than a minor offense), or against Australian or foreign criminal law involving Defence personnel, property or premises. However, notifiable incidents also include death, serious injury or disappearance of non-Defence personnel (other than enemy combatants) involving any Defence activity, property or premises, *even where there may be no reasonable suspicion of an offense*. If there is doubt as to whether a matter is a notifiable incident, it should be reported.

- d. In the UK, once a commanding officer becomes aware of an allegation or circumstances that would indicate to a reasonable person that a ‘Schedule 2 offence’ has or may have been committed by a person under their command, the commanding officer must as soon as is reasonably practicable ensure that the relevant service police force is aware of the matter.³⁷⁰ Schedule 2 offenses include general criminal law offenses of murder and manslaughter, as well as any alleged breach of the International Criminal Court Act 2001 (genocide, crimes against humanity or war crimes).
- e. In Germany, there are no distinct reporting obligations of the kind that exist in some other systems aside from the obligations to report suspected criminal offenses to civilian prosecutorial authorities.
- f. In the Netherlands, under the code of criminal procedure which applies to offenses by civilians and members of the armed forces alike, anyone can make a complaint regarding suspected wrongdoing, with any law enforcement officer (regular civilian police or the Royal Military Constabulary). The complaint will then be transferred to the appropriate prosecutorial authority. In addition, all members of the armed forces are obliged to report any knowledge of possible violations of the law of armed conflict to the responsible authorities.

³⁷⁰ *The UK report, supra* note 2, at para. 4.11.

2. Provisions on Preservation of Evidence

As part of the initial reporting of ‘reportable incidents’ (US) and ‘notifiable incidents’ (Australia), commanders are instructed to take steps to preserve potential evidence. Importantly, in Australia, a civilian death or injury is a ‘notifiable incident’ regardless of whether any criminal offense is suspected, so the requirement to preserve evidence applies even for non-criminal investigations. For countries Party to the European Convention on Human Rights (UK, the Germany and Netherlands), it seems that the *Al-Skeini* decision will require the armed forces to take on additional responsibilities for preservation of the scene of any alleged breaches of Articles 2 or 3 of the European Convention on Human Rights.

77. The Threshold for Investigations

1. Administrative Investigation

There is no clear definition of when the duty arises to conduct an administrative investigation. However, such investigations are generally opened following incidents that are not sufficiently serious, and can lead to administrative penalties or non-judicial punishment. Administrative investigations tend to be summary investigations or boards of inquiry carried out under the authority of the chain of command, usually by a commanding officer.³⁷¹ In some countries (US), administrative investigations are used to gather additional information about an alleged incident and may reveal grounds for suspecting criminal conduct. In other countries (Australia), they are used to investigate cases of civilian deaths where there is no reasonable suspicion of a criminal offense.

³⁷¹ In the US, a battalion commander or a higher commander orders this investigation; in Canada, a commanding officer of a unit or the military police orders such an investigation; in Australia, a commander or CJOPS, orders the investigation depending on the nature of the administrative investigation; in the UK, a commanding officer orders an investigation; in Germany, a commander orders such an investigation; and in the Netherlands, a commander (or the Ministry of Defence or Public Prosecution Service) orders this kind of investigation.

2. Criminal Investigation

It is not always clear when a criminal investigation is *required* to be opened, but the threshold is generally one of ‘reasonable suspicion’ or ‘reasons to believe’ that a criminal offense has been committed.

- a. In the US, a criminal investigation is generally opened in the case of reportable incidents, though the specific criteria on which Military Criminal Investigative Organization (MCIO) commanders determine whether to proceed with a criminal investigation are not publicly available. The MCIO’s decision to investigate may be a result of a notification or request from a commander, the request of the Department of Defense Inspector–General, or on its own initiative.
- b. In Canada, criminal investigations (known as ‘disciplinary investigations’) are conducted into an alleged service offense (violation of any law, including the Code of Service Discipline contained in the National Defence Act). Disciplinary investigations may be carried out by Canadian Forces National Investigation Services (CFNIS), the civilian police, base or wing military police, or, in the cases of minor breaches of discipline, unit authorities. CFNIS is most likely to be responsible for investigating violations of the law of armed conflict.
- c. In Australia, a criminal investigation would generally be opened by Australian Defence Force Investigative Service (ADFIS) in the case of a suspected law of armed conflict violation though there is no publicly accessible statement on the triggering thresholds for the initiation of a criminal investigation.
- d. In the UK, criminal investigations are conducted into alleged Schedule 2 offenses. Once possible violations of the law of armed conflict are reported to Service police by commanders (or other parties), the Service police have control of the investigation.

- e. In Germany, criminal investigations are conducted into malfeasances. Violations of the law of armed conflict may constitute malfeasances subject to disciplinary measures under the Code of Law for Members of the Armed Forces. A commander is obliged to initiate an investigation as soon as facts become known to him that justify the suspicion of a malfeasance.
- f. In the Netherlands, criminal investigations are conducted into suspected criminal offenses by members of the armed forces. The Royal Military Constabulary conducts these investigations.

78. Fact–Finding Assessment for Investigative Purposes

In some of the countries surveyed there is an initial fact–finding activity that complements reporting duties.

- a. In the US, a ‘preliminary inquiry’, a type of administrative investigation, is undertaken to determine whether US personnel may be involved in, or responsible for, a ‘reportable incident’. There 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. If it is clear that a matter requires criminal investigation, because of its gravity or complexity, the preliminary inquiries may be simple and quick.
- b. In Australia, a ‘quick assessment’ (QA) process interlocks with reporting obligations. QAs may be undertaken on the initiative of a commander or supervisor, or they may be initiated following an incident report. The QA is a fact–finding exercise and it must be completed within 24 hours. The QA may be conducted when other inquiries are occurring, but must not interfere with such other inquiries or investigations. If, in the course of a QA, it becomes evident that a notifiable incident may have occurred, this must be reported to the commander or supervisor

immediately and reported accordingly. The QA must still be completed but the individual undertaking the QA is required to liaise with investigators from ADFIS to ensure that he does not interfere with investigations.

WHO INVESTIGATES?

79. In the countries surveyed, the investigations outlined above are conducted by various authorities.

1. Administrative Investigations

Depending on the nature of the offense under investigation, administrative investigations are conducted by officers or commanders at all levels of the unit who were not involved in the incident under consideration. Often it is the member of the unit who orders the investigation that conducts it.

- a. In the US, an officer uninvolved in the incident will conduct the inquiry and report to the commander.
- b. In Canada, commanders at all levels must be able to conduct investigations for the effective and efficient administration of their units.
- c. In Australia, for less serious incidents, the commanding officer in theatre can institute a routine inquiry. For more serious incidents, there is a graduated scale of inquiries requiring escalated levels of authorization.
- d. In the UK, a reasonable commanding officer must investigate a Service offense or ensure that the relevant service police are aware of the matter. Another possibility is that the commanding officer may

nominate another officer of equal rank from outside the immediate operational chain of command to investigate.

- e. In Germany, usually a commander will ask his legal advisor to investigate, supported by the military police.
- f. In the Netherlands, a commander (or the Ministry of Defence) conducts the investigation.

2. Criminal Investigations

Once a criminal investigation is opened, typically investigative authorities proceed independently of the chain of command.

- a. In the US, although MCIO investigations are conducted by members of the armed forces, they have separate reporting chains, usually to the Chief of Staff and Secretary of the relevant service.
- b. In Canada, the CFNIS conducts criminal investigations, and the investigation is under a commanding officer who reports directly to the Canadian Forces Provost Marshal, in order to protect the ability of CFNIS to conduct investigations independently of any command influence.
- c. In Australia, ADFIS is responsible for conducting investigations into all serious crimes, and such investigations must be free of influence from the chain of command or line management. However, any investigation will require close consultation with commanders or managers. It must be noted that because the Head of ADFIS reports to the Chief of the Defence Force, it is possible that an ADFIS decision to investigate could be overruled by the chain of command at the highest level.
- d. In the UK, the Service police have control over the investigation and are subject to discipline by the relevant Provost Marshal and

not the operational chain of command. They are further required by the Queen's Regulations to investigate independently of the chain of command.

- e. In Germany, the relevant civilian prosecutor will work together with military police on the investigation.
- f. In the Netherlands, criminal investigations are conducted by the Royal Military Constabulary in accordance with the same rules applicable to the investigation of suspected criminal offenses by civilians, and in consultation with, and under the general supervision of, the Public Prosecution Service.

80. Oversight and Review

Most of the countries that were surveyed have some form of external oversight. In Canada, all military police are subject to the oversight of the Military Police Complaints Commission (MPCC), a civilian body with quasi-judicial status that was established in order to strengthen the accountability and independence of military police in relation to military police investigations; in Australia, the Inspector-General of the ADF (IGADF), who is independent of the ordinary chain of command, provides the Chief of the Defence Force with a mechanism for internal audit and review of the military justice system and has the ability to expose and examine failures and flaws in the military justice system; in the UK, the Service police are subject to inspection by Her Majesty's Inspectorate of Constabulary (HMIC) to ensure that the standards of the Service police are broadly comparable to their civilian counterparts (i.e., independent and effective investigations).

HOW TO INVESTIGATE?

81. This section will touch upon specific issues relevant to the Commission's analysis which relate to the standards of investigation.

1. Operational Debriefs

In all of the countries surveyed, in addition to administrative or criminal investigations, an operational review or debriefing is conducted after military operations. For example, in the US this is called an 'after action review' and in the Netherlands it is called an 'after action report'. Its purpose is to capture tactical, technical and operational lessons and generally it is a much more informal activity than criminal and administrative investigations. An operational review is conducted within the unit, by a commanding officer or a lower-ranking officer. The countries surveyed differ on whether statements made or information collected during a debriefing will trigger the reporting of an incident or form the basis for initiating either criminal or administrative investigations. For example, in the US an 'after action review' can trigger an investigation requirement. However, in Germany, operational debriefings have no impact on criminal investigations.

2. Separation of Advisory and Prosecution Functions

In the countries surveyed, there is a separation of advisory and prosecutorial functions, albeit to varying degrees.

- a. In Germany and the Netherlands, countries which have no comprehensive system of military justice and rely on civilian prosecutorial authorities, there is necessarily an institutional separation between the personnel providing legal advice to the armed forces (for Germany, civilian lawyers within the Ministry of Defense, and for the Netherlands, the Military Legal Service of the Armed

Forces) and the civilian prosecutorial authorities.

- b. Of the four common law countries with military justice systems, three (Canada, Australia and the UK) have moved over the years to create distinct prosecutorial authorities who have control of criminal proceedings. These prosecutorial authorities have guarantees of independence, flowing from their basis in statute and from specific provisions regarding their interactions with other officials and institutions. In Canada, the DMP is under the general supervision of the JAG, who also oversees advisory functions, but this supervisory relationship is subject to a number of formal constraints (for example, any instructions from the JAG concerning particular prosecutions, or prosecutorial policy in general, must be in writing and published). In Australia, although there is a Directorate of Operations and International Law (DOIL) and a Directorate of Military Justice overseeing advisory and military justice functions respectively, and both report to the Director-General of ADF Legal Services, prosecutorial decisions are taken by the DMP. In the UK, the Director of Service Prosecutions (DSP) is under the general supervision of the Attorney-General (although the Service Prosecution Authority are members of the Service legal branches), while the Service legal branches report to the Minister of Defence. As demonstrated, all but one of the countries surveyed had separate legal advisory and prosecutorial functions. In the US, a Judge Advocate may be responsible both for military justice matters and for operational legal advice.

3. Advice to Government

In the countries surveyed the legal branch of the armed services is not the exclusive source of advice to the government on law of armed conflict issues; the military legal branches will be consulted on such issues, but alongside legal advisers from other government departments (e.g., defense, the Attorney-General and foreign affairs).

4. Investigations into Civilian Deaths

In some countries, a factual investigation is conducted into all civilian deaths (absent any suspicion of an offense). This practice does not appear to be formally recorded in law or regulations, but in some cases it intersects with reporting obligations that have some formal basis in directives and instructions.

- a. The US does not require such investigations. The other countries surveyed (Canada, Australia, Germany, the Netherlands, and, possibly, the UK in relation to shootings) require these investigations either as a matter of policy, or it has simply become invariable practice in theatres of operation. A factual investigation is conducted in any instance in which a civilian is killed (and in the case of the Netherlands, also when a civilian is seriously injured) by members of the country's armed forces, including incidences of collateral damage.
- b. The factual investigations into civilian deaths are often carried out by individuals or institutions removed from, and independent of, the operational chain of command. (In Canada, the CFNIS is the investigatory body, at least until a determination can be made that no criminal/disciplinary culpability exists; in Australia, an Inquiry Officer is appointed from a different unit and sent to the area of operations; in Germany the military police and civilian prosecutorial authorities carry out the investigation; and similarly, in the Netherlands, the Royal Military Constabulary and the civilian prosecutorial authorities carry out the investigation).

CONCLUDING COMMENTS

82. A summary of the key points in this chapter demonstrates both divergences and similarities in the way the six countries surveyed have interpreted and applied their international humanitarian law obligation to investigate allegations of war crimes. The differences between the national systems are not surprising given that the relevant treaty obligations and standards of investigations lack specificity. The lack of uniformity is also explained by the fact that the comparator countries' investigation mechanisms are partly shaped by domestic law (common or civil law), operational and policy concerns and distinct military cultures. The countries that are Parties to the Rome Statute or to the European Convention on Human Rights carry additional obligations that influence their investigative processes. The numbers of military personnel deployed and the scope and number of investigations per year in the six countries varies greatly and this also influences distinct national institutions and processes. At the same time, there are many commonalities in the kind of domestic frameworks the countries have established to handle investigations into allegations of war crimes. In recent years, most of the countries have initiated institutional reforms to their investigation systems, and some trends that can be identified from these reforms include the 'reasonableness' threshold that triggers an investigation and the emphasis on independence as demonstrated by a separation from the chain of command or a move towards external oversight and review.

A comparative survey is a helpful tool for understanding the direction of best practice in this field as well as allowing countries to learn from each other about the kinds of processes that have been applied in order to adhere to the basic legal obligation to investigate in the context of armed conflict. Such knowledge is important when reviewing a military justice system and considering possible developments and reforms.

CHAPTER C: THE EXAMINATION AND INVESTIGATION MECHANISMS IN ISRAEL CONCERNING COMPLAINTS AND CLAIMS OF VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW

INTRODUCTION

1. This chapter is a survey of the examination and investigation mechanisms in Israel dealing with complaints and claims regarding violations of international humanitarian law. The survey in this chapter parallels the structure of the normative analysis in Chapter A: first, we will present the normative framework that gives rise to the duty to investigate violations as it is defined in Israel, whether according to Israel's international law obligations or according to Israeli law ('why investigate?'). Second, we will set out the normative provisions that define the violations that give rise to a duty to investigate under Israeli law, i.e., what are the offenses involving violations of international humanitarian law that are recognized by Israeli domestic law ('what to investigate?'). Third, we will present the Israeli examination and investigation mechanisms for complaints and claims regarding violations of international humanitarian law, which are raised against IDF soldiers, police officers, ISA workers, prison wardens and the civilian echelon ('who investigates?'). In the framework of this survey we will provide details about the legal authority of these mechanisms, the framework of their activity and their place in the general Israeli legal system, as well as the institutions that provide oversight and review of these mechanisms. Fourth, we will present the grounds for the initiation of an examination and investigation by the various mechanisms, including the reporting procedures ('when to investigate?'). Finally, we will survey the methods in which the examination and investigation processes are conducted by the various mechanisms ('how to investigate?').

The information surveyed in this chapter is based on information that was submitted to the Commission, including testimonies and documents that were submitted by the investigating mechanisms themselves; testimonies and documents that were submitted by other parties, such as human rights organizations; and on the independent assessment carried out by the Commission in which we inspected the examination and investigation procedures of a random sample of cases (see above in the introduction to this Report, paragraph 23).

A. SOURCES OF THE NORMATIVE BASIS OF THE DUTY TO EXAMINE AND INVESTIGATE COMPLAINTS AND CLAIMS OF VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW IN ISRAEL ('WHY INVESTIGATE?')

2. As stated in Chapter A, the duty to examine and investigate complaints and claims of violations of international humanitarian law is enshrined in various sources of international law. According to Israeli law, domestic law contains those provisions of customary international law that do not conflict with Israeli legislation. By contrast, a provision of conventional international law must be expressly adopted by the legislator. However, as a State Party, Israel is bound by the conventions in the international sphere. In the words of the Supreme Court:

In Israeli law, a distinction is made with regard to the relationship between international law and domestic law, i.e., the need to decide the question whether a certain provision of international law has become a part of Israeli law, whether customary law or conventional law... According to the consistent case law of this court, customary international law is a part of Israeli law, subject to an act of Israeli legislation that contains a conflicting provision... "The law is that the rules of (customary) international law are automatically absorbed by Israeli law and constitute a part thereof, but in the event of a direct conflict between them and a statutory provision, the statutory provision prevails"... Regarding the status of conventional international law in relation to our law... the adoption of international conventions – in order to make them a part of domestic law and in order to make it possible to enforce them through the national courts – is contingent upon a prior act of the legislature... International conventions may constitute a declaration of existing customary law, but then what is stated therein will be binding by virtue of

the aforesaid customary status of the rule included in them and not as a result of its inclusion in the convention.¹

3. As stated in Chapter A, Israel is a State Party to the four Geneva Conventions.² Moreover, Israel has signed and ratified additional conventions that concern the rules of international humanitarian law.³

4. The general duty to examine and investigate violation of international humanitarian law also derives from the fact that Israel is a country that belongs to the community of nations and respects human rights. The Israeli Supreme Court has reflected this sentiment in many of its judgments. Thus, for example, the Court has stated:

This warfare is not conducted in a normative vacuum. It is waged in accordance with the rules of international law, which lay down principles and rules for conducting warfare. The statement that “When the cannons roar, the muses are silent” is incorrect. Cicero’s statement that *Inter arma enim silent leges* (“Among arms, the laws are silent”) does not reflect modern reality. I discussed this in one case, where I said: “When the cannons roar, the muses are

1 H CJ 785/87 *Al Affo v. Commander of I.D.F. Forces in the West Bank*, 42(2) 4 (1988), at paras. 5(b)–5(c) of President Shamgar’s judgment.

2 See: Chapter A, para. 5; It should be noted that Israel has also adopted the Protocol III Additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem, Dec. 8, 2005 (Israel’s ratification came into effect in Nov. 22, 2007).

3 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954 (Israel’s ratification came into effect in Jul. 1, 1958); Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare. Geneva, Jun. 17, 1925 (Israel’s ratification came into effect in Feb. 20, 1969); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 19, 1984 (Israel’s ratification came into effect in Oct. 3, 1991); Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects. Geneva, Oct. 10, 1980 (Israel’s ratification came into effect in Mar. 22, 1995); Protocol on Non-Detectable Fragments (CCW Protocol I 1980) (Israel’s ratification came into effect in Mar. 22, 1995); Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and other Devices (CCW Protocol II 1980) (Israel’s ratification came into effect in Mar. 22, 1995); Protocol on Blinding Laser Weapons (CCW Protocol IV 1980) Oct. 13, 1995 (Israel’s ratification came into effect in Oct. 30, 2000); Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on May 3, 1996 (Protocol II to the 1980 Convention) (Israel’s ratification came into effect in Oct. 30, 2000); Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in armed conflict, May 25, 2000 (Israel’s ratification came into effect in Jul. 18, 2005).

silent. But even when the cannons roar, the military commander is liable to uphold the law. A society's ability to stand up to its enemies is based on its recognition that it is fighting for values that are worth protecting. The rule of law is one of those values" (HCJ 168/91 *Morcus v. Minister of Defense* 45(1) 467, 470).⁴

5. Apart from the international law obligation, in Israel there is a duty to investigate that derives from the rules of Israeli administrative and criminal law. For example, the Criminal Procedure Law [Consolidated Version], 5742–1982 (hereinafter: the Criminal Procedure Law), provides that: 'If the police become aware of the commission of an offense, whether as a result of a complaint or in any other way, they shall begin an investigation'. Similarly, the Investigation of Causes of Death Law, 5718–1958, also provides that 'when an individual dies and there is a reasonable basis for assuming... that the death was caused by an offense, ... the Attorney–General or his counsel, a police officer, a doctor or any interested person, may apply to a Magistrate judge... to investigate the cause of the death'.⁵ The duty to investigate certain claims of violations of international humanitarian law is enshrined in Israeli law also by virtue of the recognition of the right to life as held by the Supreme Court:

The actual investigation has ramifications for the protection of the right to life – the investigation first and foremost allows indictment in the appropriate cases, and imposing liability on those who deviate from the law. Moreover, a criminal investigation serves to safeguard the prospective aspect of the duty to protect life, in that it deters future perpetrators, prevents contempt for the right to life and contributes to the atmosphere of upholding the rule of law.⁶

4 HCJ 3451/02 *Almandi v. The Minister of Defense, Mr. Benjamin Ben–Eliezer*, 56(3) 30 (2002), at para. 9 to President Barak's judgment [hereinafter: *Almandi* case].

5 The Criminal Procedure Law [Consolidated Version], 5742–1982, LA 1043, at Article 59 [hereinafter: The Criminal Procedure Law]; The Investigation of Causes of Death Law, 5718–1958, LA 242, at Article 19.

6 HCJ 9594/03 *B'Tselem – Israeli Information Center for Human Rights in the Occupied Territories v. the Chief Military Prosecutor* (still unpublished, Aug. 21, 2011), at para. 10 of president Beinisch's

Like any administrative authority, the prosecution and investigation authorities also have the duty to base their decisions on as broad and as precise a set of facts as possible.⁷ Therefore, the decision to open an investigation as well as the decision to indict must be based on an examination and investigation.

6. The duty to investigate complaints and claims of violations of international humanitarian law by IDF soldiers also derives from the rules that apply to the activity of soldiers and regulate the normative framework in which they operate. Thus, the Military Justice Law, 5715–1955 (hereinafter: the Military Justice Law), states that ‘a commander... or a soldier who knows or has basis to believe that another soldier committed an offense as stated, shall prepare a complaint or should instruct that a complaint be prepared about the offense’ and shall submit the complaint to the investigation authorities,⁸ and that ‘a person cannot be committed for trial... until the offense was examined by an Examining Officer...’ (an Examining Officer is an authorized Military Police Officer).⁹ Moreover, IDF soldiers are subject to the Supreme Command Orders,¹⁰ IDF General Staff Orders (hereinafter: General Staff Orders)¹¹ and orders and directives of various military units,¹² some of which concern the duty of commanders in the IDF to examine and investigate alleged violation of the law by those under their command.

judgment [hereinafter: *B'Tselem* case].

7 HCJ 297/82 *Berger v. Minister of Interior*, 37(3) 29 (1983).

8 The Military Justice Law, 5715–1955, LA 189, at Article 225 [hereinafter: The Military Justice Law].

9 *Id.*, at Article 251.

10 Pursuant to the Military Justice Law, at Article 2A(a), the orders of the Supreme Command are ‘general orders that will be issued by the Chief of Staff with the approval of the Minister of Defense, which will determine principles concerning organization, administration, rule and discipline in the army and ensuring its proper operation’.

11 Pursuant to the Military Justice Law, at Article 2A(b), orders of the General Staff are ‘general orders issued by the Chief of Staff’, on the matters mentioned with regard to orders of the Supreme Command.

12 Military Justice Law, at Article 3, provides that the orders of the Supreme Command, the orders of the General Staff and other general orders are regarded as laws, but in a case of conflict between the orders of the Supreme Command and the orders of the General Staff or other general orders, the orders of the Supreme Command will take precedence.

7. Another important source for the obligation to investigate is the rule that imposes responsibilities on commanders to investigate alleged violations of international humanitarian law. As was explained in detail in Chapter A, ‘command responsibility’ is binding customary law.¹³

In Israel, IDF soldiers and commanders are obligated ‘to maintain the existence of discipline and compliance with the law and army orders and observe them meticulously’.¹⁴ A special responsibility is imposed upon the commanders, since they are charged with the responsibility to enforce discipline upon their subordinates.¹⁵ This special responsibility requires that every commander ensures that orders are complied with, to motivate his subordinates to fulfill their duties and to take prompt disciplinary measures in case an offense was committed.¹⁶ This responsibility of the commander applies regarding the discipline of any soldier that is lower in rank than that of the commander, in the absence of that soldier’s commander.¹⁷

The Supreme Court has also addressed the issue of command responsibility, and held that commanders are obliged to prevent offenses and to punish perpetrators when they are committed, whether through personal example, as a model for imitation by soldiers in the field, or by imposing sanctions on soldiers who violated the rules, in a manner that sends a message that such conduct will not be tolerated.¹⁸

13 See: Chapter A, para. 26. See also: Transcript of session no. 4 “Testimony of the Military Advocate-General” (Aug. 26, 2010).

14 SUPREME COMMAND ORDER 6.0302, *Discipline – Commander’s Responsibility and Staff Responsibility*, at para. 1.

15 *Id.*, at para. 3.

16 *Id.*, at para. 5.

17 *Id.*, at para. 6. See, also: A/78/88 *First Sergeant Danino v. Chief Military Prosecutor*, CM 227, 239 (1988).

18 HCJ 7195/08 *Abu Rahme v. Brigadier-General Avichai Mandelblit, Military Advocate-General* (unpublished, Jul. 1, 2009) [hereinafter: *Abu Rahme case*].

B. THE NORMATIVE PROVISIONS IN ISRAEL THAT DEFINE THE VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW THAT REQUIRE EXAMINATION AND INVESTIGATION ('WHAT TO INVESTIGATE?')

8. As stated above, there is a duty in Israel to investigate suspected violations of international humanitarian law. Below we will review the legal provisions underpinning the operation of the mechanisms responsible for the examination and investigation of the various security agencies. The provisions of the Geneva Conventions that impose a duty to punish persons who violate the conventions – and especially Article 146 of the Fourth Geneva Convention – have not been adopted by the Israeli legislator.¹⁹ In Israel, according to the principle of legality, there needs to be an express provision of legislation that prohibits certain conduct in order for that conduct to be regarded as criminal. In the words of the Penal Law 5737–1977 (hereinafter: the Penal Law): ‘There is no offense or penalty for it unless they are prescribed in statute or pursuant thereto’.²⁰ Therefore, the existence of a rule in customary international law and even Israel’s obligations in international conventions are insufficient in themselves for commencing domestic criminal proceedings.

WAR CRIMES

9. As stated in Chapter A, international law obligates States to enact legislation that enables punishing perpetrators of war crimes.²¹ In Israel, the only explicit mention of the term ‘war crime’ in domestic legislation

19 It should be noted that on this matter draft legislation was tabled in the Knesset. See for example: P/682/18 draft Geneva Convention Law, 5769–2009. See also: Hillel Summer, *And Yet It Shall Surely Apply (On the Application of the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War, 1949, in Israeli Law)*, 11(2) TAU L. REV. 263 (1986).

20 The Penal Law, 5737–1977, LA 864, at Article 1 [hereinafter: The Penal Law].

21 See: Chapter A, para. 24.

is in the Nazis and Nazi Collaborators (Punishment) Law, 5710–1950.²² Section 1(b) of the law defines the term ‘war crime’ as follows: ‘the murder of a civilian population of an occupied country or in an occupied country, their oppression or their deportation for the purpose of forced labor or for any other purpose; the murder and oppression of prisoners of war or of persons on the high seas; the killing of hostages; the theft of public or private property; the arbitrary destruction of cities, towns or villages; and destruction that is unjustified by military necessity’. However, the war crimes stipulated in Israeli law only relate to ‘the period of the Second World War, in a hostile country’.²³

10. In Israel, alleged war crimes are investigated by resorting to the offenses that are found in the Penal Law, which include, *inter alia*, the prohibitions of murder,²⁴ rape,²⁵ theft,²⁶ assault.²⁷ On this matter the Supreme Court held that:

Indeed, in our legal system, indictments are filed in the military and civil courts, in appropriate cases, on the basis of Israeli law. In cases where the laws of war have been breached, indictments will be filed pursuant to Israeli law and for the appropriate criminal offense, which is, in principle, parallel to the same principles as those of international criminal law. In cases of this kind, the prosecution needs to prove the elements of the specific offense as in any other criminal trial.²⁸

22 Nazis and Nazi Collaborators (Punishment) Law, 5710–1950, LA 57. It should be noted that in addition to this law, Israel enacted The Law Regarding the Prevention and Punishment of the Crime of Genocide, 5710-1950, LA 137, which absorbs the Genocide Convention, which was adopted on 9 December 1948.

23 *Id.*, at Article 1(a).

24 The Penal Law, at Article 300.

25 *Id.*, at Article 345.

26 *Id.*, at Article 383.

27 *Id.*, at Article 378.

28 HCJ 3292/07 *Adalah – The Legal Centre for Arab Minority Rights v. Attorney-General* (still unpublished, Dec. 8, 2011) [hereinafter: 2011 *Adalah* case]; See also: HCJ 10219/09 *Shurat HaDin Israel Law Center v. Attorney-General* (still unpublished, May 2, 2010).

11. The application of Israeli domestic law raises the question of the extraterritorial application of Israeli criminal law, since violations of international humanitarian law often occur outside the borders of the State. Indeed, the Israeli legislature extended the scope of application of criminal law beyond the territory of the State of Israel, insofar as there are certain links between the offender or the offense to Israel.²⁹ Thus, for example, the Extension of Emergency Regulations (Judea, Samaria and the Gaza Strip – Jurisdiction for Offenses and Legal Assistance) Law, 5728–1967,³⁰ gives the courts in Israel jurisdiction over offenses committed in Judea and Samaria (hereinafter: the West Bank), and until 2005 the Gaza Strip, by any person who is present in Israel and also offenses committed in the areas of the Palestinian Authority by an Israeli. The Penal Law provides that ‘Israel’s criminal law shall apply to an extraterritorial offense that is a felony or a transgression, which is committed by a person who at the time of its commission or thereafter was a citizen or resident of Israel’ (an extraterritorial offense is an offense committed outside Israeli territory).³¹

12. Apart from the offenses set out in the Penal Law that allow prosecution for violations of international humanitarian law, IDF soldiers in regular service or reserve service are subject to a special law i.e., the Military Justice Law and relevant military orders.³² The Military Justice Law also applies to civilians that are connected to the army (volunteers in the reserve forces, employees of the army, and any person who is lawfully held in custody by the army or to whom a weapon is entrusted by the army) that committed offenses from the moment they are enlisted until

29 See: the Penal Law, at Articles 13–17 (Article C – Application to Extraterritorial Offenses), which stipulate the offenses to which Israeli law applies extraterritorially (including State security, offenses against the life of an Israeli citizen or against the life of a Jew, and obligations pursuant to international conventions to which the State of Israel is a Party); See also: CA 8831/08 *State of Israel v. Ashchava* (still unpublished, Jun. 30, 2010), at paras. 13–14 of Justice Amit’s judgment.

30 Emergency Regulations Extension Law (Judea and Samaria and Gaza Strip – Trying of Offenses and Legal Assistance), 5727–1967, LA 905, as amended by the Emergency Regulations Amendment and Extension Law (Judea and Samaria – Trying of Offenses and Legal Assistance), 5772–2012. These Emergency Regulations will remain in effect until 30 June 2017.

31 The Penal Law, at Article 15; For the definition of an ‘extraterritorial offense’ see also: *Id.*, at Article 7.

32 The Military Justice Law, at Article 4.

their discharge, whether in the territory of the State of Israel or outside its territory.³³ The Military Justice Law ‘imports’ certain offenses from the Penal Law and applies them to the persons governed by the law,³⁴ and it also includes special penal provisions (‘military offenses’). The military offenses include the prohibition of looting which is a ‘war crime’ under international law.³⁵

One of the military offenses listed in the Military Justice Law deals with noncompliance with army orders.³⁶ This offense is important for our purposes because the four Geneva Conventions and the Convention for the Protection of Cultural Property in the Event of Armed Conflict, including its additional protocol, were incorporated into General Staff regulation 33.0133, according to which IDF soldiers are obliged to act in accordance with those Conventions.³⁷ It follows that a breach of the provisions of the Conventions constitutes an offense under General Staff regulations, and therefore also an offense under the Military Justice Law. Additionally, a violation of international humanitarian law can be indicted by way of offenses such as ‘unbecoming conduct’.³⁸ It should be noted that it is possible to try certain offenses – such as unbecoming conduct or noncompliance with regulations – either in disciplinary proceedings or in a court martial; in the latter case they are considered, at least by the prosecution authorities, as more serious, even though currently they do not result in a criminal record.³⁹ Offenses of this kind have been defined by the Supreme Court as

33 The Penal Law, at Articles 4–11. In regards to the application of the law to an individual who has ceased to be a soldier, see: *Id.*, at Article 6.

34 The Military Justice Law, at Article 17.

35 *Id.*, at Article 74. For an example of the international status of the offence see Article 8(2)(b)(xvi) and Article 8(2)(e)(v) of the Rome Statute for the International Criminal Court.

36 *Id.*, at Articles 132–133.

37 CHIEF OF STAFF ORDER 33.0133 *Discipline – Conduct according to International Conventions to which Israel is a Party*.

38 For example, see: THE SAMPLE EXAMINATION, at para. 23 of the Introduction of this Report: File 38/09: which dealt with an incident where the force commander was indicted for ‘unbecoming conduct’ according to Article 130 of the Military Justice Law and exceeding authority to the level of endangering life and risking health (Article 72); See also: *Abu Rahme* case, *supra* note 18.

39 According to Article 17 of the Military Justice Law, military offenses are subject to Chapters A and B of the Preliminary Part of the Penal Law, and therefore they are subject to criminal records, with the exception of lesser felony offenses, which satisfy the conditions provided at Article 404A of the

‘offenses of an open nature’, which lie on the borderline between criminal law and disciplinary law, and are unique in that they indicate a breach of norms that does not imply that the perpetrator is a danger to society, but that he has harmed the military sphere.⁴⁰

RESPONSIBILITY OF COMMANDERS AND CIVILIAN SUPERIORS

13. Once the rules of international humanitarian law were incorporated into army orders, every commander acquired the duty to prevent and repress violations of those rules by his subordinates. The duty imposed on commanders to punish persons who violate the law is considered by the army as a part of their duty to act as an example and role model. In the words of the Military Advocate–General (hereinafter: the MAG): ‘The concept of command in the IDF implies a command responsibility and an educational and ethical obligation to discipline, decisively and clearly, someone whose conduct deviates from the standard of conduct expected of a soldier or commander of his rank’.⁴¹

Military Justice Law, which are mainly offenses that are punishable by a maximum of two months’ actual imprisonment; See further on this subject the arguments of the MAG in *Abu Rahme* case, *supra* note 18, at paras. 22 and 26 of Justice Procaccia’s judgment.

40 *Abu Rahme* case, *supra* note 18, at paras. 59–60 of Justice Procaccia’s judgment.

41 The Military Advocate–General’s Reply to the Petition in the *Abu Rahme* case, as cited in the judgment; See: *Abu Rahme* case, *supra* note 18, at para. 75 of Justice Procaccia’s judgment.

C. THE MECHANISMS IN ISRAEL THAT EXAMINE AND INVESTIGATE COMPLAINTS AND CLAIMS OF VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW (‘WHO INVESTIGATES?’)

14. In this section we will provide an overview of the mechanisms that examine and investigate complaints and claims of violations of international humanitarian law. Naturally, most of the claims relating to the examination and investigation mechanisms are focused on the IDF as the main security arm engaged in hostilities. Therefore, a substantial part of the discussion will be devoted to these mechanisms in the IDF. However, complaints and claims regarding violations of international humanitarian law can also be directed against other security arms, such as the Israel Police, the Israel Security Agency (hereinafter: the ISA), and the Israel Prison Service, regardless of whether the complaints relate to alleged acts committed in the West Bank or in Israel. Finally, claims of violations of international humanitarian law may also be directed against senior decision-makers, whether in the military echelon or in the civilian-political echelon. Below we will survey the manner in which the various arms conduct examinations and investigations of complaints and claims of international humanitarian law violations and the institutions that oversee their conduct and review them.

COMPLAINTS AND CLAIMS DIRECTED AT IDF SOLDIERS

15. The military justice system in Israel is responsible for examining and investigating complaints and claims regarding the conduct of soldiers. This system is composed of three main bodies that are responsible for administering law and order in the IDF: the MAG Corps, the Military Police Criminal Investigation Division (hereinafter: the CID) and the courts martial. Alongside the military justice system, certain claims against the

conduct of soldiers are also handled within the chain of command. In this framework, the operational debriefing is used. Below we will discuss both the operational debriefing and the way it interacts with the military justice system ('how to investigate?'). We will now outline consecutively the three examination and investigation bodies in the military justice system

1. The Military Advocate-General Corps

16. There are a number of orders that regulate the operation of the MAG Corps unit. The purpose, functions and structure of the MAG Corps are regulated in the Military Justice Law and in Supreme Command Order no. 2.0613, *The Military Advocate-General's Corps* (Mar. 15, 1976). In addition, the function of the MAG Corps is regulated in Supreme Command Order no. 2.0201, *The Professional Staff in the General Staff* (Aug. 1, 1966);⁴² the Internal Regulations of the MAG's Headquarters, whose most recent version was adopted in December 2010;⁴³ and the Organizational Order of the MAG Headquarters, which was approved by the IDF's Planning Division in July 2008.⁴⁴

The MAG Corps is designated to enforce law and order in the army, (with the exception of supervision and administration of the courts martial), to advise army authorities on matters of law and order, and to instill the values of the rule of law in the army.⁴⁵ The Organizational Order of the MAG Headquarters revised this purpose, and emphasized that 'the enforcement

42 SUPREME COMMAND ORDER 2.0613 *The MAG Corps* [hereinafter: SCO 2.0613]; SUPREME COMMAND ORDER 2.0201 *The Professional Staff in the General Staff* [hereinafter: SCO 2.0201].

43 The internal orders of the MAG Corps [hereinafter: Internal orders of the MAG Corps] have the status of unit standing orders that bind all of the persons serving in the unit; See: www.law.idf.il/Templates/GetFile/GetFile.aspx?FileName=D:\projects\patzar-ks\data\Sip_storage\FILES\0\940.pdf.

44 *The Organizational Order of the MAG Corps* (approved by the Planning Department, 2008) [hereinafter: *the Organizational Order*]; The Organization Order has no special normative status, and it only binds the Planning Department of the IDF, which is responsible, *inter alia*, for formulating the IDF's organizational policy, including determining the designation, duties and main structure of each unit.

45 SCO 2.0613, *supra* note 42, at para. 2.

of law and order, and the legal advice given by the MAG Corps, constitute an integral part of the IDF's ability to carry out its assignments'.⁴⁶

The duties of the MAG Corps include managing the military prosecution system at the courts martial; maintaining the Military Defender's Office in order to provide a legal defense for soldiers; advising branches of the military in all spheres of law (in the fields of military law, international law and the law of armed conflict), and also to represent them where needed; maintaining law and order in the territories administered by the IDF (*inter alia*, maintaining a prosecution system in the West Bank); supervising disciplinary law in the army; developing, teaching and instilling military law among IDF soldiers and commanders; and handling all legislative issues relating to the army (both by initiating legislative amendments and by handling draft legislation, while coordinating the legislative proceedings taking place in government agencies and in the Knesset).⁴⁷

17. The MAG is the commander of the MAG Corps. According to the Military Justice Law, the MAG is authorized to act as adviser to the Chief of Staff of the IDF and all other military authorities on all issues of law and justice;⁴⁸ to supervise the rule of law in the army, except for supervision and management of the courts martial; to be responsible for legal supervision of disciplinary proceedings; and to carry out every other function imposed on him in accordance with every law and army regulations.⁴⁹ Moreover,

46 *The Examination and Investigation Mechanisms in Israel for Complaints and Claims Raised Regarding Breaches of the Laws of War* (Position Paper of the MAG Corps submitted to the Turkel Commission, Mar. 29, 2011) 3–4 [hereinafter: *MAG Position Paper regarding the Examination Mechanisms*].

47 SCO 2.0613, *supra* note 42, at para. 3; *MAG Position Paper regarding the Examination Mechanisms*, *supra* note 46, at 4.

48 See: SCO 2.0613, *supra* note 42, at para. 4; The Military Justice Law, at Article 178; It should be noted that these duties are defined in SCO 2.0201, *supra* note 42, at paras. 34–38; See also: INTERNAL ORDER OF THE MAG CORPS 01.01 *The Military Advocate-General and his Office – Duties and Powers*, *supra* note 43. This power is enshrined also in SCO 2.0613, *supra* note 42, at para. 4.

49 Thus, for example, according to Article 317 of the Military Justice Law the MAG is a member of the committee for approving lawyers who may act as defense counsel in the courts martial.

the MAG is competent to order the holding of a preliminary investigation when he is of the opinion that an offense indictable by a court martial has been committed, to order the opening or closing of a criminal investigation and to order supplementary investigations to be carried out.⁵⁰ It should also be noted that the opinion of the MAG is binding upon the army, since ‘it determines, for the IDF and its agencies, the current legal position’.⁵¹

18. The MAG is appointed by the Minister of Defense, upon the recommendation of the Chief of Staff.⁵² The MAG’s tenure is not defined.⁵³ When the current MAG was appointed, on 15 September 2011, the Chief of Staff and the Minister of Defense agreed to appoint him for a four-year term of office and to determine in advance the date of his promotion to the rank of Major-General.⁵⁴ From a professional point of view, the MAG is subordinate to the Attorney-General, who stands at the head of the legal system of the executive branch of government in Israel, including the prosecutorial and law enforcement system (for a discussion on the relationship between the MAG and the Attorney-General, see below in paragraphs 62–63). It should be noted that in material submitted by the MAG to the Commission, he clarified, that according to military orders, while he is subordinate to the Chief of Staff in rank and he is a part of the professional staff on the General Staff, ‘he is only subject to the authority of the law’.⁵⁵ The MAG further stated that ‘the professional independence of the MAG is not limited solely to the person holding that office, but reflects the professional independence of the MAG Corps as a whole’.⁵⁶

50 *Id.*, at Articles 178(4)–178(5).

51 SCO 2.0613, *supra* note 42, at para. 13.

52 The Military Justice Law, at Article 177(a).

53 For example, the last MAG served for approximately eight years and his predecessor served for approximately four and a half years.

54 Letter of Colonel Hod Batzar, assistant to the Chief of Staff, to Hoshea Gottlieb, the Commission’s Coordinator, *The Status of the Military Advocate-General* (Nov. 10, 2011).

55 See: SCO 2.0613, *supra* note 42, at para. 9(a); A similar order can be found in: SCO 2.0201, *supra* note 42, at para. 7(a)(7); See also: *Position Paper of the MAG Corps submitted to the Turkel Commission* 66 (Dec. 19, 2010) [hereinafter: *MAG Position Paper 2010*].

56 *MAG Position Paper regarding the Examination Mechanisms*, *supra* note 46, at para. 6.

19. Another significant figure in the MAG Corps is the Deputy MAG, who is appointed by the Chief of Staff on the recommendation of the MAG.⁵⁷ The Deputy MAG, who is an officer with the rank of colonel, acts as the chief of staff of the MAG Corps, and his duties include assisting the MAG in exercising his powers according to the law, replacing the MAG in his absence, managing the work of the MAG Corps Headquarters, and exercising the powers given to him by law and army regulations or delegated to him by the MAG.⁵⁸

20. For the purpose of discharging their duties, the MAG and his deputy are assisted by officers of the MAG Corps, who are IDF officers with legal education and training.⁵⁹ In the Organizational Order of the MAG's Headquarters, it is provided that 'an officer in the MAG Corps, with the exception of the Military Defender, is subordinate in carrying out his duties solely to the MAG, and not to the commander to whom he provides a legal service'.⁶⁰ Similarly, also the military advocates in the various jurisdiction districts⁶¹ are not in their professional capacity subordinate to the district heads (i.e., to the General of Command or the Force Commander), but only to the MAG.⁶²

21. In terms of institutional structure, the MAG Corps is made up of three professional systems: a law enforcement system (composed of the military prosecution and the Military Defender's Office); a legal advice

57 The Military Justice Law, at Article 177(b).

58 *Id.*, at Article 178A(a); SCO 2.0613, *supra* note 42, at para. 6; INTERNAL ORDER OF THE MAG CORPS 01.02 *The Deputy Military Advocate-General and his Office – Duties and Powers*, *supra* note 43. It should be noted that the structure of the MAG Corps has undergone several significant changes in recent years, some of which will be considered below. Therefore, SCO 2.0613, *supra* note 42, at para. 8, which lists the main bodies in the MAG Corps, no longer reflects the current position, and it will be changed in the future in the amendment to the Supreme Command Orders.

59 See: the Military Justice Law, at Article 178; SCO 2.0613, *supra* note 42, at para. 5.

60 SCO 2.0613, *supra* note 42, at para. 11, provides that the Chief Military Defender shall not be subject to the authority of his commanding officers when he carries out his duties, and he shall be guided solely by the best interests of the defendant.

61 In the IDF there are nine jurisdiction districts, which coincide with the geographic or functional commands.

62 SCO 2.0613, *supra* note 42, at para. 10.

system (composed of the Advice and Legislation Department, the Legal Adviser for the Territories of Judea and Samaria, and the International Law Department); and the training and research system, of which the center is the Military Law School. In addition to these three systems, there is an Audit, Internet, Complaints and Information Unit, as well as other administrative divisions and units.⁶³

It should be noted that the separation between the law enforcement system and the legal advice system is a consequence of an organizational change that took place in the MAG Corps in 2007. Following this change, the military advocates in charge of the prosecution teams no longer engage in the provision of legal advice to the heads of the jurisdiction districts in which they operate, but the legal advice to the various army entities is provided solely by the departments of the legal advice system.⁶⁴ Below the Commission will discuss in detail the structure and operation of these three professional systems, i.e., the law enforcement system, the legal advice system and the training and research system.

A. The Law Enforcement System

22. As noted above, two of the units that compose the law enforcement system are the military prosecution and the legal defense. The head of military prosecutions is the Chief Military Prosecutor (hereinafter: the CMP), an officer with the rank of colonel, who is responsible for the military advocates and gives them professional guidance. His duties are listed in the internal regulations of the MAG Corps, and they are mainly to assist the MAG and his deputy in exercising their powers in the criminal sphere; to carry out the functions that have been imposed on him according to any law and under army regulations, with regard to examination,

63 See: INTERNAL ORDER OF THE MAG CORPS 01.04 *The Military Prosecution – Structure, Mission and Duties*, *supra* note 43.

64 This separation is incorporated in *The Organizational Order*, *supra* note 44, and in internal instructions by the MAG. The division was also adopted into the draft amendment of SCO 2.0613, *supra* note 42.

investigation, arrest and trial proceedings; to oversee the teams of the military prosecutions in both the courts martial and the military courts in the West Bank; to supervise the activity of prosecution teams and to give them professional guidance; to determine a uniform and coordinated prosecution policy in various fields; and to advise and assist in training and instruction by the Military Law School on matters relating to the sphere of military prosecutions.⁶⁵ The CMP is also responsible for supervising the CID, giving them professional guidance, and ordering them to open investigations and carry out or complete examinations.

23. Three advocates with the rank of lieutenant-colonel serve as the MAG's representatives in the respective jurisdictional districts for all law enforcement issues and investigation and trial proceedings in the army.⁶⁶ An additional military advocate is responsible for the investigation and prosecution proceedings in the military courts in the West Bank (the Judea and Samaria Advocate). The military advocates are professionally subordinate to the MAG and they are subordinate to the CMP in the chain of command and professionally, but, as stated above, they are not subordinate to the head of the jurisdiction district (the District Commander or the Force Commander).⁶⁷

24. Additionally, there are four teams within the MAG Corps that are headed by military advocates and that are authorized to handle specific issues. These teams are the MAG Corps for Special Tasks, the MAG Corps

65 INTERNAL ORDER OF THE MAG CORPS 01.04 *The Military Prosecution – Structure, Mission and Duties*, *supra* note 43.

66 *Id.*, at para. 23; At paras. 31–33, it is provided that a Military Advocate of the Central Command will also act as the Military Advocate of the Air Force jurisdiction district, the Chief of Staff jurisdiction district and the Home Front jurisdiction district; that the Military Advocate of the Southern Command will also act as the Military Advocate of the Land Forces Command; and the Military Advocate of the Navy shall also act as the Military Advocate of the Northern District. The main duties of the Military Advocate are also listed in that order (see para. 24).

67 INTERNAL ORDER OF THE MAG CORPS 01.04 *The Military Prosecution – Structure, Mission and Duties*, *supra* note 43, at para. 29.

for Operational Matters, the MAG Corps for Absentees and Deserters, and the MAG Corps for Traffic Issues.⁶⁸

25. Of these four teams, the one of particular relevance for our purposes is the MAG Corps for Operational Matters, which was established in 2007. This team specializes in handling cases relating to incidents that occurred during military operations and cases concerning training accidents. It should be noted that before this team was established, complaints and claims regarding breaches of law during operational activity, including assistance for investigations by the CID and for the indictment proceedings that followed them, were examined by the prosecution teams in the jurisdiction districts, in addition to the other offenses they were responsible for handling.⁶⁹

The functions of MAG Corps for Operational Matters include: the review of operational debriefings in order to decide whether to order the CID to open an investigation; advising the MAG and the International Law Department with regard to the definition of the rules of engagement (together with other advisory bodies);⁷⁰ handling examination and investigation files for offenses arising from operational activity of the IDF, and offenses of IDF soldiers that are committed against a civilian population in a territory administered by the IDF or during combat; and handling complaints of civilians and organizations regarding offenses of IDF soldiers in the aforementioned fields.⁷¹

68 The Traffic Division is headed by an officer of the rank of major.

69 See: *Activity Report for the 2007 Work Year 17–18* (Annual Report of the Military Advocate-General's Headquarters, 2007), available at: www.law.idf.il/sip_storage/FILES/3/393.pdf [hereinafter: *2007 MAG Activity Report*].

70 It should be noted that according the letter of Major-General Avichai Mandelblit, the MAG, to Hoshea Gottlieb, the Commission's Coordinator 2 (Aug. 9, 2011) the involvement of the MAG Corps for Operational Matters in the drafting of the rules of engagement focuses on advice regarding the enforcement aspect. Its involvement is intended to ascertain that the rules are drafted sufficiently clearly so that in the event of a deviation it will be possible to establish disciplinary or criminal liability and to present to the drafters lessons that were learned from past incidents relating to the manner of drafting the rules of engagement, and to verify their assimilation in the new rules.

71 *The Organizational Order*, *supra* note 44, at para. 5.7.

Within the MAG Corps for Operational Matters, there are approximately ten military advocates and the Corps is headed by the Military Advocate for Operational Matters with the rank of lieutenant-colonel and his deputy with the rank of major.⁷² The advocates that serve in this team, like the advocates of the other teams, have (at least) a first degree in law and have passed an officers' course as well as a legal officers' course.⁷³ During the process of absorbing and training them, the advocates also receive training on legal issues that are relevant to the team's work, from, amongst others, the Military Advocate for Operational Matters and his deputy. In addition, the advocates periodically receive professional training during their service in the team, such as study days together with the CID, special operational study days, study tours of operational units and training from professional army personnel. The MAG Corps for Operational Matters also holds study days with the participation of commanders of CID bases and with investigators in cases involving violations of international humanitarian law, in order to improve the handling of cases and to learn lessons for the future.⁷⁴

26. The second unit that comprises the law enforcement system is the Military Defender's Office, whose purpose is to provide legal representation to IDF soldiers who have been or may be ordered to stand for criminal trial in a court martial.⁷⁵ The right to representation applies to the whole proceeding, from the investigation stage until the proceedings after the main trial, for example, proceedings before the Discharge Board or the Parole Board. The head of the Military Defender's Office is the Chief

⁷² 2007 MAG Activity Report, *supra* note 69, at 5–8.

⁷³ Legal officers' course trains the interns, who have finished academic legal studies, to become familiar with the spheres of activity of the Military Advocate-General's Corps. The course, which lasts two months, is divided into three main parts: the criminal part – studying the military law enforcement system, which incorporates the theoretical aspect in practical workshops; the advice part – which includes becoming familiar with the advice departments at the MAG Corps; and familiarity with the IDF – which includes visits to various IDF bases and becoming familiar with the commanders in the field.

⁷⁴ MAG Position Paper regarding the Examination Mechanisms, *supra* note 46, CID annex, at 2 [hereinafter: SID annex].

⁷⁵ The main duties of the Military Defender's Office are set out in INTERNAL ORDER OF THE MAG CORPS 01.03 *Military Defender's Office – Structure, Mission and Duties*, *supra* note 43.

Military Defender (hereinafter: the CMD), who is an officer with the rank of colonel, and who is defined, according to the internal regulations of the MAG's Headquarters, as the assistant to the MAG for matters concerning the Military Defender's Office.⁷⁶ However, like any military defender, in carrying out his duties, the CMD is not subordinate to the MAG and he is guided solely by the best interests of the defendant.⁷⁷ In this context it should also be noted that apart from the CMD, the military defenders carry out their duties in civilian clothes and not in army uniform, with the aim of improving the degree of confidence in the Military Defender's Office.⁷⁸ The Military Defender's Office is divided into four units: the CMD's Office and three command teams that correspond with the jurisdiction districts of the MAG Corps – the Southern Command and the Land Forces Headquarters, the Northern Command and the Navy, and the Central Command, which includes the Chief of Staff units, the Air Force and the Home Front.

B. The Legal Advice System

27. The second professional system within the MAG Corps is the legal advice system which is made up of three departments: the Advice and Legislation Department, the Legal Advisor for Judea and Samaria and the International Law Department. Each of the departments is headed by an officer with the rank of colonel, who is subordinate to the MAG professionally and in the chain of command. The Advice and Legislation Department is responsible for giving legal advice to the army in all spheres of activity and areas of law, except for the issues that have to do with 'the administered territories and international law' which are handled by the two dedicated departments. The Advice and Legislation Department is also responsible for formulating the IDF's legal position on draft legislation, both by initiating legislative amendments and by handling legislative

76 The Chief Military Defender is appointed by the Chief of Staff, on the recommendation of the MAG; See: the Military Justice Law, at Article 182.

77 SCO 2.0613, *supra* note 42, at para. 11.

78 INTERNAL ORDER OF THE MAG CORPS 01.03 *Military Defender's Office – Structure, Mission and Duties*, *supra* note 43, at para. 15.

proposals, in coordination with the legislative proceedings taking place in Government bodies and the Knesset.⁷⁹

28. The Legal Advisor for Judea and Samaria gives legal advice to army units operating in the West Bank and acts to strengthen the rule of law and order there, in cooperation with the other security and law enforcement agencies operating in the West Bank; determines the binding interpretation of the law and security legislation in the West Bank; carries out legal administrative work and drafts and publishes legislation in that territory.⁸⁰

29. The International Law Department gives legal advice in the field of international law and incorporates into the army Israel's international law commitments. This department also acts as an information center and assists members of the civil service (i.e., non-military personnel) in the fields of international law relating to military and security operations.⁸¹ The department's functions are listed in the Internal Regulations of the MAG Corps, and they include advising all military agencies in all areas of international law, while determining the binding interpretation of its rules; acting as a part of the MAG Corps general staff with regard to the fields of international law; giving professional guidance to all the units of the MAG Corps in the fields of international law; advising IDF units with regard to operational activity during times of emergency and calm, including formulating a legal position on methods of warfare, operational plans and military targets; and advising IDF units and other parties in the civil service on political negotiations and political agreements between the State of Israel and Arab countries and the Palestinians, and

79 INTERNAL ORDER OF THE MAG CORPS 01.05 *The Advice and Legislation Department – Structure, Mission and Duties*, *supra* note 43.

80 INTERNAL ORDER OF THE MAG CORPS 01.06 *The Legal Advisor for Judea and Samaria – Structure, Mission and Duties*, *supra* note 43.

81 *MAG Position Paper regarding the Examination Mechanisms*, *supra* note 46, at 8–9.

even participating in political negotiations and on committees for the implementation of international agreements that relate to the IDF.⁸²

C. The Training and Research System

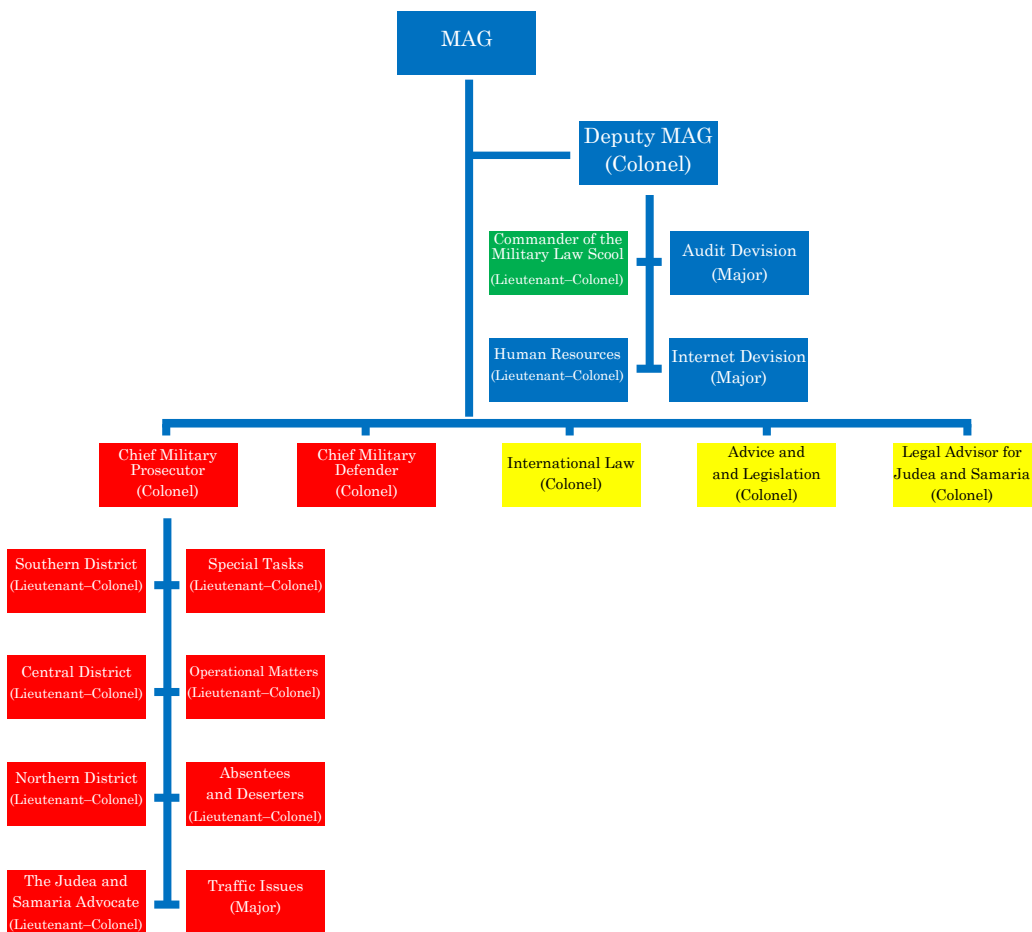
30. The third professional system in the MAG Corps is the training and research system whose central organ is the Military Law School. This school acts as a professional center in the IDF for training and research in the field of military law.⁸³ The commander of the Military Law School is an officer with the rank of lieutenant-colonel, who is subordinate to the Deputy MAG professionally and in the chain of command.

The Military Law School has several departments, including the Criminal Law Department, the Disciplinary Law Department and the International and Civil Law Department. The subjects studied in the International and Civil Law Department include public international law, such as the law of armed conflict including the legality of combat methods; the rules of conduct in combat operations and routine security operations; international criminal responsibility; prisoners of war and detainees; belligerent occupation and human rights. Officers in the department give lectures in training programs to commanders on all levels, including in a combat personnel course, academic courses at the Tactical and Naval Command College, officers' courses, courses for coordination and liaison officers, border commanders, etc.⁸⁴

82 INTERNAL ORDER OF THE MAG CORPS 01.07, *The International Law Department – Structure, Mission and Duties*, *supra* note 43.

83 INTERNAL ORDER OF THE MAG CORPS 01.08 *The Military Law School – Structure, Mission and Duties*, *supra* note 43.

84 See further on this issue: www.law.idf.il/455-he/Patzar.aspx#paragraph_2.



2. The Military Police Criminal Investigation Department

31. The second main body responsible for administering law and order in the IDF is the Military Police which is comprised of four systems: the CID – which is the main system we will focus on, the traffic enforcement system (which corresponds to the Traffic Division in the Israel Police); the imprisonment system (which corresponds to the Israel Prison Service); and the security check system (at border crossings around Jerusalem⁸⁵ and in the West Bank).⁸⁶

32. The CID has the authority to carry out investigations in the IDF in the criminal sphere, including road accidents. CID's activity is regulated in the Military Justice Law, in General Staff Order 33.0304, and in Order 5000 of the Chief Military Police Commissioner (hereinafter: the CMPC), and its purpose is to enforce the law, prevent offenses and eradicate crime. In order to carry out its duties, the CID is entitled to investigate any person (including civilians) and to take possession of any object that is required for the investigation.⁸⁷ The CID has independent authority to open a criminal investigation for offenses that were committed in a military context or that were committed by someone who is subject to the Military Justice Law.⁸⁸ Apart from the CID only the MAG and the military advocates are entitled to order the opening of an investigation.⁸⁹ All of the officers in the CID are not subordinate to external authorities but only to their direct commanders in the unit, in the chain of command up to the commander of the CID himself.⁹⁰ It should also be

85 The area around Jerusalem includes the towns near the route of the separation barrier in the Jerusalem area.

86 Transcript – Part B, session no. 7 “Testimony of the Chief Military Police Commissioner” 2 (Apr. 14, 2011) [hereinafter: *CMPC's Testimony*].

87 The Military Justice Law, at Article 256.

88 *MAG Position Paper regarding the Examination Mechanisms*, *supra* note 46, CID annex, at 2.

89 GENERAL STAFF ORDER 33.0304 *CMPC's Inspection and Investigation* [hereinafter: GENERAL STAFF ORDER 33.0304]

90 CHIEF MILITARY POLICE COMMISSIONER ORDER 5000 *Definition of Officers in the CID and their Powers* [hereinafter: *CMPC Order 5000*]. The order was last revised in February 2007.

emphasized that the professional guidance for the CID is given by the MAG and the military prosecution.⁹¹

33. The CID is headed by a commander with the rank of colonel, who is subordinate in the chain of command to the CMPC and acts as his deputy in the sphere of investigations in the IDF.⁹² Apart from being in charge of the unit, the CID Commander recommends to the MAG candidates to serve as CID investigators; he is in charge of improving the professionalism of CID investigators; and he is competent to order the opening of criminal investigations and to recommend to the MAG or military advocates the opening or closing of an investigation.⁹³

34. The sub-units and officers that are subordinate to the CID Commander are: three district commanders (Northern, Central and Southern); the Special Investigations Unit Commander; the National Fraud Investigations Unit (hereinafter: the NFIU) Commander; and the head of the Intelligence and Detection Division.⁹⁴

The District CID units handle the main day-to-day work of the CID, including investigations regarding violations of international humanitarian law.⁹⁵ Each unit is headed by a District CID Commander (Investigating Military Police Commander, hereinafter: the IMPC), who is responsible for enforcement of the law in IDF units that operate in the district under his command.⁹⁶ The IMPC has under his command a district investigations unit (the Investigating Military Police base), a district road accidents investigations base (which deals with road accidents in that district) and a central investigations unit, which deals with special and

91 *MAG Position Paper regarding the Examination Mechanisms, supra* note 46, CID annex, at 2.

92 See: *CMPC Order 5000, supra* note 90, at para. 3.

93 *MAG Position Paper regarding the Examination Mechanisms, supra* note 46, CID annex, at 3.

94 *CMPC Order 5000, supra* note 90.

95 *Id.*, at paras. 34–36.

96 *Id.*, at paras. 32–33.

sensitive investigations, including the smuggling and theft of weapons and ammunition on small scales, serious drugs cases, forgery of documents and additional sensitive cases.⁹⁷

35. The Central Special Investigations Unit (hereinafter: the CSIU) centralizes the most sensitive and complex investigation abilities that rely on advanced technology, and make use of special intelligence sources.⁹⁸ These services are provided by the CSIU to all CID units, and also harnesses its abilities for the purpose of investigating sensitive and special criminal targets, such as soldiers suspected of dealing in drugs or weapons, or assisting the enemy, etc. Investigations are referred to this unit at the discretion of the CID Commander.

36. NFIU was established in May 2000 (the unit replaced a special investigation team that operated within the CSIU) in order to handle fraud offenses that are carried out by IDF soldiers, including large scale thefts (of gasoline, army equipment etc.), money laundering, forgery that gives rise to an economic benefit, bribery, breach of trust, etc.⁹⁹ The NFIU operates with a national deployment and carries out intelligence and evaluation services that are unique to fraud offenses and economic crime. Within the framework of the NFIU there is a sub-unit for computer offenses and searches of computer material, which has at its disposal advanced technological machinery and acts as an expert in this field for all the CID units.¹⁰⁰ This sub-unit is also responsible for the training of investigators for computer offenses. It should be noted that the sub-unit carried out a central role in investigation of offenses of theft that were committed within

97 *Id.*, at paras. 36–37. It should be noted that in the Central District and the Southern District there are already such central units, whereas in the Northern District there is a special investigating team.

98 *Id.*, at paras. 22–29.

99 *Id.*, at paras. 30–31 (At this stage the order has not yet been updated and the Fraud Department is defined within the framework of the CSIU. See: *MAG Position Paper regarding the Examination Mechanisms*, *supra* note 46, CID annex, at 4, Fn.14).

100 *Id.*, at paras. 41–42 (at this stage *CMPC Order 5000* defines the sub-unit as the ‘Head of the Computer Division’. See: *MAG Position Paper regarding the Examination Mechanisms*, *supra* note 46, CID annex, at 4, Fn.15).

the framework of the maritime incident of 31 May 2010, on the deck of the *Mavi Marmara*, and the searches that were carried out on computers and cellular telephones which revealed evidence that implicated the suspects in the offenses.¹⁰¹

37. The final sub-unit subordinate to the CID Commander is the Intelligence and Detection Division, which coordinates the activity of obtaining intelligence and detection services for the whole of the CID.¹⁰² The division constitutes a professional authority for making use of intelligence as well as locating sources and operating them, and it trains and employs intelligence coordinators and detectives that serve the whole of the CID. In addition, the division coordinates the databases to which the Military Police has access (the Criminal Register, the Ministry of the Interior Register, etc.) and it is responsible for enhancing investigations of the CID. In order to guarantee the quality of the intelligence sources and information, the head of the Intelligence and Detection Division conducts periodic audits of the work of the intelligence coordinators working under him.

38. Another aspect of the CID that must be noted is the training given to its investigators. According to the testimony of the CMPC before the Commission, CID investigations are carried out by investigators who have received several months of professional training, including six weeks of basic training and initial qualification and a ten-week basic course, which takes place at the Military Police Professions School.¹⁰³ During the course, the participants also receive legal training from the MAG Corps, and they are authorized to perform their duties as CID investigators by the MAG.¹⁰⁴ At the end of the course, the graduates spend three months in field work,

101 For full details of Investigating Military Police investigations that were opened following the incident, see: *The Public Commission to Examine the Maritime Incident of 31 May 2010: The Turkel Commission REPORT PART ONE*, at para. 160 (2011) [hereinafter: THE COMMISSION'S FIRST REPORT].

102 *CMPC Order 5000*, *supra* note 90, at paras. 14–15.

103 *CMPC's Testimony*, *supra* note 86, at 23.

104 Military Justice Law, at Article 252(a)(3); See also: *MAG Position Paper regarding the Examination Mechanisms*, *supra* note 46, CID annex, at 3.

during which the junior investigators are trained by senior investigators. At the end of the training period, the trainees return to the Military Police Professions Training Base for two weeks of advanced training. In addition, all CID investigators are required to participate in special study courses throughout their service and to pass professional fitness tests each month.

3. The Courts Martial

39. The third main body within the military justice system responsible for administering law and order in the IDF is the courts martial system. The courts martial system is the 'judicial branch' of the military legal system. The structure of the system and the powers of its courts are set out in the Military Justice Law¹⁰⁵ and Supreme Command Regulation no. 2.0612, *The Courts Martial Unit* (Jul. 15, 1966). The courts martial system includes district courts martial (which are divided according to geographical jurisdiction or functional jurisdiction), special courts martial (which adjudicate matters concerning officers with the rank of lieutenant colonel and above), and the courts martial for appeals (which hears appeals on district and special courts martial).¹⁰⁶

According to the Military Justice Law, the courts martial have jurisdiction over offenses committed by IDF soldiers in regular service and reserve duty.¹⁰⁷ The jurisdiction of the courts martial is personal, and it extends to offenses committed by soldiers anywhere, either in war or peacetime.¹⁰⁸ The court's jurisdiction applies both to offenses defined in the Military Justice Law¹⁰⁹ and to other offenses defined in general Israeli legislation. The jurisdiction of the courts martial with regard to

105 Military Justice Law, at Chapter 2 of Part four – 'Courts Martial'.

106 *Id.*, at Chapter 5 – 'Appeal'.

107 *Id.*, at Articles 7–10; Furthermore, the Military Justice Law applies the jurisdiction of the courts martial to anyone who is lawfully in the custody of the army, anyone working in the army's employment or as its agent, and prisoners of war.

108 *Id.*, at Articles 13–14.

109 For the definition of 'military offenses', see: *Id.*, at Article 1.

non-military offenses is not exclusive, and the civil courts have parallel jurisdiction. For the purposes of such offenses, the military prosecution determines which judicial system, military or civil, will commit a suspect to trial, when the main criterion that guides it is the extent of the connection between the offense and the military service.¹¹⁰

40. The principle of the independence of court martial judges is a basic principle set out in the Military Justice Law: 'in matters of administering justice, a military judge is subject to no authority other than the authority of the law, and he is not subordinate to any authority of his commanders'.¹¹¹ The head of the courts martial system is the President of the appeals court martial, who is competent to determine the rules of procedure in the courts martial and supervise their activity, and he also serves as the commander of the courts martial.¹¹² The President of the appeals court martial, like all the courts martial judges, is appointed to his position by the President of the State, after selection by a committee that includes civilians and army personnel and that is headed by the Minister of Defense.¹¹³ The appointment is for a fixed period, but the selection committee may recommend an extension for additional periods.¹¹⁴ Termination of office, without the judge's consent, is limited to certain grounds and is effected according to a decision of a special disciplinary tribunal or the selection committee.¹¹⁵ In addition to the regular judges, the courts martial also have judges that are not jurists, called 'military judges', who are appointed to their position upon the recommendation of the President of the court martial in which

110 The Attorney-General is competent to order the transfer of a trial of a non-military offense from the courts martial to the civil jurisdiction system, if he is of the opinion that the offense was not committed within the framework of the army or as a result of the defendant's being in the army (*Id.*, at Article 14).

111 *Id.*, at Article 184.

112 SCO 2.0612 *The courts martial unit*, in paras. 1–2.

113 Articles 186–197 of the Military Justice Law; Pursuant to Article 187, the members of the committee for selecting judges are: the Minister of Defense, who holds the position of chair of the committee, the Minister of Justice, the President of the Supreme Court, a justice of the Supreme Court selected by his fellow-justices, a representative of the Israel Bar Association who is selected by its National Council, the Chief of Staff, the Head of Manpower at the IDF General Staff, the President of the appeals court martial and a judge of the appeals court martial determined by its President.

114 *Id.*, at Article 192.

115 *Id.*, at Article 192C.

they serve. According to the provisions of the Military Justice Law, a bench of a district court martial or a special court martial is made up of three or five judges, of whom at least one is a ‘military judge’ and at least one is a ‘jurist judge’;¹¹⁶ a panel of the appeals court martial will always have a majority of ‘jurist judges’.¹¹⁷

41. A final point to complete this survey of the military justice system, is that in the West Bank there is a *military court system* comprised of a court of first instance and a court of appeals, which operates according to an order.¹¹⁸ The Military Court in the West Bank is authorized to try civilians for any offense that is defined as such in the law and security legislation.¹¹⁹ In that way it is different from the courts martial which only try offenses committed by soldiers and those individuals subject to the Military Justice Law.¹²⁰ In general, the Military Court is competent to try any offense committed in the West Bank, even if the perpetrator of the offense is not a resident of the West Bank.¹²¹ However, where the accused is subject to the parallel jurisdiction of a military court and a civil court, Israeli citizens and residents will be tried before a civil court, unless most of the circumstances relating to the offender and the offense connect the case to the West Bank.¹²² An appeal on the Military Court is to the Military Court of Appeal.

116 The Military Justice Law, at Articles 201–202; In cases where a district court martial tries a case with one judge only (for example, for offenses of being absent without leave), that judge will be a ‘jurist judge’ (*Id.*, at Article 203).

117 *Id.*, at Article 216; In cases where the Appeals Court Martial hears a case with one judge only (in an appeal on a judgment of a traffic court martial), that judge will be a judge advocate (*Id.*, at Article 215A).

118 Security Provisions Order [Consolidated Version] (Judea and Samaria) (no. 1651), 5710–2009 [hereinafter: Security Provisions Order 2009]; This order replaced most of the earlier orders that regulated the normative framework in the West Bank.

119 The security legislation is all of the legislation enacted by the military commander of the territory.

120 The Military Justice Law, at Articles 8–20.

121 In parallel to the aforesaid Article, which sets out the jurisdiction of the courts martial in the West Bank, it was determined that ‘in addition to what is stated in any law, the court in Israel will be competent to try, under the law in force in Israel, a person who is situated in Israel for his act or omission that occurred in the territory’. (Article 2 of the Emergency Regulations (Judea and Samaria – Jurisdiction for Offenses and Legal Assistance), 5767–2007, which extended the Emergency Regulations (Judea and Samaria and Gaza Strip – Jurisdiction for Offenses and Legal Assistance), 5727–1967).

122 See: HCJ 3634/10 *Agbariya v. Attorney-General* (still unpublished, Dec. 9, 2010), at para. 6 of Vice-President Rivlin’s judgment.

COMPLAINTS AND CLAIMS DIRECTED AT POLICE OFFICERS

42. The second relevant security arm that complaints and claims regarding violations of international humanitarian law can be directed against is the Israel Police. There are two categories of police officers: ordinary police that belong to the Israel Police ('blue police'), and police that belong to the Border Police ('green police').¹²³ The Border Police is a hybrid force that is subordinate to the Israel Police, but recruits soldiers as an alternative to military service. In addition, Border Police participate in operations that are of a similar nature to military operations. Noteworthy for our purposes are the Special Anti-Terror Unit and the Police Undercover Unit. When the Police operate in the West Bank, 'every officer in the Israel Police is regarded as... someone who has been seconded to the commander of the IDF forces in the territories'.¹²⁴ As explained below, the distinction between 'blue' and 'green' police is important for the identification of the body that investigates claims directed towards them. Investigating claims against blue police is handled by the Police Internal Investigations Department in the Ministry of Justice (hereinafter: the PIID) whereas investigating claims against green police for shooting incidents committed in the West Bank is handled by the Judea and Samaria District Police.

1. The Police Internal Investigations Department

43. An investigation of claims directed at police is handled by the PIID. The activity of this department, that was established in 1992, is regulated by the Police Ordinance [New Version], 5731–1971 (hereinafter: the Police Ordinance) and also by State Attorney Guideline 14.4 *Authority to investigate and commit for trial when a complaint is made against a*

¹²³ The Border Police is the operational branch of the Israel Police whose purpose is to provide a solution to problems on matters of public security, fighting against terrorism, guarding the Egyptian border and guarding the borderline region between Israel and the West Bank. Furthermore, the Border Police is a multi-purpose force for guarding and policing, whose duties include the prevention of disturbances of the peace, the dispersal of riots and the frustration of, and first response to, terrorist operations. See: www.police.gov.il/mehozot/mishmarHagvol/Pages/default.aspx.

¹²⁴ The Security Provisions Order, 5710–2009, *supra* note 118, at para. 1.

policeman. The Police Ordinance provides that the investigation of police suspected of offenses whose punishment exceeds one year imprisonment 'shall not be conducted by the Israel Police, but by the Police Internal Investigations Department of the Ministry of Justice'.¹²⁵ This provision was legislated *inter alia*, as a result of public criticism that the police investigates its own members, a procedure that undermines the investigation and leads to many incomplete investigations.¹²⁶ It should be stated that the investigation of complaints in the disciplinary sphere are still handled by the police but this excludes disciplinary offenses involving the unlawful use of force (which are handled by the PIID).

44. There are several exceptions to the rule according to which investigations of police shall not be conducted by the police themselves.¹²⁷ For example, the First Schedule to the Police Ordinance states that offenses carrying a penalty of up to one year imprisonment and also offenses arising from special events determined by the State Attorney and the Police Commissioner will not be investigated by the PIID, but will be investigated by the police. On 25 May 1992, the State Attorney and the Police Commissioner decided that offenses involving the use of firearms by police in the West Bank will be investigated by the police themselves and not by the PIID.¹²⁸ These investigations are conducted by the Judea and Samaria District Police, as elaborated below in paragraph 46. It can be

125 The Police Ordinance [New Version], 5731–1971, at Article 49I(a) [hereinafter: the Police Ordinance]. The article was legislated in amendment no. 11 of the Police Ordinance, 5731–1971.

126 The State Comptroller, ANNUAL REPORT 56A FOR 2005, 355 (2005).

127 The exceptions listed in the First Schedule to the Ordinance are:

- (1) An offense for which the penalty is no more than one year's imprisonment, unless the State Attorney and the Police Commissioner determined that the offense will be investigated by the department [PIID];
- (2) A traffic offense as defined in section 1 of the Traffic Ordinance;
- (3) An offense that an authority other than the police is competent to investigate pursuant to law;
- (4) An offense committed by a policemen together with another, and the department director, after consultation with the head of the Investigations Division at the police, determined that the role of the policemen in the commission of that offense was secondary;
- (5) Offenses deriving from special events as determined by the State Attorney and the Police Commissioner.

128 *Procedure for Investigating Offenses of Policemen* (procedure of the State Attorney's Office and the Police Commissioner, May 25, 1992).

seen from the material brought before the Commission that the rationale behind this exception is the ‘unique nature of these incidents, their location, the limitations of the PIID and so on’.¹²⁹ A decade later, the police began to take steps to remove the exception, and to return the investigation of the offenses in these incidents to the PIID. This policy decision was based on the sense that the original sentiment behind the creation of the PIID – the realization that the police cannot conduct investigations of its own police officers objectively, independently and fairly – also applies to such incidents.¹³⁰

In 2007, after the issue was examined by the Ministry of Justice, the State Attorney decided to return the investigation of shooting incidents that occur in the West Bank to the PIID.¹³¹ The transfer process, however, has not actually been implemented, and from the material brought before the Commission it can be seen that the PIID has expressed an objection to taking responsibility for the additional investigations. The main reason for the objection is that the PIID is currently undergoing a ‘civilianization’ process (see below in paragraph 45) which has resulted in the reality that many of the PIID investigators are junior and relatively inexperienced and that adding new tasks to the unit’s ordinary tasks will increase the difficulties for the unit’s professional staff. Additionally, the PIID claims a lack of resources as well as complications associated with approval for entry of civilian investigators, or investigators who have no combat experience, into military territory (including the complexities of ensuring investigators’ security).¹³²

129 *Examination and Investigation Mechanisms in Israel for Complaints and Claims regarding Breaches of the Laws of War*, 8 (Position Paper of the Deputy State Attorney (Special Assignments) submitted to the Turkel Commission, Apr. 6, 2011) [hereinafter: *Deputy State Attorney (Special Assignments), Position Paper*].

130 See: *Investigation of Policemen in Judea and Samaria and the Gaza Strip* (Summary of a Discussion held in the State Attorney’s Office, Jul. 4, 2005), the State Attorney emphasized that ‘conceptually it is appropriate that an investigation in this area should be conducted by the PIID’.

131 Letter from Eran Shendar, State Attorney, to Inspector-General Moshe Karadi, the Police Chief Commissioner and others, *Investigation of Shooting Incidents by Police in Judea and Samaria* (Feb. 11, 2007) [hereinafter: *State Attorney’s Letter regarding the Investigation of Shooting by Policemen 2007*].

132 Meeting between Hoshea Gottlieb, the Commission’s Coordinator, and Uri Carmel, Head of the Police

In light of this objection, it was decided to transfer to the PIID investigations involving shooting incidents in the West Bank in two stages. In the first stage, investigations of two types of shooting incidents by police in the West Bank would be immediately transferred: (1) incidents involving 'blue' police, and (2) incidents that take place in areas that 'can usually be reached without any risk',¹³³ e.g., Givat Ze'ev and Ma'aleh Adumim. The reason for choosing these two types of incidents was that incidents involving 'blue' police raise a more significant concern of a conflict of interest with police investigators and that incidents that take place inside or near the Green Line do not give rise to the problem of civilian investigators entering a military area. In the second stage, which was supposed to be completed by 1 January 2009, investigations of incidents involving 'green' police were supposed to be transferred to the PIID.¹³⁴ The second stage of the State Attorney's decision has not, however, been implemented, and therefore claims of breaches that involve shooting incidents in the West Bank are currently investigated by the Judea and Samaria District Police. In recent years, shooting incidents that occurred in the areas around Jerusalem, especially in relation to the construction of the separation barrier, are also regarded as shooting incidents in the West Bank and are investigated by the police.¹³⁵ It is important to note that, in 2011, the head of the PIID recommended that shooting incidents involving police in the West Bank should be investigated by the military.¹³⁶

Internal Investigation Department, 1–2 (Sep. 22, 2011) [hereinafter: *Meeting with the Head of the PIID*]; See also: Letter from Herzl Shaviro, Head of the PIID, to Moshe Lador, State Attorney, *The proper identity of the body which should investigate shooting incidents by The Border Police in Judea and Samaria and freezing the decision to transfer to the PIID authority on this matter* (Jan. 30, 2011) [hereinafter: *Letter from the Head of the PIID*].

133 *The Examination and Investigation Mechanisms in Israel for Complaints and Claims Regarding Breaches of the Laws of War – Supplementary Material*, 7 (Position Paper of the Deputy State Attorney (Special Assignments) submitted to the Turkel Commission, Aug. 23, 2011) [hereinafter: *Deputy State Attorney (Special Assignments), Position Paper – Supplementary Material*].

134 *State Attorney's Letter regarding the Investigation of Shooting by Policemen 2007*, *supra* note 131.

135 *Policy for Investigating Incidents in which a Person is Injured by the Police Forces in the Area Around Jerusalem* (summary of a meeting at the office of the Deputy State Attorney (Criminal Matters), Dec. 8, 2009) [hereinafter: *Summary of Meeting regarding the Investigation of Shooting Incidents in the Area around Jerusalem*].

136 *Letter from the Head of the PIID*, *supra* note 132.

45. The PIID is headed by an attorney whose status is equivalent to that of a district attorney and who is subordinate to the State Attorney and the Attorney-General. Attorneys and investigators work under him. When the PIID was established, most of its investigators were police officers with experience and training in the field of investigations that were 'loaned' to the PIID. However, the Commission was informed by the head of the department that PIID investigators lack training with regard to international law in general and the rules of international humanitarian law in particular.¹³⁷ In 2005, it was decided to replace the unit's investigators with civilian investigators that would be recruited from outside the police, in a process that is referred to as a 'civilianization' of the department. The purpose of the change was, *inter alia*, to strengthen the independence and impartiality of the PIID.¹³⁸ In a process that began in 2008, the PIID took on civilian investigators, in order to gradually replace the investigators that were 'loaned' from the Israel Police. The new investigators undergo a two month training course from senior police investigators and attorneys from the State Attorney's Office, and following this a year of internship with a senior investigator, during which they work in investigations. From the material that was submitted to the Commission by the PIID it can be seen that the 'civilianization' process is expected to be completed in 2015.¹³⁹

2. The Judea and Samaria Police District

46. Investigations into shooting incidents by the police in the West Bank, are currently conducted by the investigations department of the Judea and Samaria Police District, however, the identity of the individual authorized to decide whether to open an investigation is unclear. As a rule, in operational activity during which there is a death or injury of a civilian due to shooting by the police forces (Border Police) operating in the West Bank under the auspices of the IDF, the decision to open an investigation is

137 *Meeting with the Head of the PIID, supra note 132, at 2-3.*

138 *Id.*

139 *Letter from the Head of the PIID, supra note 132, in the annex, at 8-10.*

made by the Deputy State Attorney (Criminal Matters),¹⁴⁰ based on a police debrief (hereinafter: the police operational debrief).¹⁴¹ In practice, however, police operational debriefings do not always occur,¹⁴² and the decision to open an investigation is not in fact always made by the Deputy State Attorney (Criminal Matters), but rather by a police officer in the Judea and Samaria District who is obligated only to *notify* the Deputy State Attorney.¹⁴³ It appears that the figure that initially receives the information also influences who makes the decision about opening an investigation. When the information reaches the Deputy State Attorney's Office directly (for example, when human rights organizations file a complaint with the State Attorney's Office, or when the State Attorney's office becomes aware of the incident in some other way), the Deputy State Attorney (Criminal Matters) makes the decision about opening the investigation himself. In contrast, when the information comes directly to the Judea and Samaria District Police (for example, when injured persons complain directly to the police, or when the police become aware of the incident in some other way), the Judea and Samaria District Police make the decision about whether or not to open an investigation.

140 The Police Law, 5766–2006, LA 2045, at Article 102(b)(4)(b) [hereinafter: the Police Law]. See also: Letter from Eran Shendar, State Attorney, to Brigadier-General Anat Shefy, Legal Adviser to the Israel Police, *Applications to Inspect Police Investigation Material pursuant to section 102 of the Police (Disciplinary Rules, Investigating Complaints against Policemen and Miscellaneous Provisions) Law, 5766–2006* (Oct. 4, 2006) [hereinafter: *State Attorney's letter about Police Investigation Material*].

141 BORDER POLICE – OPERATIONS AND TRAINING DEPARTMENT PROCEDURE 60.210.055 *Making an Operational Report* [hereinafter: *the debrief procedure*]; INVESTIGATION AND INTELLIGENCE DEPARTMENT ORDER 03.300.071 *Investigation of Shooting Incidents in Judea and Samaria in which inhabitants are injured as a result of shooting by Israel Police personnel* [hereinafter: IID GUIDELINE 03.300.071].

142 See, for example: Letter from Yehoshua Lemberger, the Deputy State Attorney (Criminal Matters), to Police Commander Itzik Rahamim, Investigations and Intelligence Department Officer for Judea and Samaria (May 25, 2009).

143 *Summary of Meeting regarding the Investigation of Shooting Incidents in the Area around Jerusalem*, *supra* note 135.

COMPLAINTS AND CLAIMS DIRECTED AT ISA PERSONNEL

47. The third relevant security arm that complaints and claims regarding violations of international humanitarian law can be directed against is the Israel Security Agency. From a historical point of view, the handling of claims against ISA personnel underwent various changes over the years, which mainly concerned the body and the method of handling the claims. During the 1980's, widespread public discussion of these issues occurred following the incident which was later known as the 'Bus 300 Affair' – the killing of terrorists that were captured by ISA personnel, and the ISA's defective handling of the investigation of that affair.¹⁴⁴ During this period, an incident also occurred in which an officer named Izat Nafso was indicted for espionage and convicted on the basis of perjured testimonies.¹⁴⁵ These two incidents led to the establishment in 1987 of a Commission of Inquiry to examine the ISA's investigation methods – the Landau Commission.¹⁴⁶ The Commission exposed an institutional culture of non-cooperation by ISA personnel with external investigators. Following the death of Khaled Sheikh Ali in 1989,¹⁴⁷ a commission of examination (the Sokar Commission) was set up to investigate complaints concerning the conduct of ISA personnel.¹⁴⁸ The State Comptroller Report that reviewed ISA interrogations between 1988–1992 found that even after the Landau Commission Report the phenomenon of lying by investigators to judicial authorities or other investigation or examination authorities had not been eradicated.¹⁴⁹ In February 1992, in response to public criticism, the Minister of Justice decided that the ISA and the State Attorney's Office

144 For details of the affair, see: HCJ 428/86 *Barzilai v. Government of Israel*, 40(3) 505 (1986) [hereinafter: *Barzilai* case].

145 For further details, see: CA 124/87 *Izat Nafso v. Chief Military Prosecutor*, 41(2) 631 (1987).

146 The Commission of Inquiry regarding Interrogation Methods of the Israel Security Agency on matters of Terrorist Activity (Part I), REPORT (1988).

147 For further details see: CA 532/91 *A v. State of Israel* (unpublished).

148 The Commission for Examining Cases of Death During Interrogation REPORT (1991).

149 The State Comptroller, SUMMARY OF THE STATE REVIEW REPORT REGARDING THE INVESTIGATION SYSTEM IN THE ISRAEL SECURITY AGENCY (ISA) FOR THE YEARS 1988–1992, 6 (2000).

would formulate a procedure for referring complaints of persons who were interrogated by the ISA to an external body for investigation.

48. This procedure for examining complaints of interrogated persons was approved by the Ministerial Committee for ISA Matters, and based on that approval a two-stage examination mechanism was established.¹⁵⁰ In the first stage, the complaints of ISA interrogated persons against their interrogators are transferred to the Interrogatee Complaints Comptroller (hereinafter: the Mavtan), who is an ISA employee with a rank equivalent to the rank of Brigadier-General in the IDF or the Israel Police. In order to prevent a conflict of interest between the Mavtan and the ISA interrogators against whom complaints are made, only someone who has not worked in the Investigations Department of the ISA can be appointed Mavtan.¹⁵¹ In the second stage, the Mavtan transfers his findings to a senior prosecutor from the State Attorney's Office, who is called 'the Mavtan's Supervisor'. It should be noted that both the Mavtan and the Mavtan's Supervisor have been authorized in law as disciplinary investigators, so that they can take testimony from the ISA interrogators against whom complaints are made, for later use in disciplinary proceedings (but not in criminal proceedings).¹⁵²

49. Both the findings of the Mavtan and the recommendations of the Mavtan's Supervisor are transferred to the Attorney-General (or to whomever the Attorney-General delegates his authority) and a decision is made on whether to open a criminal investigation. If it is decided to open a criminal investigation, the file is transferred to the PIID. The discretion to initiate an investigation is limited to the Attorney-General because of 'the unique nature of the ISA's work, the ISA's mission and

150 Decision no. IS/16 of the Ministerial Committee for Israel Security Agency Matters of the 24th Government, *Procedure for Examining Interrogatees' Complaints* (May 20, 1992); The procedure currently applicable was last revised on 1 February 2006.

151 Transcript – Part B, session no. 7 "The Mavtan's testimony" 11 (Apr. 14, 2011) [hereinafter: *Mavtan's Testimony*].

152 The Civil Service (Discipline) Law, 5723–1963, LA 390; and Civil Service (Discipline) (The Israel Security Agency and the Institute for Intelligence and Special Operations) Order, 5739–1979, CR 1750.

the great sensitivity surrounding its work as the authority responsible for frustrating and preventing illegal operations whose purpose is to harm the security of the State, the democratic system of government or its institutions, in view of its fight, *inter alia*, against terrorist organizations'.¹⁵³ According to the Police Ordinance, the PIID is authorized to investigate ISA employees where there is a suspicion that a criminal offense has been committed:

- (a) An offense that an employee of the Israel Security Agency is suspected of committing, within the framework of carrying out his duties or with regard to his duties, shall be investigated by the department [PIID], if the Attorney-General so decides; the provisions of section 49B(b) or (c) shall apply in this regard, *mutatis mutandis*; in this subsection, "offense" – any offense except for a traffic offense as defined in section 1 of the Traffic Ordinance, and an offense that another authority, which is not the police or the Israel Security Agency, is competent to investigate according to law.
- (b) The Attorney-General may delegate to the State Attorney and to the Deputy State Attorney – in general, for types of cases or for a specific case – his power pursuant to subsection (a).¹⁵⁴

50. In 2010, after discussing the Mavtan's activities including an examination of sample cases that he handled,¹⁵⁵ the Attorney-General decided (with the consent of the State Attorney, the head of the ISA and

¹⁵³ *Deputy State Attorney (Special Assignments), Position Paper, supra* note 129, at 10.

¹⁵⁴ Police Ordinance in Article 49(I)a. For the considerations underlying the aforesaid amendments, see: explanatory notes to the draft Police Ordinance Amendment Law (no. 12) (Investigation of Israel Security Agency Personnel), 5753–1993, Draft Law 304; Debate on the draft Police Ordinance Amendment Law (no. 12), 5754–1994 (second and third readings), KP 39, 7249 (5754); and also explanatory notes to the draft Police Ordinance Amendment Law (no. 18) (Investigation of Israel Security Agency Employees by the Police Internal Investigations Department), 5764–2003, Government Draft Law 42; Debate on the draft Police Ordinance Amendment Law (no. 18), 5764–2004 (second and third readings), KP 60, 5486 (5764).

¹⁵⁵ Letter from Yehoshua Lemberger, Deputy State Attorney (Criminal Matters), to Eran Shendar, State Attorney, *Sample examination of the Mavtan's files* (Oct. 9, 2007).

the Director–General of the Ministry of Justice) that the Mavtan would no longer be an ISA employee but an employee of the Ministry of Justice and that he should be subordinate administratively and organizationally to the Director–General of the Ministry of Justice, and professionally to the Mavtan’s Supervisor, the State Attorney and the Attorney–General. This policy decision emanated from a combination of reasons, amongst them, the finding that the Mavtan ‘lacks in practice investigative experience which is definitely required for this position’, as well as ‘a problem of perception, i.e., the inherent difficulty to justify a situation in which... an internal employee in the ISA examines complaints – ostensibly criminal – against his co–workers’.¹⁵⁶ It is important to note that the Commission was informed that, even after the proposed change, the Mavtan will still have access to documents and information in the possession of the ISA, in order to allow the Mavtan to carry out his work in an optimal manner.¹⁵⁷ Until the submission of this Report, this decision of the Attorney–General has not yet been implemented.

COMPLAINTS AND CLAIMS DIRECTED AT PRISON WARDENS

51. The fourth security arm that complaints and claims regarding violations of international humanitarian law can be directed at is the Israel Prison Service. The National Prison Wardens Investigation Unit (hereinafter: the NPWIU) is responsible for examining and investigating claims that criminal offenses were committed by Israel Prison Service wardens within the framework of carrying out their duties. The NPWIU is subordinate to the National Unit for International Investigations, as a part of the Investigations and Intelligence Division at the Israel Police. The NPWIU is headed by an officer with the rank of Chief Superintendent,

¹⁵⁶ *Transfer of the Mavtan to the Ministry of Justice* (Summary of Discussion of Oct. 4, 2010, Attorney–General’s office, Nov. 11, 2010).

¹⁵⁷ *Deputy State Attorney (Special Assignments), Position Paper – Supplementary Material*, *supra* note 133, at 8.

and under him work 11 investigators, most of whom are appointed to the job after training as police investigators and serving in the National Unit for International Investigations. When needed, the NPWIU receives cooperation and reinforcement from additional units in the Investigations and Intelligence Division of the Israel Police, such as the National Unit for International Investigations, which reinforces the NPWIU with investigators and with evaluation, intelligence, communications and detection services.¹⁵⁸

COMPLAINTS AND CLAIMS DIRECTED AT THE CIVILIAN ECHELON

52. Complaints and claims regarding violations of international humanitarian law can also be directed at the civilian echelon. It is clear that when a suspicion arises that senior members of the executive branch have breached the law, the suspicion must be assessed in the same way as suspicions against any other person. Thus, the Supreme Court held that on the question of investigating violations of international law:

The rule of law in its formal sense means that all parties in the State, whether private parties such as individuals and corporations or the branches of the State, should act according to the law, and an act contrary to the law should lead to the organized sanction of society. The rule of law, in this sense, has two meanings: the legality of government and the enforcement of law... Therefore, if the Attorney-General is of the opinion that there is *prima facie* evidence that justifies an investigation of very serious offenses that were committed by any person in the executive branch, the rule of law requires an investigation and examination. This is how we would act with regard to any other person. This is how we should act with regard to political leaders. Security considerations do not require any other outcome. There

¹⁵⁸ *Id.*, at 9–10.

is no security without law. The rule of law is an element of national security. Security necessitates the finding of proper tools for an investigation.¹⁵⁹

53. The police, who investigate suspicions against civilians in general, also investigate claims against senior officials. However, the decision to initiate a criminal investigation against members of government requires the approval of the Attorney-General.¹⁶⁰

54. Apart from the criminal proceeding of examination and investigation, Israel has a mechanism of commissions of inquiry, which as a rule, addresses claims directed at decision makers in the civilian echelon. These commissions of inquiry may be of different types: a State commission of inquiry; a government commission of examination; a commission of assessment; and a parliamentary committee of inquiry.

1. State Commission of Inquiry

55. One type of commission of inquiry that exists in Israel is a State commission of inquiry. A State commission of inquiry is regulated in the Commissions of Inquiry Law, 5729–1968 (hereinafter: the Commissions of Inquiry Law), and it is established by the government when necessary and at its discretion.¹⁶¹ According to the Commissions of Inquiry Law:

- (a) in the decision to establish a commission of inquiry the government will define the matter which will be the subject of the inquiry.
- (b) the government may, upon the request of the commission extend or restrict the subject matter of the inquiry.¹⁶²

159 *Barzilai* case, *supra* note 144, at para. 45 of Justice Barak's judgment.

160 *Investigation of Public Figures*, ATTORNEY-GENERAL GUIDELINE 4.2200 (2006).

161 The Commissions of Inquiry Law, 5729–1968, LA 548, at Article 1.

162 *Id.*, at Article 2.

When the government decides to appoint a State commission of inquiry, it shall give notice to the President of the Supreme Court, ‘and he will appoint the head of the commission and the rest of its members’.¹⁶³ The Supreme Court considered the government’s general authority to appoint a commission of inquiry and held that: ‘The choice to appoint or not to appoint a State commission of inquiry lies at the heart of the authority of the executive branch’.¹⁶⁴ In special circumstances that are listed in the State Comptroller Law, 5718–1958, the State Control Committee of the Knesset also has the power to decide to appoint a State commission of inquiry.¹⁶⁵

Over the years, 14 commissions of inquiry have been established according to the Commissions of Inquiry Law, and four commissions of inquiry were established according to the State Comptroller Law. Several of them have examined claims of violations of international humanitarian law, for example, the Landau Commission (discussed above); and the Kahan Commission which investigated the Israeli involvement in the atrocities that were committed against the civilian population in the Sabra and Shatilla refugee camps in Lebanon by a unit of the Lebanese forces.¹⁶⁶

2. Government Commission of Examination

56. A second type of commission of inquiry that exists in Israel is a government commission of examination. Section 8A of the Government Law, 5761–2001 (amended in 2003) (hereinafter: the Government Law) provides that:

163 *Id.*, at Article 4(a).

164 HCJ 6728/06 *Ometz, Citizens for Proper Government and Social Justice v. Prime Minister, Mr. Ehud Olmert* (unpublished, Nov. 30, 2006), at para. 10 of Vice-President Rivlin’s judgment [hereinafter: *Ometz case*].

165 The State Comptroller Law, 5718–1958, LA 248, at Article 14B [hereinafter: the State Comptroller Law].

166 For further detail, see: The Commission of Inquiry into the Events at the Refugee Camps in Beirut REPORT (1983).

If a Minister appoints a commission to examine a specific subject or an incident under his responsibility (hereinafter: appointing Minister), and the commission is headed by a retired Judge, the Minister of Justice may, at the request of the appointing Minister and with the approval of the government, determine that the commission will have the authorities of a commission of inquiry, according to sections 9–11 and 27(b) of the Commissions of Inquiry Law 1968.¹⁶⁷

Over the years, government commissions of examination were established on various matters, two of which examined claims of violations of international humanitarian law: the Winograd Commission for Examining the Events of the 2006 Lebanon War and the Turkel Commission for Examining the Maritime Incident of 31 May 2010.¹⁶⁸

3. Commission of Assessment

57. A third type of commission of inquiry that exists in Israel is a commission of assessment. Apart from the Government commission of examination, the Government and any minister in the government may appoint a commission of assessment, provided that no State commission of inquiry has been appointed to examine that same matter.¹⁶⁹ The main difference between this kind of commission and the ones surveyed above is that a commission of assessment has no authorities provided in legislation.¹⁷⁰ Ministers often establish commissions of assessment.

167 The Government Law, 5761–2001, LA 1780.

168 For further detail, see: The Commission for Examining the Events of the 2006 Lebanon War (the Winograd Commission) FINAL REPORT Vol. I, 484–486 (2008) [hereinafter: *Winograd Commission Report*] (in Hebrew); See also: THE COMMISSION'S FIRST REPORT, *supra* note 101.

On the matter of the discretion of a government commission of examination see also: *Ometz* case, *supra* note 164, and also: HCJ 258/07 *MK Zahava Galon v. Government Commission of Examination for Examining the Events of the Lebanon War 2006* (unpublished, Feb. 6, 2007).

169 The Commissions of Inquiry Law, at Article 28(a).

170 See: HCJ 6001/97 *Amitai, Citizens for Proper Government and Integrity v. Prime Minister* (unpublished, Oct. 22, 1997), at para. 3: 'Like any administrative body, the government may establish a commission of investigation in order to investigate and examine a matter for which it is responsible or which concerns the performance of its duties (see and cf. in this regard the provisions of section 28(a) of the Commissions of Inquiry Law). Such a commission has no regulated status in statute and it is usually used as a tool to investigate internal matters of the authority that appoints it. As

Two examples of commissions of assessment that dealt with significant incidents are the Zorea Commission to investigate the 300 Bus Affair and the Ciechanover Commission that investigated the failed attempt to assassinate the Hamas leader Khaled Mashal in Jordan.¹⁷¹

4. Parliamentary Committee of Inquiry

58. A fourth type of commission of inquiry in Israel is a parliamentary committee of inquiry. Apart from the Government, the Knesset is also authorized to appoint committees of inquiry according to section 22 of the Basic Law: the Knesset, which states that:

The Knesset may appoint committees of inquiry, whether by authorizing one of the standing committees or by electing a committee from among its members, in order to investigate matters that the Knesset determines; the powers and functions of a committee shall be determined by the Knesset; every committee of inquiry shall also contain representatives of parties that are not members of the government, according to the balance of power of the parties in the Knesset.¹⁷²

Over the years, 25 parliamentary committees of inquiry have been established. For example, in 1951 a parliamentary committee was established regarding detainees of the Jalami Camp which dealt with violations of human rights.¹⁷³

Y. Zamir says of this in his book *Administrative Authority*, vol. 1, at page 418: "Often a commission of investigation is established to investigate a particular matter without any statutory authority. Such commissions are usually called commissions of investigation. Indeed, commissions without any statutory authority have no enforcement powers, but in many cases there is no need for such powers in order to arrive at the truth. The participation of public representatives or experts on commissions of investigation may add to them a dimension of prestige, professionalism and credibility".

171 For further details, see: *The Commission for Investigating the Failed Assassination Attempt of the Hamas Leader, Khaled Mashal, in Jordan* REPORT (1998).

172 Basic Law: the Knesset, LA 1958 244.

173 For further details, see: *The Report of the Parliamentary Committee of Inquiry Regarding the Detainees of the Jalami Camp*, KP 28, 2196 (1951), available at: www.knesset.gov.il/committees/heb/docs/piqJalamiReport.pdf (in Hebrew).

OVERSIGHT AND REVIEW OF INVESTIGATIVE BODIES

59. The first part of this section ('who investigates?') surveyed the mechanisms for examining and investigating claims of violations of international humanitarian law in Israel, i.e., the MAG Corps, the CID, the courts martial, the PIID, the Israel Police, the Mavtan, the NPWIU and the commissions of inquiry. In this part we will present the institutions that oversee and review the conduct of the examination and investigation mechanisms, i.e., the Attorney-General, who stands at the head of the public legal system and serves as the Chief Prosecutor and the Supreme Court, sitting as the High Court of Justice.

1. Oversight

60. The Attorney-General heads the legal system of the executive branch. His duties include giving advice to the government and the various agencies that operate on its behalf, representing the State and executive agencies in the courts, and protecting the public interest in the field of law. As the authorized interpreter of the law for the executive branch, his guidelines bind all the branches of government and State agencies, including the IDF and the other security forces.¹⁷⁴

61. In order to carry out his advisory duties, the Attorney-General is assisted by six deputies, who manage the advice and legislation departments at the Ministry of Justice. From the material submitted to the Commission, it appears that there is no department that specializes in advice on international humanitarian law.¹⁷⁵ Apart from the deputies, the

174 See: The Public Commission for Examining the Methods of Appointing the Attorney-General and Matters Relating to his Office REPORT (1999); See also: HCJ 4267/93 *Amitai, Citizens for Proper Government and Integrity v. Prime Minister*, 47(5) 441, 475 (1993).

175 It should be noted that there are several bodies in the Ministry of Justice and the State Attorney's Office that specialize in international law, including the International Agreements and International Claims Unit in the Ministry of Justice (which includes the Human Rights and Foreign Relations Department), the International Affairs Department at the State Attorney's Office and the Special Assignments (International) Department at the State Attorney's Office. In addition, the Deputy Attorney-General (Special Assignments) handles such matters on a regular basis.

Attorney-General is also assisted, when he considers matters involving the operations of the defense forces (including international law issues), by the High Court of Justice Department at the State Attorney's Office (which represents the army, amongst others, in petitions against it).¹⁷⁶ This department also has no particular specialization in the field of international law.

Oversight of the Military System

62. By virtue of his position as head of the legal service in Israel, the Attorney-General has the authority to give professional guidance to the MAG. The issue of the involvement of the Attorney-General in the MAG's decision was summarized by the Supreme Court in the following guidelines:

- (1) The Attorney-General may intervene and even order the Military Advocate-General how to act with regard to decisions that he thinks are of special importance to the public or where he finds that the implications go beyond the military sphere. The Attorney-General may intervene in these matters within the framework of his position as the person who has supreme responsibility for the various prosecution authorities and legal agencies in the executive branch.
- (2) The Attorney-General will intervene in the decisions of the Military Advocate-General in all of those cases where the decision of the Military Advocate-General departs from accepted legal norms. The Attorney-General may intervene in these decisions by virtue of his power as the person responsible for the legality of the actions of the various branches of government.

¹⁷⁶ The High Court of Justice Department constitutes a part of the State Attorney's main office in Jerusalem, and it numbers approximately 40 employees; The advocates in the Department represent the government and the other State agencies in administrative and constitutional proceedings taking place in the Supreme Court. For further detail, see: Uzi Fogelman, *The High Court of Justice Department in the State Attorney's Office*, 6 MISHPAT U'MIMSHAL (LAW AND GOVERNMENT) 173 (2001); Osnat Mandel, *On Lawyering in the High Court of Justice's Petitions Department*, 2 MA'ASEI MISHPAT (LEGAL PRACTICE) 53 (2009).

- (3) In matters concerning general policy, such as the military prosecution policy regarding committal for trial, the Military Advocate–General is obliged to take into account the Public Prosecution policy determined by the Attorney–General and the need for uniformity and harmony between the various prosecution agencies. The Attorney–General may intervene in the decisions of the Military Advocate–General when the latter has not given proper weight to this consideration.¹⁷⁷

These guidelines of the Supreme Court are demonstrated in the authority of the Attorney–General to instruct to the MAG in cases where he is of the opinion that there is a basis for his intervention or instructions; in cases where the MAG asks of his own initiative to consult with the Attorney–General; or following a request by an external body on the subject of the policy or conduct of the MAG, in which case the Attorney–General will need to formulate his position on the issue, and he can adopt the position of the MAG or instruct him to change his policy.¹⁷⁸ The Attorney–General’s involvement with the decisions of the MAG is routinely demonstrated when discussions are held between the High Court of Justice Department at the State Attorney’s Office and the MAG Corps about petitions against the military that are filed in the Supreme Court. In cases where a disagreement arises between the MAG and the State Attorney’s Office about the position of the State to be submitted to the Court, the matter is referred to the Attorney–General, whose decision binds both the MAG and the State Attorney’s Office.¹⁷⁹

2. Review

A. The Attorney–General (in his Role as Chief Prosecutor)

63. One of the bodies that the Attorney–General reviews is the MAG

¹⁷⁷ H CJ 4723/96 *Atiya v. Attorney–General*, 51(3) 714, 733 (1997) [hereinafter: *Atiya* case].

¹⁷⁸ *Deputy State Attorney (Special Assignments), Position Paper – Supplementary Material*, *supra* note 133.

¹⁷⁹ *Deputy State Attorney (Special Assignments), Position Paper*, *supra* note 129, at 3.

Corps. More specifically, he acts in his capacity as reviewer of the MAG in particular cases. It was determined by the Supreme Court in *Atiya v. Attorney-General* that decisions of the MAG which, in the Attorney-General's opinion are of special public interest, or decisions with implications that extend beyond the military sphere are to be assessed by the Attorney-General or someone acting on his behalf. If there is a basis for intervention, the Attorney-General will intervene in the decisions of the MAG.¹⁸⁰ In the material that was submitted to the Commission, it was stated that, as a rule, decisions concerning claims of violations of international humanitarian law are a class of decisions that is of special public interest, and therefore any question on these issues will be examined by the Attorney-General or by whomsoever he appoints for this purpose on its merits, and a decision will be made after verifying all the circumstances of the case.¹⁸¹ It should be noted that in cases of fatal training accidents in the IDF, the Attorney-General Guidelines contain a unique procedure for objecting to the Attorney-General against decisions of the MAG to close an investigation file.¹⁸²

64. The Attorney-General's authority to review the decisions of investigation bodies in the other security forces (i.e., the Israel Police, the PIID and the bodies that investigate the ISA) is regulated in law by an appeal mechanism.¹⁸³

B. The Supreme Court

65. The Supreme Court, sitting as the High Court of Justice (hereinafter: HCJ), hears petitions that are submitted to the Court concerning the actions of the government and its agencies, including the decisions of the Attorney-

180 *Atiya* case, *supra* note 177.

181 *Deputy State Attorney (Special Assignments), Position Paper*, *supra* note 129, at 4.

182 *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 (2002).

183 Criminal Procedure Law, at Article 64.

General and the military justice system. In this framework, the Court exercises judicial review over issues to which international humanitarian law applies, even while hostilities are ongoing. Over the years, the HCJ has reviewed various issues, amongst them: the interrogation techniques employed by the ISA;¹⁸⁴ the route of specific sections of the separation barrier;¹⁸⁵ government decisions relating to the humanitarian situation in the Gaza Strip, for example, the decision to restrict the supply of fuel and electricity;¹⁸⁶ and widespread review of IDF operational activity such as, early warning procedures;¹⁸⁷ the targeted killing policy;¹⁸⁸ assigned residency;¹⁸⁹ evacuating bodies during ‘Operation Defensive Shield’;¹⁹⁰ the siege on the Church of the Nativity;¹⁹¹ and claims concerning the humanitarian situation in the Gaza Strip during Operation ‘Cast Lead’.¹⁹²

For our purposes, it is important to emphasize that the HCJ has also reviewed the investigation policy of the IDF, for example, the MAG’s policy not to open an investigation following the death of civilians as a result of IDF military activity in the West Bank (the *B’Tselem* case discussed below),¹⁹³ and the investigation policy of complaints directed at ISA interrogators.¹⁹⁴ Furthermore, the HCJ also intervened in concrete decisions of the MAG relating to the investigation process. The HCJ considered a petition against

184 HCJ 5100/94 *Public Committee Against Torture in Israel v. The State of Israel*, 53(4) 817 (1999); HCJ 11447/04 *Center for the Defence of the Individual founded by Dr. Lotte Salzberger v. The Attorney-General* (unpublished, Jun. 14, 2005), in paras. 6 and 9 of President Barak’s judgment [hereinafter: 2004 *Center for the Defence* case].

185 HCJ 2056/04 *Beit Sourik Village Council v. The Government of Israel*, 58(5) 807 (2004); HCJ 7957/04 *Mara’abe v. The Prime Minister of Israel*, 60(2) 477 (2005).

186 HCJ 9132/07 *AlBassiouni v. Prime Minister* (unpublished, Jan. 30, 2008).

187 HCJ 3799/02 *Adalah – The Legal Center for Arab Minority Rights in Israel v. GOC Central Command, IDF*, 60(3) 67 (2005).

188 HCJ 769/02 *The Public Committee Against Torture in Israel v. The Government of Israel*, 62(1) 507 (2006) [hereinafter: *Targeted Killing* case].

189 HCJ 7015/02 *Ajuri v. IDF Commander in West Bank*, 56(6) 352 (2002) [hereinafter: *Ajuri* case].

190 HCJ 3114/02 *MK Barake v. The Minister of Defense, Benjamin Ben-Eliezer*, 56(3) 11 (2002).

191 *Almandi* case, *supra* note 4.

192 HCJ 201/09 *Physicians for Human Rights v. Prime Minister of Israel* (still unpublished, Jan. 19, 2009).

193 See: *B’Tselem* case, *supra* note 6.

194 HCJ 1265/11 *Public Committee Against Torture in Israel v. Attorney-General* (still unpublished, Aug. 6, 2012) [hereinafter: 2011 *Public Committee Against Torture* case].

the decision of the MAG not to open an investigation following incidents involving the injury to civilians and destruction of houses,¹⁹⁵ and recently it reviewed the decision of the MAG not to open an investigation following the death of a Palestinian in the course of a military operation.¹⁹⁶ The HCJ also exercises judicial review over concrete decisions whether or not to open investigations into complaints directed at police and ISA interrogators.¹⁹⁷ It should be noted, however, that the HCJ's intervention in concrete cases is limited to decisions that have been tainted by extreme unreasonableness or a material injustice.¹⁹⁸

195 *2011 Adalah* case, *supra* note 28; See, also: *Abu Rahme* case, *supra* note 18, where the Court discussed whether the indictments selected by the MAG conform to relevant rules of international law; HCJ 425/89 *Tzofan v. Military Advocate-General*, 43(4) 718 (1989), where the Court considered the MAG's decision to indict for disciplinary proceedings rather than a criminal trial.

196 HCJ 1901/08 *D'babse v. The Military Advocate-General* (still unpublished, Jul. 15, 2012).

197 For a review of decisions to refrain from prosecuting ISA interrogators see: HCJ 2150/96 *Harizat v. The Attorney-General* (unpublished, Mar. 26, 2002), in para. 8 of Justice Strasberg-Cohen's verdict [hereinafter: *Harizat* case]; *2004 Center for the Defence* case, *supra* note 184, in paras. 6 and 9 of President Barak's judgment; HCJ 6138/10 *Center for the Defence of the Individual founded by Dr. Lotte Salzberger v. The Attorney-General* (still unpublished, Jan. 12, 2011), at para. 4 of Justice Fogelman's judgment. For decisions concerning legal measures against police, see: HCJ 5817/08 *Aramin v. Attorney-General* (still unpublished, Jul. 10, 2011) [hereinafter: *Aramin* case]; See also: HCJ 1299/05 *Anonymous v. Attorney-General* (unpublished, Jan. 23, 2007), in para 13 of Justice Procaccia's judgment.

198 See: *Harizat* case, *supra* note 197, at para. 6 of Justice Strasberg-Cohen's judgment; HCJ 6009/94 *Shafraan v. Chief Military Prosecutor, Colonel Dan Beeri*, 48(5) 573, 582 (1994); HCJ 4550/94 *Isha v. Attorney-General*, 49(5) 859, 871 (1995).

D. THE GROUNDS THAT GIVE RISE TO AN OBLIGATION TO INVESTIGATE IN ISRAEL (‘WHEN TO INVESTIGATE?’)

66. In this section of the chapter, we will discuss the processes that lead to opening an examination or investigation in Israel by the various investigation authorities. This depends upon two interrelated questions. First, what are the grounds that give rise to the obligation to investigate violations of international humanitarian law according to the law and practice in Israel. Second, what are the reporting duties for suspicions of violations, including the duties to document the scene of an incident. These procedures are essential because they form the basis for establishing grounds for an examination and investigation. These questions will be examined with relation to the IDF, the police, the PIID and the NPWIU, and the ISA.

THE GROUNDS THAT GIVE RISE TO AN OBLIGATION TO INVESTIGATE IN THE IDF

1. Investigation Policy

67. The grounds that give rise to an obligation to investigate complaints and claims of violations of international humanitarian law in the IDF are set out in General Staff Order 33.0304 (hereinafter: the Order), and in the various guidelines of the MAG. According to the Order a criminal investigation must be started by the CID in cases where there is a basis for a suspicion that offenses stipulated in the Order have been committed,¹⁹⁹ including: looting,²⁰⁰ rape²⁰¹ and unlawful use of weapons (i.e., without authority or without taking proper precautions) in cases of wounding,

199 GENERAL STAFF ORDER 33.0304, *supra* note 89, at para. 62.

200 *Id.*, at para. 62A(19).

201 *Id.*, at para. 62A(20).

threats or deliberately endangering someone.²⁰² The Order further provides that when there is a basis for a suspicion that an offense the Penal Law has been committed and there is no corresponding offense in the Military Justice Law, an investigation shall be opened by the CID, provided that the offense is connected with the suspect's military service.²⁰³ Notwithstanding, the Order provides that a commander of a CID has discretion *not* to open an investigation in these cases, after consulting with a military advocate when 'in his opinion there is no objective justification for doing so'.²⁰⁴

68. According to the MAG, this discretion provided in the Order is the only legal basis in Israeli law for his guidelines that determine the circumstances in which a CID investigation is opened immediately.²⁰⁵ These guidelines are referred to as 'the investigation policy'.

Until 2000, the investigation policy determined that 'almost every case of death, and also certain cases of injury to Palestinian residents [in the West Bank and the Gaza Strip], that occurred in the framework [of the] friction... between IDF forces and the population led to an immediate opening of a CID investigation'.²⁰⁶ In 2000, the MAG changed the investigation policy so that, in an incident where a Palestinian resident was killed as a result of military operations, the decision whether to open an investigation would be delayed until an operational debriefing of the incident would be received by the MAG (for a detailed explanation of the operational debrief see below in paragraphs 88–93). The MAG instructed the opening of an investigation if the circumstances revealed in the debriefing (and other available data) raised a suspicion of the commission of an offense.²⁰⁷

202 *Id.*, at para. 62A(26).

203 *Id.*, at para. 62C.

204 *Id.*, at para. 63.

205 *The Public Commission for Examining the Maritime Incident of May 31, 2010 – Supplementary Material 14* (position paper of the MAG Corps submitted to the Turkel Commission, Aug. 9, 2011) [hereinafter: *MAG Position Paper 2011 – Supplementary Material*].

206 *MAG Position Paper 2010*, *supra* note 55, at 9.

207 *MAG Position Paper 2011 – Supplementary Material*, *supra* note 205, at 14.

According to the MAG, the change in 2000 to the investigation policy was a result of an escalation in the conflict between Israel and the Palestinians. In that year the Second Intifada erupted where suicide attacks were renewed in Israel and violent incidents occurred in the West Bank and the Gaza Strip. In these territories the IDF forces contended with armed Palestinians equipped with a wide variety of standard and improvised weapons. This situation led to a shift in the nature of the IDF's operations, which was demonstrated by the amount of force, weapons and methods of warfare, and in a change in the rules of engagement, which permitted the use of deadly force against persons identified as involved in combat or in terrorist operations.²⁰⁸ Consequently, Israel announced that a change had occurred in its position on the legal framework regulating IDF operations in the West Bank and the Gaza Strip because the level of hostilities amounted to an armed conflict. The Supreme Court came to a similar legal determination and held that Israel is involved in an armed conflict with Palestinian terrorist organizations.²⁰⁹ Thus, during this period, the applicable law governing the activity of the IDF in the West Bank and Gaza Strip was international humanitarian law and in particular the rules regulating the conduct of hostilities according to which the death of a civilian does not of itself give rise to a suspicion that an offense has been committed and, therefore, does not necessarily require the opening of an investigation.

69. In 2011, shortly before the MAG and the Attorney-General testified before this Commission, the MAG decided, with the Attorney-General's approval, to change the investigation policy yet again. According to the MAG, this new policy derives from 'a significant change in the nature of the operational activity of the IDF forces in the West Bank that, generally, no longer bears a clear combat character'.²¹⁰ According to the new policy,

208 *MAG Position Paper 2010*, *supra* note 55, at 12.

209 *Targeted Killing* case, *supra* note 188, at para. 40 of President Barak's judgment; *Ajuri* case, *supra* note 189, at para 13 of President Barak's judgment.

210 Letter of Major-General Avichai Mandelblit, the MAG, to Yehuda Weinstein, Attorney-General,

the CID is obligated to open an immediate investigation in every case of the death of a Palestinian resident as a result of operations by the IDF forces in the West Bank, except in 'cases where it is clear that the operations during which the Palestinian inhabitant was killed were of a real combat nature'.²¹¹ In case of death in course of combat, the decision of whether to open an investigation must be made only after conducting an initial assessment of the facts of the case through an operational debrief (similar to the policy set in 2000).²¹²

70. Thus, until 2000, the death of a Palestinian civilian as a result of IDF activity in the West Bank and Gaza triggered the immediate opening of an investigation; between 2000–2011, the decision on whether to open an investigation into the death of a Palestinian civilian was delayed until receiving the findings of an operational debrief; since 2011, the death of a resident in the West Bank triggers the opening of an immediate CID investigation, except for incidents that occurred during actual combat activity where the decision of whether to open an investigation is delayed until receiving operational debrief findings, based on which the MAG decides if a suspicion to an offense arises and, therefore, whether an investigation shall be opened.

71. The current investigation policy (the policy from 2011) was approved by the Supreme Court in the *B'Tselem* case, which held that:

... the obligation is not to investigate every case of death, but *to investigate every case of death where there is a concern that it is the result of prohibited conduct*, i.e., where there is a concern of a breach of the law and a criminal offense. This obligation applies both in times of war and in times of calm; when there is a suspicion of prohibited conduct, an investigation should

Investigations Policy of IDF operations in the West Bank, 8 (Apr. 4, 2011).

211 *Id.*

212 *Id.*

be started in order to investigate that suspicion. However, the balancing point and the scope of the expression “suspicion of prohibited conduct” varies according to the circumstances of the particular incident, and the grounds that justify opening an investigation always depend on the circumstances. It can be seen from the respondent’s updating notice that in incidents taking place in the territory of Judea and Samaria that are not of a “actual combat nature,” the respondent is of the opinion that *the death of a Palestinian civilian in itself gives rise to a suspicion of unlawful conduct*, according to the laws that apply to the territory and such operations, and therefore it justifies the opening of an investigation by the CID. The respondent’s new policy, as set out in the revised statement, is acceptable to us, since it reflects the viewpoint that as the role of the security forces in the territories changes, there is also a change in the balancing point and in the manner of implementing the law.²¹³

2. Reporting Procedures

72. The general duty to report offenses in the IDF is enshrined in the Military Justice Law, which provides that ‘a commander who knows or has reasonable grounds to believe that one of his subordinates has committed an offense’ should prepare a complaint and bring it before a competent officer (hereinafter: the general reporting duty).²¹⁴ With regards to reporting duties, a distinction should be made between two types of incidents. The first type concerns incidents that do not result in the death or injury of civilians but which raise a suspicion of other violations of international humanitarian law (for example looting). In such incidents commanders have the general reporting duty to submit the information about the incident to the competent officer. According to General Staff Orders, the competent officer should convey the information in these cases to the CID,

213 *B’Tselem* case, *supra* note 6, at para. 10–11 of President Beinisch’s judgment.

214 The Military Justice Law, at Article 225.

without carrying out an examination himself (for further details, see ‘How to investigate?’).²¹⁵

73. The other type concerns incidents that result in death or injury and to which a different reporting duty applies. The background for this is as follows: In 2005, in response to a petition concerning the MAG’s investigation policy discussed above (*B’Tselem* case), the Government stated that it would formulate a procedure that would improve the handling of claims concerning the death of Palestinians in the West Bank that resulted from IDF operations.²¹⁶ Following this statement a ‘Reporting Procedure for Incidents in which Palestinian Civilians were Injured’ was drafted, adopted by the Chief of Staff and enshrined in the orders of the Operations Division in the Operations Department and of the Central Commander’s Office (hereinafter: the reporting procedure).²¹⁷ According to the reporting procedure, ‘in any case in which the aforementioned uninvolved person is killed or injured, the incident will be reported... immediately to the Chief of Staff’s chambers, the Operations Branch and the MAG. *The said report will be submitted no later than 48 hours from the time of the incident*’.²¹⁸ The Reporting Procedure sets out guidelines for how to fill out a ‘Preliminary Report of an Incident involving the Death or Injury of a Palestinian Civilian’ form (hereinafter: Preliminary Report Form). The commanders enumerated in the Procedure are responsible for submitting the Preliminary Report Form to the MAG within 48 hours. The Preliminary Report Form must indicate the location of the incident, the time of the incident, details of the soldiers involved, number of casualties including their condition, their gender and age as well as other circumstances.²¹⁹ According to the Reporting Procedure, ‘copies of the relevant Operation Log

215 GENERAL STAFF ORDER 33.0304, *supra* note 89, at para. 62.

216 An interim decision of 14 July 2005 in *B’Tselem* case, *supra* note 6.

217 ORDERS OF THE IDF’S OPERATIONS BRANCH MB–SP–015 *Reporting Procedure for Incidents in which Palestinian Civilians were Injured* (and ORDERS OF THE CENTRAL COMMANDER’S OFFICE LS–41877, dated Feb. 13, 2007) [hereinafter: ORDERS OF THE IDF’S OPERATIONS BRANCH AND THE CENTRAL COMMANDER’S OFFICE, *Reporting Procedure*].

218 *Id.*

219 *Id.*, in the attached reporting form.

Books, the daily reports and any other relevant material must be attached to the Preliminary Report Form'.²²⁰ The reporting duty further requires that 'it is the responsibility of the regional brigade commander and the unit commander... to ensure the photographing and documentation of the scene immediately after the incident occurred as long as it does not endanger the forces and it is possible in the circumstances',²²¹ and 'insofar as there are grounds that prevent documenting and photographing... the reasons must be detailed'.²²²

However, in practice, the MAG does not receive a report of incidents involving the death or injury of civilians in accordance with the Reporting Procedure, and in cases where the report is received from military authorities it is transmitted by telephone by the relevant commander, usually in close proximity to the incident.²²³ According to the MAG:

In most of the cases information of an incident reaches the military prosecution in a timeframe of up to 48 hours from the occurrence of the incident. Sometimes, the report may come from external sources such as the media or human rights organizations even before it is received from military authorities. As to the reporting from military authorities there are cases in which the information is not submitted in time either because of lack of awareness or failure to observe the procedure, or because in certain cases military authorities are unaware that an operation caused the injury of an individual.²²⁴

220 *Id.*

221 *Id.*

222 *Id.*

223 Meeting between Hoshea Gottlieb, the Commission's Coordinator, and Major-General Avichai Mandelblit, The MAG 2 (Aug. 10, 2011) [hereinafter: *Meeting with MAG*]. The Commission also asked to receive forms that were completed by the units and prepared in accordance with the Reporting Procedure, but it was told that no such forms exist.

224 *MAG Position Paper 2011 – Supplementary Material, supra* note 205, at 6.

THE GROUNDS THAT GIVE RISE TO AN OBLIGATION TO INVESTIGATE IN THE POLICE

1. Investigation Policy

74. The grounds that give rise to an obligation to investigate in the police complaints and claims of offenses are set out in Article 59 to the Criminal Procedure Law, according to which, 'If the police become aware of the commission of an offense, whether as a result of a complaint or in any other way, they shall begin an investigation'.²²⁵ However, as stated above in paragraph 46, in operational activity during which there is a death or injury of a civilian due to shooting by Border Police operating in the West Bank under the auspices of the IDF, the decision is delayed until the Deputy State Attorney (Criminal Matters) receives a police operational debrief according to which, *inter alia*, he makes a decision whether to open an investigation. The grounds for which the Deputy State Attorney will instruct that an investigation should be opened into shooting incidents involving Border Police are the same as the grounds for which the MAG will instruct that an investigation should be opened into incidents involving the IDF.²²⁶ In practice, however, it appears that because it is not always clear who decides to open an investigation (see above in paragraph 46), the grounds upon which the investigation is opened are also unclear because they are dependent on the identity of the deciding figure. When the police (a Judea and Samaria District officer) is the body that decides whether to open an investigation it acts according to the grounds set in Article 59 even in shooting incidents in the West Bank.

²²⁵ The Criminal Procedure Law, at Article 59. It should be noted that the law authorizes a police officer to decide not to investigate offenses which are not a felony. As for the duty to investigate, see also HCJFH 7516/03 *Nimrodi v. Attorney-General* (unpublished, Feb. 12, 2004).

²²⁶ In 2011, in the context of the Government's statement in the Supreme Court *B'Tselem* case, *supra* note 6, the Government stated that it decided to 'make a similar change to the investigation policy relating to police units operating in Judea and Samaria in military operations under the command of the IDF'. See: Letter from Yehoshua Lemberger, the Deputy State Attorney (Criminal Matters), to Police Commander Shaul Gordon, Legal Adviser to the Israel Police (Jun. 9, 2011).

2. Reporting Procedures

75. Reporting procedures also apply to incidents in the West Bank where Palestinian civilians are injured as a result of shooting by members of the police force. According to a procedure of the Investigations and Intelligence Department of the Israel Police the commander of a company or unit should report every case in which a 'local inhabitant' is injured as a result of shooting by police in the course of operations in the West Bank.²²⁷ The report is sent to three individuals: the commander of the police station for the area in which the incident occurred; the commander of the local division or the area commander; and the director of the PIID in the Ministry of Justice (even though according to the current procedures the PIID is not involved in investigating these incidents). Moreover, the commander of the divisional administration should report immediately to the IDF commander in the area, to the Border Police Commander in cases where Border Police forces were involved in the incident, to the commander of the Judea and Samaria District and to the head of the Investigations and Intelligence Department in the Police. According to the police procedure the report should contain details of the incident, including the location of the incident, the time that it occurred, the circumstances, the number of civilians injured and the type of injuries, details of the police officers who carried out the shooting and details of the force commander.

76. Nonetheless, similar to the situation regarding the Reporting Procedure in the IDF, from the material presented to the Commission, it can be seen that the police Reporting Procedure is not carried out as specified, and sometimes a considerable amount of time passes before the information about injuries to civilians is conveyed to the investigating authorities.²²⁸ Moreover, sometimes the investigating authorities become

²²⁷ IID GUIDELINE 03.300.071, *supra* note 141.

²²⁸ Meeting between Hoshea Gottlieb, the Commission's Coordinator, and Yehoshua Lemberger, Deputy State Attorney (Criminal Matters), and the Deputy Legal Adviser of the Israel Police, the Legal Adviser of the Border Police and the Deputy Head of the Investigations Division in the Judea and Samaria District of the Israel Police, 5–6 (Oct. 5, 2011) [hereinafter: *Meeting with the Deputy State*

aware of the injury only indirectly, for example as a result of the filing of a tort action made by victims of the incident.²²⁹

It should be noted in this context that the Commission is unaware of the existence of a procedure for non-shooting incidents in which police officers are involved, but give rise to a suspicion of other violations of international humanitarian law (for example looting).

THE GROUNDS THAT GIVE RISE TO AN OBLIGATION TO INVESTIGATE IN THE PIID AND THE NPWIU

1. Investigation Policy

77. The grounds that give rise to an obligation for the PIID and the NPWIU to investigate complaints and claims of offenses are set out in Article 59 of the Criminal Procedure Law.²³⁰ The Deputy State Attorney (Special Assignments) emphasized that ‘although Section 59 of the Criminal Procedure Law grants the police officer the discretion not to open an investigation for reasons of public interest, according to police procedures for prison wardens, if there is a *prima facie* suspicion that a criminal offense has been committed related to the warden’s position generally an investigation will be opened’.²³¹ Therefore, the threshold for opening investigations against prison wardens can differ from the threshold for opening an investigation against police officers (detailed above). In addition, the procedure of the Investigations and Intelligence

Attorney (Criminal Matters)]; See also, for example: *Aramin case*, *supra* note 197; *Exceptions – Committing IDF Soldiers for Trial in and after the Second Intifada, 2000–2007* 15–16 YESH DIN (Sep. 2008), available at: www.yesh-din.org/sys/images/File/Exceptions%5BEng%5D%5B1%5D.pdf.

229 *Meeting with the Deputy State Attorney (Criminal Matters)*, *supra* note 228, at 3.

230 See *supra*, at para. 43; See also: The Police Ordinance, at Article 49I(a), which states that despite all other laws, the investigation of an offense in which a police officer is a suspect will be investigated by the PIID (except for an offense whose punishment exceeds one year imprisonment, unless the State Attorney and the General Comptroller decide it will be investigated by the PIID).

231 *Deputy State Attorney (Special Assignments), Position Paper – Supplementary Material*, *supra* note 133, at 9–11.

Department of the Israel Police, which regulates the handling of offenses committed by wardens, provides that ‘if the complaint raises a suspicion of only a disciplinary offense before an investigation was opened the file will be closed by the head of the NPWIU with the approval of the State Attorney’s Office’.²³²

78. It should be noted that there is a special procedure concerning investigations regarding the death of detainees or prisoners that can be held outside the police:

If a person dies and there is a reasonable ground for suspicion that the cause of his death is not natural or that his death was caused by an offense, *and if a person dies when he is in detention or imprisonment* or when he is hospitalized in a mental hospital or in a closed institution for retarded children, the Attorney-General or his representative, a police officer, a physician or any interested person may apply to a judge of the Magistrates Court in whose jurisdiction the death occurred or the body was found (hereinafter – investigating judge) to investigate the cause of death.

In this section, “interested person” – includes the spouse of the deceased, his parents, grandparents, descendants, brothers or sisters’.²³³

2. Reporting Procedures

A. The Police Internal Investigation Department (PIID)

79. In general, the information about suspicions of offenses reaches the PIID by means of complaints (whether from the complainant himself or

²³² IID GUIDELINE 03.300.071, *supra* note 141, at para. 2a(5).

²³³ The Investigation of Causes of Death Law, 5718–1958, LA 242, at Article 19 [emphasis added]; STANDING ORDERS OF THE ISRAEL POLICE 14.01.013 *Investigation of incidents of death*, at Articles 1 and 4A, adopt what is stated in the law with regard to the grounds for opening an investigation for the purposes of the standing orders of the police.

from somebody acting on his behalf).²³⁴ A complaint may be filed with the PIID in writing or by appearing in person at one of the PIID's offices and filing a complaint with an investigator.²³⁵ A detainee or prisoner who wishes to file a complaint against a police officer should send his complaint to the manager of the custodial facility in which he is held, and the manager will refer the complaint to the PIID. In such cases, according to the procedures, a representative of the PIID will come to the detention facility or the prison and continue the handling of the complaint.²³⁶

80. Inhabitants of the West Bank, who are unable to enter Israel in order to file a complaint, may file a written complaint, and in certain cases, a meeting with a PIID investigator is arranged at one of the border crossings in order to obtain details of the complaint.²³⁷ However, there is a lack of clarity about the correct 'address' for filing the complaint (complaints against police concerning shooting incidents should be filed with the police, whereas complaints against police concerning all other offenses, including the use of force during disturbances of public order, should be filed with the PIID). Additionally, it has been claimed that in practice it is difficult to arrange meetings at border crossings and to obtain an interpreter, and that in many cases the complaints are investigated only after a considerable time delay.²³⁸

81. Information concerning offenses committed by police officers can also reach the PIID other than by way of complaints. Thus, for example,

234 *Deputy State Attorney (Special Assignments), Position Paper, supra* note 129, at 7.

235 The PIID's offices are located in Nazareth, Tiberias, Haifa, Tel-Aviv, Rehovot, Ashkelon, Eilat and Beer-Sheba.

236 *Deputy State Attorney (Special Assignments), Position Paper, supra* note 129, at 7.

237 *Deputy State Attorney (Special Assignments), Position Paper – Supplementary Material, supra* note 133, at 5; See, for example: PIID file 2471/10, PIID file 768/11, PIID file 782/11 and PIID file 2433/11, in which the complainants' testimony was taken by a PIID investigator at the Rachel border crossings, at the and Hizma checkpoint, at the Qalqilya District Coordination Liaison Office, and at the tunnels border crossing, respectively.

238 *Alleged Investigation – The Failure of the Investigation into Offenses Committed by IDF Soldiers against Palestinians*, 35–46 YESH DIN (Aug. 2011), available at: <http://yesh-din.org/userfiles/file/Reports-Hebrew/Alleged%20Investigation%20%5BHebrew%5D.pdf> [hereinafter: *Alleged Investigation Report*].

according to Police Orders, a police officer that receives information about a criminal offense committed by another police officer is obliged to refer it to the PIID.²³⁹ This information is received by the police through complaints against police officers that are erroneously filed with the police rather than the PIID and from complaints that interrogatees raise against police officers during their investigation or during court proceedings in their matter.²⁴⁰

B. The National Prison Wardens Investigation Unit (NPWIU)

82. Complaints concerning the commission of offenses by employees of the Israel Prison Service may be filed with the NPWIU orally, in writing, or in a report by the Israel Prison Service.²⁴¹ According to the Prison Commissioner's Office Order, 'if a prisoner wishes to file a complaint against a warden in connection with his role the prisoner will be given the opportunity to file it in a closed envelope that will be sent directly that day to the NPWIU'.²⁴² Moreover, the various units of the Israel Prison Service are instructed to report to the head of the disciplinary branch every complaint or information that gives rise to a suspicion of a criminal offense committed by a warden and he will transfer the complaint or the information to the NPWIU.²⁴³ The report should contain insofar as possible 'full details of the individuals involved' and medical documents.²⁴⁴ When a suspicion of an unlawful use of force against a prisoner arises, even if no complaint is filed, the unit shall report to the head of the Disciplinary

239 NATIONAL POLICE ORDER 06.03.03 *Investigation of Police by the Police and the Police Investigation Department in the Ministry of Justice*, at Article 5A(1).

240 *Deputy State Attorney (Special Assignments) – Position Paper*, *supra* note 129, at 7.

241 *Deputy State Attorney (Special Assignments), Position Paper – Supplementary Material*, *supra* note 133, at 10.

242 PRISON COMMISSIONER'S OFFICE ORDER 02.10.00 *Handling of Criminal Offenses by Prison Wardens*, at para. 3(d) [hereinafter: PRISON COMMISSIONER'S OFFICE ORDER 02.10.00]; GUIDELINE OF THE INVESTIGATIONS AND INTELLIGENCE DEPARTMENT 03.300.039 *Handling of Prison Wardens' Offenses*, at para. 2(a)(2) [hereinafter: IID GUIDELINE 03.300.039].

243 PRISON COMMISSIONER'S OFFICE ORDER 02.10.00, *supra* note 242, at paras. 3(a), 3(j).

244 *Id.*, at paras. 3(b), 3(j)(2).

Department.²⁴⁵ The head of this Department is responsible for examining the case, and if he is of the opinion that the use of force was unlawful, he shall refer the handling of the incident to the NPWIU.

83. Information about offenses can also reach the NPWIU by means of the ‘official prison visitor’ mechanism (hereinafter: an official visitor).²⁴⁶ An official visitor, is appointed by the Minister of Public Security, from a list of candidates submitted to him each year by the Attorney–General, which includes Ministry of Justice employees, representatives of the Israel Bar Association, employees of public bodies that apply to have their representatives authorized as an official visitor, and any other person that the Minister sees fit to appoint as an official visitor.²⁴⁷ Additionally, the justices of the Supreme Court, the judges of the District and Magistrates Courts (in the area of their jurisdiction) and also the Attorney–General are ‘official visitors’ by virtue of their office.²⁴⁸ An official visitor ‘may at any time enter a prison that he has been authorized to visit and examine the conditions there, the manner in which the prisoners are treated, the proper running of the prison and whether all of the aforesaid conforms to the provisions of the law and other rules’.²⁴⁹ According to an Attorney–General guideline, an official visitor is competent to enter any place in the prison facility, speak with any detainee or prisoner privately and receive any document or information.²⁵⁰ The guideline further provides that when a prisoner ‘raises claims against a warden or a police officer and the official visitor intends to mention this in a report, he should first speak with the warden or police officer against whom the complaint was made. However, if the complaint concerns violence

245 *Id.*, at para. J(1).

246 The Prisons Ordinance, at Article 71.

247 PRISON COMMISSIONER’S OFFICE ORDER 03.04.00 *Official Comptrollers in the Prisons*; See also: *Visits to Prison Facilities*, ATTORNEY–GENERAL GUIDELINE 4.1201 (2010) [hereinafter: ATTORNEY–GENERAL GUIDELINE 4.1201].

248 The Prisons Ordinance, at Article 72.

249 *Id.*, at Article 72A(a); The Commission received reports that were produced as a result of visits to prison facilities by official comptrollers, in accordance with this mechanism, both to ISA facilities and other prison facilities.

250 ATTORNEY–GENERAL GUIDELINE 4.1201, *supra* note 247, at paras. 3–10; The Prisons Ordinance, at Article 72A.

or a suspicion of another criminal offense, the persons against whom the complaint was made should not be asked for a response'.²⁵¹

THE GROUNDS THAT GIVE RISE TO AN OBLIGATION TO INVESTIGATE ISA INTERROGATORS

1. Investigation Policy

84. The grounds that give rise to the duty to investigate claims and complaints directed at ISA interrogators are subject to the discretion of the Attorney-General, who examines each case in accordance with Israeli criminal procedure and the Penal Law. As stated above in paragraph 49, the Attorney-General makes the decision to open a criminal investigation against ISA investigators only after an investigation conducted by the Mavtan, and on the basis of the recommendation of the Mavtan's Supervisor.²⁵²

2. Reporting Procedures

85. The Mavtan receives information regarding violations of international humanitarian law through complaints that are submitted to him directly by interogatees or by human rights organizations.²⁵³ It should be noted that in his testimony before the Commission, the Mavtan stated that he 'receives the different complaints from various bodies. It can come from lawyers, it can come from one of the various human rights groups, [for example] the ICRC, the Public Committee Against Torture in

251 ATTORNEY-GENERAL GUIDELINE 4.1201 *supra* note 247, at para. 8.

252 It should be noted that meanwhile the Supreme Court handed down a decision on this matter; See: *2011 Public Committee Against Torture case*, *supra* note 194.

253 It should be noted that the ICRC makes regular visits to all of the ISA's interrogation facilities, sends concrete complaints on a regular basis for the ISA's response and submits a periodic report each year with regard to 'The Treatment of Detainees in Interrogation Facilities'. This report is defined as classified, it is not available to the public and is only sent for the response of the relevant authorities.

Israel, B'Tselem'.²⁵⁴ Moreover, all ISA personnel are instructed to send to the Mavtan any information in their possession that may give rise to a complaint against an ISA interrogator. Thus, complaints are sent to the Mavtan, whether made by an interrogatee to an interrogator, or in court during detention proceedings.²⁵⁵

²⁵⁴ *Mavtan's Testimony*, *supra* note 151, at 2.

²⁵⁵ *Id.*, at 3.

E. METHOD OF CONDUCTING THE EXAMINATION AND INVESTIGATION IN ISRAEL ('HOW TO INVESTIGATE?')

The survey of the examination and investigation mechanisms in Israel discussed so far the questions of 'why investigate?', 'what to investigate?', 'who investigates?' and 'what to investigate?'. In this last section we will survey the processes of conducting an examination and investigation in the various mechanisms ('how to investigate?'). Similar to the previous parts, here too we will first discuss the manner in which examinations and investigations are conducted in the IDF, in the police and in the PIID and following this we will discuss the manner in which examinations and investigations are conducted by the Mavtan, the NPWIU and commissions of inquiry.

METHOD OF CONDUCTING THE EXAMINATION AND INVESTIGATION IN THE IDF

86. In surveying 'how to investigate?' in the IDF we will outline chronologically the processes for examinations and investigations. We will first discuss the examination process which starts with the operational debrief mechanisms and is followed by the MAG's decision on whether to open an investigation based on the findings that emerge from the operational debrief. We will then discuss the CID investigation process. The chronology of the process is influenced by the nature of the complaints and claims directed at IDF soldiers. As described above in paragraph 69, according to the current investigation policy, there are two tracks for examining and investigating complaints and claims of violations of international humanitarian law. The first track is the immediate investigation track, which is opened following claims relating to events that take place in the West Bank, in the course of the IDF's ordinary law enforcement operations, and following complaints of acts constituting a

violation of absolute prohibitions that cannot be justified even within the framework of the conduct of hostilities. The second track involves the MAG deferring the decision on whether to open an investigation until he receives the findings of an operational debriefing, upon which he will determine whether there is a suspicion for criminality.

87. Information concerning violations of international humanitarian law may reach the MAG through complaints filed by the injured parties themselves or through human rights organizations that represent them, by means of reports in the media or following Israeli or foreign reports of a particular incident,²⁵⁶ or from the forces operating in the field. According to the Reporting Procedure (see above in paragraph 73), in any case of death or injury to a Palestinian civilian a preliminary report form shall be filled out and sent to the MAG within 48 hours. In addition, an operational debriefing should be prepared and approved by the area commander and sent to the MAG within 21 days, together with the material that was accumulated during its preparation.²⁵⁷

The preliminary report is assessed by the MAG Corps for Operational Matters. If the assessment does not give rise to a *prima facie* suspicion of criminality, the decision as to whether to open an investigation is deferred until after receipt of the operational debriefing.

1. The Operational Debrief

88. An ‘operational debrief’ is an ‘inquiry made by the army, based on army orders, concerning an incident that occurred during training or military operations, or with regard thereto’.²⁵⁸ The status of the operational

²⁵⁶ *MAG Position Paper 2011 – Supplementary Material*, *supra* note 205, at 6.

²⁵⁷ ORDERS OF THE IDF’S OPERATIONS BRANCH AND THE CENTRAL COMMANDER’S OFFICE, *Reporting Procedure*, *supra* note 217.

²⁵⁸ See: The Military Justice Law, at Article 539A(a); SCO 2.0702 *Report that is classified*, at para. 1(b) [hereinafter: SCO 2.0702].

debrief and the manner of preparing it are regulated in section 539A of the Military Justice Law, in SCO 2.0702 *Report that is classified* (hereinafter: SCO 2.0702) and in the orders of the Operations Department – Education and Training Division on the subject of ‘Learning, Implementing and Assimilating Lessons’ (hereinafter: the Lesson Learning Order),²⁵⁹ and on the subject of ‘Reporting Procedures and Presentation of Operational Reports to the Chief of Staff’ (hereinafter: the Reporting Procedures Order).²⁶⁰

According to the Lesson Learning Order, an operational debrief is compiled in three stages: assembling and authenticating the facts, identifying the findings that have relevance to the activity being debriefed, and arriving at conclusions.²⁶¹ After the operational debrief is completed, on the basis of the conclusions that were reached, a lesson learning process is carried out, in order to implement and disseminate them.²⁶² The Lesson Learning Order emphasizes the importance of preparing the operational debrief as soon as possible after the debriefed activity and requires that the participants in an operation that may lead to an operational debrief shall keep a written record in which they will describe what happened.²⁶³

The rules concerning the legal status of the operational debrief, and especially the classified status of the information accumulated during it, are intended to guarantee the credibility of the data collected in the framework of the debrief.²⁶⁴ The person conducting the debrief is not subject to the

259 ORDERS OF THE IDF’S OPERATIONS BRANCH, INSTRUCTION AND DOCTRINE DIVISION T-29(43), *Learning Lessons, implementation and assimilation* (Sep. 23, 2003) [hereinafter: *The Lesson Learning Order*]. According to SCO 1.0105 *Army Orders, Other General Orders, Standing Orders and Peacetime Orders*, the orders of the Operations Branch – Instruction and Doctrine Division constitute ‘other general orders’, as these are defined in Article 2A(c) of the Military Justice Law, and they are considered law for the purpose of the Military Justice Law, even though their hierarchical status is lower than that of Supreme Command Orders or Chief of Staff Orders.

260 ORDERS OF THE IDF’S OPERATIONS BRANCH, INSTRUCTION AND DOCTRINE DIVISION 1.6, *Reporting Procedures and Presentation of Operational Reports to the Chief of Staff* (Jun. 18, 2007).

261 *The Lesson Learning Order*, *supra* note 259, at para 8(b).

262 *Id.*, at para. 7.

263 *Id.*, at para. 8(c).

264 *MAG Position Paper 2011 – Supplementary Material*, *supra* note 205, at 15–17.

rules of evidence and he may take testimony from every soldier that was involved in the incident or whose testimony is required for the debriefing, and obtain all relevant documents, including operational orders and plans, operational journals, meeting summaries, professional opinions, aerial photos, video clips, etc. SCO 2.0702 imposes a duty on every soldier who is required to do so, to cooperate and to deliver relevant information in his possession, whether in the form of testimony or in any other way.²⁶⁵ In an operational debrief process, as distinct from a criminal investigation, the soldiers being debriefed are not entitled to representation by a lawyer, and do not have the right to remain silent or the right not to incriminate themselves. Moreover, making a false statement or concealing an important detail in a process of an operational debrief is an offense under the Military Justice Law, and carries a penalty of imprisonment.²⁶⁶

89. The materials of an operational debrief are privileged. According to Article 539A of the Military Justice Law, ‘statements made in a debriefing, the debrief report, any other material prepared during it and summaries, findings and conclusions are inadmissible as evidence in a trial’. However, it should be stated that tangible evidence seized during the debriefing may be admissible as evidence in a criminal trial.²⁶⁷ The Article also provides that ‘the debrief material shall not be given to an investigating body’ (this includes the CID), and that ‘the debrief materials shall be privileged to any person, however, it will be delivered in whole or in part only to those military bodies that need the debrief in order to carry out their duties’.²⁶⁸ Army orders provide that although the materials of the operational debrief are impermissible evidence in a trial, it is possible to commit a soldier for a disciplinary trial based on its conclusions or to take command sanctions following the debriefing.²⁶⁹

265 SCO 2.0702, *supra* note 258, at para. 8–10; *Learning Lessons Order*, *supra* note 259, at para. 8(c).

266 The Military Justice Law, at Article 108(2) and 539A.

267 *MAG Position Paper 2011 – Supplementary Material*, *supra* note 205, at 16.

268 For a discussion of this issue, see: HCJ 2366/05 *Alnabari v. IDF Chief of Staff* (unpublished, Jun. 29, 2008).

269 SCO 2.0702, *supra* note 258, at para. 11; The Military Justice Law, at Article 282.

90. After completing the operational debrief, the findings are submitted to senior officers for approval, i.e., the area commander or the head of the service and in certain cases even the Chief of Staff, and each of them has the power to order the operational debrief to be completed if it contains any deficiency in the facts, findings or conclusions. In certain cases, such as incidents during which uninvolved Palestinian civilians are injured, the debriefing body has a duty to send the operational debrief to the MAG, who is also entitled to request the expansion of the debriefing or a clarification of its findings.²⁷⁰ It is important to note that as appears from the materials submitted to the Commission the period of time between the occurrence of an incident and the completion of an operational debrief and its submission to the MAG Corps may be very lengthy.²⁷¹

2. The Experts Debrief

91. Apart from the operational debrief that is conducted in the framework of the unit being debriefed, the IDF also has a special process of an experts debrief which is conducted when there are special considerations that justify it, such as the scope of the investigated operation, the variety of forces involved in it or the weapons that were used.²⁷² The commander of the unit under consideration can take the initiative for conducting an experts debrief and so can his superior officers in the chain of command,

270 The duty imposed on the person who prepares an operational debrief to deliver the debrief material to the MAG or to his representative is also regulated in SCO 2.0702, *supra* note 258, at para. 14, which lists the following grounds that give rise to the duty:

- (a) In every case relating to military operations during which a soldier or someone who is not an enemy is killed or injured;
- (b) In a report relating to training exercises in which a person was killed or seriously injured;
- (c) In any other case, or in other types of cases, in which the Military Advocate-General or his representative makes such a request.

271 THE SAMPLE EXAMINATION: File 203/10 reveals that the MAG Corps received the debrief six months after the date of the incident; File 279/07 reveals that the MAG Corps received the debriefing approximately ten months after the date of the incident; File 427/07 reveals that MAG Corps requested to receive the debrief five months after the incident (unclear when the debrief was submitted); File 375/09 reveals that the MAG Corps located the debrief two years after the incident. In addition, as part of file 359/07 the Commission came across a summary of a meeting between the MAG and certain General, during which the MAG raised the difficulty of receiving debriefs.

272 For details of the types of cases in which preference will be given to an 'experts debrief' rather than an ordinary debrief, see: *MAG Position Paper 2010*, *supra* note 55, at 70–71.

or the Chief of Staff, and also the MAG, as actually happened, for example, after ‘Operation Cast Lead’.²⁷³ Another example of an order for an experts debrief occurred after the maritime incident of 31 May 2010, when the Chief of Staff ordered a report from a panel of experts, which was chaired by Major-General (res.) Giora Eiland, a former head of the Operations Department, the Planning Division and head of the National Security Council.²⁷⁴

An ‘experts debrief’ is conducted by individuals that are outside the unit being debriefed. According to the Lesson Learning Order, the individuals must be experts in the professional areas relevant to the case and familiar with the nature of the unit being investigated, its assignments and the roles of the unit’s officers. Also, the experts cannot have taken part in the operations under consideration.²⁷⁵

3. Decisions Based on the Operational Debrief

92. After it is completed, the operational debrief is sent to the MAG Corps, in order for a decision to be made about whether to open an investigation into the incident. The MAG Corps for Operational Matters reaches an opinion about opening an investigation, and the MAG holds a ‘debrief meeting’, the purpose of which is to determine whether to open an investigation into the various incidents. It should be noted that the MAG’s decisions on whether or not to open investigations are not always provided with written explanations.²⁷⁶

273 *The Public Commission for Examining the Maritime Incident of May 31, 2010* (Position Paper of the MAG Corps submitted to the Turkel Commission, Jul. 29, 2010).

274 *Winds of Heaven 7* (General Staff Expert Report of Giora Eiland, Jul. 11, 2010); See: THE COMMISSION’S FIRST REPORT, *supra* note 101, at para. 9.

275 *Learning Lessons Order*, *supra* note 259, at para. 8(e)(2).

276 See for example: THE SAMPLE EXAMINATION: file 359/07 and file 377/10.

93. When the debrief's material reveals a suspicion that an offense has been committed, and prior to the MAG ordering the initiation of an investigation, he must consult with the commander responsible for the unit involved in the incident, whose rank is, at least, Major-General.²⁷⁷ The purpose of this consultation is to ensure that the relevant operational circumstances are brought to the attention of the MAG. Nonetheless, the MAG retains his sole discretion regarding the decision to open an investigation.²⁷⁸

4. CID Investigations

94. CID investigations are criminal investigations. A CID investigator is entitled to take testimony from any person and to take possession of any object that is required for the purpose of carrying out an investigation.²⁷⁹ Among the various actions carried out by the CID, it should assemble as many details as possible about the incident, including the location and time of the incident, the persons involved in it, etc.²⁸⁰ In the course of its work, the CID works with army personnel in order to locate the incident that is being investigated, the unit relevant to the incident (sometimes incidents occur on the border between areas where various units operate), to identify the specific force that operated at the site, etc. The CID is also authorized to collect testimony anywhere in the country (at IDF camps, at CID bases, at police stations or various offices).²⁸¹ The CID is also entitled to obtain assistance from additional bodies in order to make progress in

²⁷⁷ The Military Justice Law, at Article 539A(b)(4)(b).

²⁷⁸ See: *MAG Position Paper 2010*, *supra* note 55, at 17; *Meeting with MAG*, *supra* note 223, at 7.

²⁷⁹ The Military Justice Law, at Article 256.

²⁸⁰ *MAG Position Paper regarding the Examination Mechanisms*, *supra* note 46, CID annex, at 5.

²⁸¹ *Id.*, CID annex, at 6; In this context, it should be noted that after Operation Cast Lead, it was alleged in the media that in several cases preliminary testimonies were taken from soldiers at cafés or restaurants. According to the MAG, these cases were rare and only involved cases of taking statements (and not investigation) from soldiers who at the time of taking the testimony had already been discharged from the army. The MAG stated that the MAG Corps were not involved *ab initio* in the decision, but in view of various investigation considerations and mainly the desire to obtain the cooperation of the witnesses, it did not appear that there was any impropriety in this practice in this specific context. It is important to point out that the investigation of suspects (as opposed to the obtaining of statements) was carried out only at IDF bases. *Meeting with MAG*, *supra* note 223, at 5.

the investigation (for example, receiving photographs from Air Force units, intelligence and the ISA), and requesting expert opinions in order to clarify issues that require technical or other expertise (such as questions relating to a particular weapon).²⁸²

In addition, the CID makes contact with the complainant (usually through human rights organizations) in order to obtain relevant information in his possession (such as death certificates, medical documents, property damage reports, pictures and photographs, receipts, etc.) and to obtain his testimony.²⁸³ According to the material submitted to the Commission by the CID, the testimonies are obtained at the checkpoints between Israel and the West Bank or the Gaza Strip, or near the checkpoints, in rooms designated for this purpose.²⁸⁴ As can be seen from the CMPC's testimony, recently statements have been taken by CID investigators that speak Arabic (according to the CMPC, however, further progress can still be made in this regard).²⁸⁵ Furthermore, from the material submitted to the Commission by the human rights organization Yesh Din, that represent complainants, a number of difficulties in collecting the testimonies were highlighted, including arranging the meetings, a shortage of interpreters that speak Arabic, finding suitable places for taking the testimony, and the presence of persons in addition to the investigators when the testimonies are taken, which may deter the complainant from giving his testimony.²⁸⁶

95. From materials that the CID Commander submitted to the Commission, it appears that most of the complaints received by the CID relating to violations of international humanitarian law concern cases of violence or looting that took place during routine security operations in the

282 *MAG Position Paper regarding the Examination Mechanisms*, *supra* note 46, CID annex, at 6.

283 *Id.*

284 *Id.*

285 *CMPC's Testimony*, *supra* note 86, at 17–18.

286 *Alleged Investigation Report*, *supra* note 238.

West Bank. Recently, the CID has especially dealt with complaints regarding damage caused by the IDF's activity during 'Operation Cast Lead'.²⁸⁷

Moreover, the MAG argued before the Commission that investigations relating to violations of international humanitarian law in cases that occur during combat 'pose before the CID many and various challenges'.²⁸⁸ He contended that:

the scene in which the crime was (ostensibly) committed, is located – generally – outside the territory of the State of Israel, and in many cases *even in an area controlled by an enemy state (South Lebanon) or by hostile parties (the Gaza Strip)*. This fact significantly limits and sometimes totally thwarts the capability of the investigators to visit the sites and gather physical evidence located at the site. Furthermore apprehension also exists that parties wishing to accuse the IDF of committing war crimes will “*plant*” *fictitious evidence at the scene*.

An additional difficulty derives from the fact that in many cases, *the fighting itself leads to the destruction of the evidence...* A third difficulty is connected with *finding eyewitnesses to the incidents* (aside from the soldiers themselves)...

Likewise, difficulty frequently arises already at the preliminary stage of *identifying the location where the incident took place and the force that was involved in it...*

Finally, even when the location and the force involved were identified, *difficulty exists in getting a uniform and clear version...* because the operational circumstances and the “fog of war” influence.²⁸⁹

According to the CID Commander these files are ‘sensitive and complicated

287 MAG Position Paper regarding the Examination Mechanisms, *supra* note 46, CID annex, at 5.

288 MAG Position Paper 2010, *supra* note 55, at 4. See also: MAG Position Paper regarding the Examination Mechanisms, *supra* note 46, CID annex, at 1 (paras. 4–5).

289 MAG Position Paper 2010, *supra* note 55, at 4–5.

investigation files, which require intensive work by the investigation teams that handle them'.²⁹⁰ Because of this complexity, the MAG Corps for Operational Matters usually accompany the CID in these investigations.²⁹¹ It is important to note that every CID base that deals with investigations of violations of international humanitarian law has a contact in the MAG Corps that provides professional advice.²⁹² In October 2009, after Operation Cast Lead, and following the opening of many investigations, a special investigation team within the CID was set up, under the command of an officer with the rank of lieutenant-colonel and with six other officers, two Non-Commissioned Officers and 12 soldiers (which also included Arabic interpreters).²⁹³ For the purpose of supervising the investigations, situation assessments were also made by a team led by the MAG, the CMP, the CMPC and the CID Commander.²⁹⁴

96. When the CID has finished its handling of a case, it is referred to the MAG Corps for a decision about further handling.²⁹⁵ Cases involving alleged violations of international humanitarian law are referred to the MAG Corps for Operational Matters which is already involved in the handling of the case from the investigation stage.²⁹⁶ The MAG Corps is authorized to close the investigation file, to complete the investigation, to refer the case to another investigating authority (for example, when there is no connection to the army or the Military Justice Law does not apply), or to file an indictment against the suspects.

290 *MAG Position Paper regarding the Examination Mechanisms*, *supra* note 46, CID annex, at 1.

291 *Id.*, at 2, para.11.

292 *Id.*, at 3.

293 *Id.*, at 6.

294 *Id.*

295 GENERAL STAFF ORDER 33.0304, *supra* note 89, at para. 63, provides that only a military advocate is competent to give approval to the CID not to carry out an investigation or to close an investigation file after it has been opened. It should be noted that from the letter of the CID Commander it can be seen that currently the General Staff are working on amending this order, so that the CID authorities will have power to close investigation files by themselves in certain cases, without referring the case to the MAG Corps, after consulting an advocate. However, it was stated there that this does not refer to cases that contain claims of violations of international humanitarian law (see: *MAG Position Paper regarding the Examination Mechanisms*, *supra* note 46, CID annex, at 3, *fn* 6).

296 *MAG Position Paper 2010*, *supra* note 55, at 4.

97. The procedures of the MAG Corps, including the MAG Corps for Operational Matters, provide that when it receives a power of attorney from a suspect or defendant giving notice of legal representation, it is obliged to notify the attorney of the stages of handling the case. The material presented before the Commission showed that in many cases the MAG Corps tends to send the information about the stage of handling to human rights organizations, if they request the information, even if there is no power of attorney for legal representation in the file.²⁹⁷ However, it appears that sometimes a significant period of time passes until a response is given to the complainants or the human rights organizations.²⁹⁸

98. According to information submitted to the Commission by the CID, more than 3,000 in average, investigation files are opened by the CID in each work year, for all types of alleged offenses. In 2008, shortly after the MAG Corps for Operational Matters was established, 3,500 investigation files were opened by the CID, of which approximately 323 files were opened for complaints of violations of international humanitarian law (out of 432 complaints). In 2009, 236 investigation files (out of 415 complaints), were opened for complaints of violations of international humanitarian law (some of which were complaints relating to Operation Cast Lead) and in 2010, more than 140 investigation files (out of 201 complaints) were opened as noted (some of which were complaints relating to Operation Cast Lead).²⁹⁹ Most of the files were opened following complaints by residents from the West Bank and the Gaza Strip against IDF soldiers for routine security operations. According to figures that were submitted to the Commission by the MAG, a total of 52 investigation files were opened by the CID following Operation Cast Lead, of which seven investigations are still pending.³⁰⁰ After the maritime incident of 31 May 2010, the CID opened investigations

297 *Meeting with MAG, supra* note 223, at 6.

298 For an example of this, see: THE SAMPLE EXAMINATION: File 359/07.

299 *MAG Position Paper regarding the Examination Mechanisms, supra* note 46, CID annex, at 1.

300 Letter from Major Roni Katzir, MAG Corps, to Hoshea Gottlieb, the Commission's Coordinator, *Investigation Data Regarding Cast Lead events* (Jun. 28, 2012).

against 18 suspects for various incidents of theft of property belonging to flotilla participants by IDF soldiers (as distinct from the claims concerning the actual operation of taking control of the flotilla, which were examined in an experts debrief headed by Major-General (res.) Eiland, and by this Commission). Out of all the investigations that were opened, indictments have been filed against eight soldiers.³⁰¹

METHOD OF CONDUCTING THE EXAMINATION AND INVESTIGATION IN THE POLICE

99. The Israel Police (Judea and Samaria District) deal with claims of violations of international humanitarian law that occurred during incidents of shooting by police officers in the West Bank (apart from certain categories of police officers described above in paragraph 44).³⁰² In surveying the question of ‘how to investigate?’ into police conduct, we will outline the processes for examinations and investigations. We will first discuss the examination process which includes the police operational debrief and its transfer to the Deputy State Attorney (Criminal Matters) in order to make a decision on opening an investigation. We will then discuss the investigation process in the Judea and Samaria District Police. As noted above in paragraph 46, in practice, however, investigations are also opened without a decision by the Deputy State Attorney (Criminal Matters) and sometimes police operational debriefs are not conducted.

1. The Police Operational Debrief

100. A police operational debrief is regulated in the Police Law (Disciplinary Law, Assessing Police Complaints and Other Instructions)

301 Letter from Major Roni Katzir, MAG Corps, to Hoshea Gottlieb, the Commission’s Coordinator, *Investigation Data Regarding the Marmara Events* (Aug. 13, 2012). See also: THE COMMISSION’S FIRST REPORT, *supra* note 101, at para. 160; *MAG Position Paper 2010*, *supra* note 55, at 83–84.

302 *Summary of Meeting regarding the Investigation of Shooting Incidents in the Area around Jerusalem*, *supra* note 135.

2006 (hereinafter: the Police Law) and in an operational procedure of the Border Police ‘Conducting an Operational Debrief’ (hereinafter: the debrief procedure).³⁰³ The Police Law defines a police operational debrief as ‘an assessment conducted in the Israel Police in accordance with procedures by the Chief Commissioner or on his behalf concerning an incident that occurred during operational activity’.³⁰⁴ According to the debrief procedure: following every incident in which a weapon is used ‘a debrief will be conducted by the commander of the force, as a rule, and by the level that commands him (by decision)’.³⁰⁵ However, ‘in an incident in which an individual was injured from the use of force or a weapon... a debrief will be conducted only after obtaining approval of the PIID’.³⁰⁶ The debrief procedure provides that the debriefing must be conducted ‘as close as possible to the incident... while ensuring the reliability of those carrying out the debrief and those being debriefed’.³⁰⁷ The police operational debrief must be completed in writing on a ‘debrief form’ and transferred to the commanding levels in the Border Police.³⁰⁸

101. The rules concerning the legal status of the police operational debrief, and especially the classified status of the information accumulated during it, are regulated in the Police Law similar to the way the IDF operational debrief is regulated in Article 539A of the Military Justice Law (see above in paragraph 89).³⁰⁹

2. Decisions Based on the Police Operational Debrief

102. The Police Law provides that ‘the debrief material concerning specific

303 *The debrief procedure*, *supra* note 141.

304 The Police Law, at Article 102(a).

305 *The debrief procedure*, *supra* note 141, at Article 4A1; annex A, Article 1I.

306 *Id.*, at annex A, Article 2.

307 *Id.*, at Article 4.

308 *Id.*, at annex C.

309 The Police Law, at Article 102(a); See also: *Police and Army debriefs’ status on the criminal procedure* (order of the Deputy State Attorney (Criminal Matters), Aug. 5, 2008).

incidents or concerning types of incidents should be handed to the Attorney–General or to whomever he authorizes, upon his request’.³¹⁰ It further provides ‘if the Attorney–General or a person authorized by him, finds that the debrief material reveals a suspicion for the commission of a crime that justifies an examination or an investigation he may... after consulting with the Chief Commissioner, order in writing, an investigatory body to open an examination or investigation’.³¹¹ In this context, the Attorney–General authorized the Deputy State Attorney (Criminal Matters) to be the main figure in charge of this matter.³¹² According to a guideline of the State Attorney to the Israel Police, the debriefs must be submitted to the Deputy State Attorney ‘within 21 days at most’.³¹³ It appears that in practice this guideline is not followed.³¹⁴ In addition, the police operational debriefs are not always conducted even when they are required by the debrief procedure (see above in paragraph 46).

It should be noted that in 2007 the Deputy State Attorney (Criminal Matters) adopted a ‘work procedure’ according to which, prior to his decision to open an investigation and before he consults with the Chief Commissioner, he will send the police operational debrief to the MAG in order to get his views on the matter. The MAG, in turn, will consult with the General of the command where the police operation took place. The views of the MAG and of the General of the command will be considered by the Deputy State Attorney when he makes his decision on whether to open an investigation.³¹⁵ The work procedure was adopted in an attempt to minimize the discrepancies between the MAG’s reliance on the operational

310 The Police Law, at Article 102(b)(4)(a).

311 *Id.*, at Article 102(b)(4)(b).

312 *State Attorney’s letter about Police Investigation Material*, *supra* note 140.

313 *Id.*

314 *Meeting with the Deputy State Attorney (Criminal Matters)*, *supra* note 228.

315 *Debriefs of Border Police shooting incidents* (summary of a meeting that took place on 19 July 2007, at the office of the Deputy State Attorney (Criminal Matters), Yehoshua Lemberger, Jul. 26, 2007); Letter from Yehoshua Lemberger, the Deputy State Attorney (Criminal Matters), to Colonel Liron Libman, the Chief Military Prosecutor (Aug. 27, 2007); See also: *Police Debriefs* (summary of a meeting that took place on 28 July 2009, at the office of the Deputy State Attorney (Criminal Matters), Yehoshua Lemberger, Oct. 15, 2009).

debrief concerning IDF incidents and the Deputy State Attorney (Criminal Matters') reliance on the police operational debrief concerning police incidents.

3. Police Investigations

103. Police investigations of shooting incidents in the West Bank are conducted like ordinary investigations in the course of their routine activity (in terms of their authority to collect evidence, take testimonies, etc.), however, they are also subject to a specific procedure by the Investigations and Intelligence Department of the Israel Police which deals with 'shooting incidents in the West Bank in which civilians are injured' (hereinafter: police procedure for shooting incidents in the West Bank).³¹⁶ According to the procedure an initial investigation will be carried out at the responsibility of the commander of the relevant investigating station. In the framework of this investigation, the station will handle the following issues:

- a. The scene of the incident (collecting evidence, documentation, etc.).
- b. Investigating the injured person and witnesses (including police officers) about the involvement of the injured person in the incident.
- c. Identifying the body, in a case of an injury that led to death, and sending it to the National Center for Forensic Medicine in order to investigate the cause of death.
- d. Completing the investigation on the basis of the managerial debrief report of the local division or the Border Police company commander.³¹⁷

104. After these actions are completed, it is the responsibility of the commander of the relevant investigating station to transfer the findings

³¹⁶ IID GUIDELINE 03.300.071, *supra* note 141.

³¹⁷ *Id.*

to a district investigation team, which ‘receives, as soon as possible, the initial investigation material which was collected by the police station as well as the operational debrief prepared by the Border Police... and any other material relevant to the incident in the Border Police’s possession (operational journals), police reports, etc.’³¹⁸ The district investigation team carries out its own investigation operations, which include collecting relevant exhibits (such as weapons and ammunition), taking testimony from police officers and other witnesses and obtaining forensic findings. At the end of the investigation, the investigation team should prepare a detailed summary of the evidence and the material in the case, and reach a conclusion as to whether there is a suspicion of a criminal or disciplinary offense. Subsequently, the investigation file is sent to the investigating officer in the Judea and Samaria District, who gives his opinion and sends it to a prosecutor in the District Prosecution (civilian).³¹⁹

105. It should be noted that the police are subject to the Rights of Victims of Crime Law,³²⁰ which places, *inter alia*, a duty to transfer to the victim of a crime, or to his family, information regarding the criminal proceedings.

106. The complainant may appeal against a decision to refrain from investigating or indicting to the Director of Appeals in the State Attorney’s Office who is subordinate to the Deputy State Attorney (Criminal Matters).³²¹

107. In response to the Commission’s request to receive information about files that were opened by the police concerning alleged violations of international humanitarian law, it was informed that the police do

318 *Id.*

319 *Id.*

320 Rights of Victims of Crime Law, 5761–2001, LA 1782.

321 The Criminal Procedure Law, at Article 64.

not document the source of the complaint. This is important because the identity of the complainant impacts upon the classification of the complaint as a violation of international humanitarian law. Therefore, it was not possible to state the number of files investigated by the police that relate to complaints of violations of international humanitarian law.³²²

METHOD OF CONDUCTING THE EXAMINATION AND INVESTIGATION BY THE PIID

108. Generally, the PIID investigates claims and complaints directed at police officers.³²³ When the PIID receives a complaint or information that gives rise to a suspicion of criminal conduct, an initial examination of the complaint or the information is made by an attorney (prosecutor). When he decides to open an investigation, the attorney sends the complaint or the information to one of the PIID's investigation teams. The PIID investigators have an intelligence division and also technological abilities identical to those of the Israel Police. However, the PIID does not have a forensic science department and it uses the police's forensic science department.³²⁴ Since the PIID investigators do operate in the West Bank, their investigations of Palestinian complainants that are residents of the West Bank usually take place at the District Coordination and Liaison Offices, whereas the investigation of the police officers against whom the complaints were made takes place at the PIID's offices.³²⁵

109. At the end of an investigation, the file is transferred to an attorney in the PIID, who examines the materials and based on them recommends

322 *Meeting with the Deputy State Attorney (Criminal Matters)*, *supra* note 228.

323 See *supra*, at paras. 43–44; On the PIID's authority to investigate ISA employees, see para. 49.

324 *Meeting with the Head of the PIID*, *supra* note 132, at 2.

325 See: *Deputy State Attorney (Special Assignments), Position Paper – Supplementary Material*, *supra* note 133, at 5.

to the department management to either file an indictment, transfer the case to a disciplinary track or close the file. A decision to file an indictment is made by the head of the department or his deputy, whereas a decision to close the case can also be made by a senior attorney in the department.³²⁶

110. It should be noted that the PIID is required to transfer information about any criminal proceedings to the victims of the crime as set out in the Rights of Victims of Crime Law. According to materials that the Commission received, it appears that in the case of Palestinian victims of crime, the department sometimes enlists the assistance of human rights organizations in order to carry out its duties under the law.³²⁷

111. It is possible to file an appeal against a decision to refrain from investigation or indicting.³²⁸ The appeal is examined by the Appeals Department at the State Attorney's Office, which is subject to the Deputy State Attorney (Criminal Matters).

112. Similar to the police, the PIID does not document the source of the complaint, the identity of the complainant or the offense alleged in the complaint in a manner that allows monitoring and the creation of a statistical database on alleged violations of international humanitarian law. However, according to the Deputy State Attorney (Special Assignments), it is rare that the PIID handles complaints and claims concerning alleged violations of international humanitarian law.³²⁹

³²⁶ *Id.*

³²⁷ *Deputy State Attorney (Special Assignments), Position Paper – Supplementary Material, supra note 133, at 5.*

³²⁸ The Criminal Procedure Law, at Article 64.

³²⁹ *Deputy State Attorney (Special Assignments) – Position Paper, supra note 129, at 6.*

METHOD OF CONDUCTING THE EXAMINATION AND INVESTIGATION BY THE MAVTAN

113. The process of handling complaints and claims directed at ISA investigators begins with the Mavtan. Upon receiving a complaint the Mavtan meets the complainant and this meeting is conducted in Arabic and is recorded and documented. According to the State Attorney's guidelines, the meeting is held without the presence of a lawyer on behalf of the complainant.³³⁰ The Mavtan also assesses material relating to the complainant's interrogation by the ISA, including meetings between the interrogatee and medical personnel and the documentation of their findings. He questions ISA personnel involved in the case, and assesses the conduct of the interrogation as documented in the ISA's internal database, to which he has access. In cases where the Mavtan is unable to meet with the complainant (for example, because the complainant has been released from custody and refused to respond to his request), the investigation is based on documents in the Mavtan's possession.³³¹

114. At the end of the Mavtan's assessment, he sends the file, which includes a summary of his finding to the Mavtan's Supervisor at the State Attorney's Office. The Mavtan's Supervisor formulates a recommendation on whether there is a basis for opening a criminal investigation, whether it should be referred to disciplinary proceedings, whether the matter should be assessed further or whether the file should be closed. The recommendation is submitted to the Attorney-General (or to whomever he delegated the authority). There are cases in which the Mavtan's Supervisor recommends that procedures should be changed.³³²

115. In principle, if a decision is made to open a criminal investigation,

³³⁰ *Mavtan's Testimony*, *supra* note 151, at 6.

³³¹ *Id.*, at 15.

³³² *Id.*, at 24.

the file is passed to the PIID, where the case is handled in the same way as other cases by the PIID, and at the end of the investigation a decision is made whether the ISA interrogator must be indicted. The material that was brought before the Commission reveals that in practice, since the Mavtan was established in 1992, over 700 complaints have been filed and not a single criminal investigation has ever been opened against an ISA investigator.³³³

METHOD OF CONDUCTING THE EXAMINATION AND INVESTIGATION BY THE NPWIU

116. The NPWIU is a unit in the Israel Police that is responsible for investigating complaints and claims directed at the Israel Prison Service personnel. The handling of complaints and claims directed at wardens is regulated in the police procedure for handling offenses by wardens.³³⁴ According to the procedure, the head of the NPWIU is authorized to order an ‘initial examination’ of the complaint before he decides whether to continue handling it, and he may be assisted by the Prisoner Complaints Officer at the Ministry of Public Security for the purpose of this examination.³³⁵ The procedure emphasizes the need for urgent handling of complaints of the unlawful use of force by the Israel Prison Service personnel, and it provides that the complaint should be heard quickly and ‘external signs of the use of force on the body of the complainant’ should be documented in writing and in photographs.³³⁶ This assessment can also be done by the local investigation unit at the Israel Prison Service personnel facility.

333 See: Transcript – Part B, session no. 11 “Testimony of the Israel Security Agency Chief” 15 (Apr. 12, 2011); See also: *Above Criticism: The Lack of Investigations and Sanctions for Torture and Abuse in ISA Interrogations* 31–32 THE PUBLIC COMMITTEE AGAINST TORTURE IN ISRAEL (Dec. 2009).

334 IID GUIDELINE 03.300.039, *Supra* note 242.

335 *Id.*, at Article 2A(7).

336 *Id.*, at Article 2A(8).

117. Recently the NPWIU was connected to the computer system of the Israel Prison Service, so that it has access to the current database of wardens and inmates.³³⁷ Moreover, it is currently being considered whether the unit can be directly connected to the Israel Prison Service's security cameras in order to allow it to examine the events that it is investigating directly.³³⁸ At the end of the NPWIU's investigation, the file is sent to the State Attorney's Office with a recommendation of the unit.

118. According to the information submitted to the Commission, there are no figures for complaints concerning suspected violations of international humanitarian law. The Commission was, however, given the figures on complaints and investigations that relate to all the prisoners in the custody of the Israel Prison Service, which include both security prisoners and criminal prisoners.³³⁹

METHOD OF CONDUCTING THE EXAMINATION AND INVESTIGATION BY COMMISSIONS OF INQUIRY

119. In the following section we will discuss the method of conducting the examination and investigation by the various commissions of inquiry, beginning with State commissions of inquiry, followed by government commission of examination and ending with a commission of assessment.

1. State Commissions of Inquiry

120. As stated above in paragraph 55, according to the Commissions of Inquiry Law, the composition of the State commission of inquiry is

³³⁷ *Deputy State Attorney (Special Assignments), Position Paper – Supplementary Material, supra note 133, at 9.*

³³⁸ *Id.*, at 10.

³³⁹ *Id.*

determined by the President of the Supreme Court.³⁴⁰ The commission of inquiry is headed by a justice of the Supreme Court or a District Court.³⁴¹ In its decision to set up the commission, the Government defines the subject matter of the inquiry, and it is entitled, at the request of the commission, to clarify, extend or restrict the subject matter of the inquiry.³⁴² Commissions of this type have extensive powers. The law provides that a commission of inquiry is not required to act in accordance with the rules of procedure of the courts; for example, it may admit evidence in any manner that seems to it advantageous and determine the procedures for examining witnesses.³⁴³ It may summon witnesses to testify and the obligations of any such witness will be the same as those of a person investigated according to section 2 of the Criminal Procedure (Testimony) Ordinance,³⁴⁴ and it may issue a search warrant.³⁴⁵ If a State commission of inquiry reaches a conclusion that there is a suspicion of a violation of international humanitarian law or that any other criminal offense has been committed, it should refer its findings to the competent authority so that it may order the opening of a criminal investigation (the Attorney-General or the MAG, as applicable).³⁴⁶

A commission of inquiry publishes its report shortly after submitting it to the Government. However, it may decide not to publish the report, in whole or in part, if it is persuaded that this is necessary in order to prevent real harm to State security, its foreign relations, one of its essential economic interests, the safety or privacy of an individual, or the classified methods in which an authority or body that has investigative powers under

340 The Commissions of Inquiry Law, at Article 4(a).

341 *Id.*, at Article 4(b).

342 *Id.*, at Article 2.

343 *Id.*, at Article 8.

344 *Id.*, at Article 10.

345 *Id.*, at Article 12.

346 An example of a State Commission of Inquiry whose findings led to the opening of a criminal investigation is the Commission of Inquiry regarding the Bank Share Manipulation (The Bejski Commission), which was set up by the State Control Committee of the Knesset, following the filing of the State Comptroller's report. For further detail, see CA 2910/94 *Yafet v. State of Israel*, 50(2) 221, 253 (1996).

the law operates.³⁴⁷ Moreover, the Commissions of Inquiry Law provides arrangements relating to the publication of transcripts of the commission's sessions and regarding the possibility of determining provisions and restrictions upon the public's ability to inspect the commission's material.³⁴⁸

2. Government Commission of Examination

121. A minister that appointed a commission of examination of a certain issue or incident within his sphere of responsibility may, after obtaining the Government's approval, ask the Minister of Justice to determine that such a commission will have powers of a State Commission of Inquiry (powers to summon witnesses, to compel them to testify, to compel them to appear before it and to impose sanctions on persons who refuse to testify).³⁴⁹ Similarly, testimony before the commission, and the commission's report, may not be admitted as evidence in a legal proceeding.³⁵⁰

According to the Government Law, 'No person may be appointed or act as a member of a Government commission of examination if he may find himself, directly or indirectly, in a situation of a conflict of interest between his position as a member of the commission and any other position that he holds or any other personal interest'.³⁵¹ The law further provides that 'if a Government commission of examination finds that there is a suspicion that a criminal offense has been committed, it should bring the matter to the attention of the Attorney-General'.³⁵² A Government commission of examination submits its report to the minister that appointed it, who submits the report to the Government.³⁵³

347 The Commissions of Inquiry Law, at Article 20.

348 *Id.*

349 *Id.*, at Articles 9–11 and 27(b).

350 *Id.*, at Articles 14, 22; See also: The Government Law, at Article 8A(a).

351 The Government Law, at Article 8A(b).

352 *Id.*, at Article 8A(d).

353 *Id.*, at Article 8A(e).

3. Commission of Assessment

122. The Commissions of Inquiry Law states that ‘there is nothing in this law that derogates from the powers of a minister to appoint a commission of assessment in order to examine an issue under his responsibility’.³⁵⁴ A commission of assessment is mainly an administrative tool, which is intended, *inter alia*, to find administrative or organizational flaws; it is not intended to lead to legal proceedings (although this may be one of the consequences of this assessment).³⁵⁵

123. Where a commission of assessment has begun its activity and a suspicion of criminal conduct arises, the matter should be brought to the attention of the Attorney–General, and the commission’s work should be stopped until the assessment is completed, in order to prevent any undermining of the criminal investigation. If it is decided nonetheless to continue the activity of the commission of assessment, the commission will focus on issues of an administrative or professional nature; in determining the framework of the commission’s functions, the extent to which the areas of its investigation are removed from the criminal aspect will be considered.³⁵⁶ As a rule, when there is no exception according to the Freedom of Information Law or any other law, the authority is liable to make the report of the commission of assessment available for the review of anyone requesting it.³⁵⁷

354 The Commissions of Inquiry Law, at Article 28A. See also: *Internal Commissions of Investigation*, ATTORNEY–GENERAL GUIDELINE 4.2301 (2003) [hereinafter: ATTORNEY–GENERAL GUIDELINE 4.2301].

355 ATTORNEY–GENERAL GUIDELINE 4.2301, *supra* note 354, at para. 1.

356 *Id.*, at Article b2(a).

357 It should be noted that there are special arrangements regarding the proceedings of a commission of medical examination, see: *Id.*, at para. c(3).

CHAPTER D: DO THE EXAMINATION AND INVESTIGATION MECHANISMS IN ISRAEL CONCERNING COMPLAINTS AND CLAIMS OF VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW CONFORM TO ISRAEL'S OBLIGATIONS UNDER INTERNATIONAL LAW?

INTRODUCTION

1. This chapter assesses whether the examination and investigation mechanisms in Israel dealing with complaints and claims regarding violations of international humanitarian law (see Chapter C of the Report) conforms with Israel's obligations under international law (see Chapter A of the Report). The chapter will also present the Commission's conclusions and recommendations. Throughout this chapter certain practices of the countries surveyed in Chapter B of the Report will be presented for comparative purposes.¹

The analysis in this chapter parallels the structure of the analysis in the proceeding chapters: first, we will examine whether the offenses under Israeli domestic law correspond with the relevant violations of the international humanitarian law that require an investigation ('what to investigate?'). Second, we will compare the rules and practices in Israel that outline the grounds for establishing the obligation to investigate with the requirements of international law ('when to investigate?'). Finally, the Commission will assess the methods for conducting an examination and investigation in Israel according to the rules of international law ('how to investigate?'). Within the framework of assessing the methods, we will also assess the conformity of the investigative bodies in Israel to the requirements under international law.

¹ It should be noted that reference to the comparative survey in this chapter is intended to point out where there is a need for regulation and not necessarily to replicate the practice of the States.

2. In this chapter, the Commission will mainly focus on the central claims raised in the testimonies and the documents that were submitted to the Commission and that were presented in various international fora and reports. Naturally, most of the claims regarding the examination and investigation mechanisms are raised against the Israel Defense Forces (hereinafter: the IDF) which is the central security branch engaged in combat. Accordingly, a large part of this chapter will be devoted to the IDF mechanisms. However, as stated in Chapter C, complaints and claims of violations of international humanitarian law (such as complaints of torture, looting, abuse or other serious violations) may also be raised against other security branches, such as the Israel Police, the Israel Security Authority (hereinafter: the ISA), and the Israel Prison Service. Therefore, the Commission will also examine the manner in which these branches operate when they examine and investigate complaints and claims of violations of international humanitarian law.

3. At the outset, it should be 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.

A. THE NORMATIVE PROVISIONS IN ISRAEL THAT DEFINE THE VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW THAT REQUIRE EXAMINATION AND INVESTIGATION ('WHAT TO INVESTIGATE?')

4. In this section of the chapter, the Commission will compare the criminal offenses in Israel *which may be investigated*, to international humanitarian law violations *which require investigation*. Within this framework, the Commission will focus on the question of whether Israel must adopt in its legislation offenses of 'war crimes' and legislation imposing 'criminal responsibility of military commanders and civilian superiors'.

Recommendation No. 1: 'War Crimes' Legislation

5. As noted in Chapter A, the rules of international humanitarian law require countries to enact legislation enabling effective penal sanctions for anyone committing a war crime or instructing its execution.² This requirement refers to the investigation of acts that are suspected of constituting serious violations of international humanitarian law.³

6. As outlined in Chapter B, the countries surveyed have adopted domestic criminal legislation which characterizes war crimes as unique offenses: in the penal codes of the United States and Canada, there are offenses of war crimes; in these countries the offenses are defined by reference to relevant treaties.⁴ The UK penal code has legislation incorporating

² See: Chapter A, para. 24 and para. 33, *fn* 114.

³ See: Chapter A, paras. 25, 41; throughout this chapter (Chapter D) the term 'violations of international humanitarian law' also covers 'serious violations'.

⁴ See the United States 18 U.S.C. § 2441(c): 'Definition. – As used in this section the term "war crime" means any conduct – (1) defined as a grave breach in any of the international conventions signed at Geneva 12 August 1949, or any protocol to such convention to which the United States is a party; (2) prohibited by Article 23, 25, 27, or 28 of the Annex to the Hague Convention IV, Respecting the Laws and Customs of War on Land, signed 18 October 1907; (3) which constitutes a grave breach of common Article 3 (as defined in subsection (d)) when committed in the context of and in association with an armed conflict not of an international character; or (4) of a person who, in relation to an armed conflict and contrary to the provisions of the Protocol on Prohibitions or Restrictions on the

offenses of war crimes, crimes against humanity and genocide as defined in the Rome Statute, as well as a separate offense regarding the commission of serious violations of the Geneva Conventions and the First Additional Protocol.⁵ Australia and Germany have legislation which defines offenses that are similar or identical to those in international criminal law.⁶ The Netherlands has identical offenses to those defined in the Rome Statute even though the term ‘war crimes’ does not appear in its penal code. Its legislation also prohibits violations of the Geneva Conventions and the First Additional Protocol and other violations of the laws and customs of war.⁷

7. As noted in Chapter C, the only explicit reference to the term ‘war crimes’ in Israeli legislation is in the Nazis and Nazi Collaborators (Punishment) Law, 5710–1950.⁸ In Israel, violations of international humanitarian law are indicted through offenses listed in Israeli law, in particular, the Penal Law, the Military Justice Law and in relevant command regulations.⁹ If there is no domestic criminal law to which a soldier may be held accountable, it is possible to use a ‘basket’ offense, according to General Staff Order 33.0133. This Order requires IDF soldiers to act according to the Geneva Conventions.¹⁰ Therefore, where the behavior of a soldier or of a commander is contrary to the Conventions he may be indicted for violating the General Staff Order.

Use of Mines, Booby-Traps and Other Devices as amended at Geneva on 3 May 1996 (Protocol II as amended on 3 May 1996), when the United States is a party to such Protocol, willfully kills or causes serious injury to civilians’ (See Annex C: *The US Report*, at paras. 8–9); See the Canadian Crimes Against Humanity and War Crimes Act (S.C. 2000, c. 24): ‘An act or omission committed during an armed conflict that, at the time and in the place of its commission, constitutes a war crime according to customary international law or conventional international law applicable to armed conflicts, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission’. Canadian law also clarifies that: ‘The crimes described in Articles 6, 7 and 8(2) of the *Rome Statute* are crimes according to customary international law’ (See Annex C: *The Canadian Report*, at paras. 9–11).

5 See: Chapter B, para. 10; See also Annex C: *The UK Report*, at para. 1.14.

6 See: Chapter B, *Id.*; See also Annex C: *The Australian Report*, at para. 4; *The German Report*, at paras. 110–111.

7 See: Chapter B, *Id.*; See also Annex C: *The Netherlands Report*, at para. 8.

8 See: Chapter C, para. 9.

9 See in detail: Chapter C, paras. 10, 12.

10 Chapter C, para. 12.

8. The question of whether there is a need for domestic legislation that defines war crimes was raised in testimonies before the Commission. Professor Yuval Shany and Dr. Amichai Cohen (hereinafter: Shany and Cohen) pointed out that the list of crimes in Israeli law is only partial and does not include all acts defined as war crimes under international humanitarian law.¹¹ Furthermore, a representative of the Association for Civil Rights in Israel claimed that offenses in Israeli law – both the ‘regular’ offenses and the ‘basket’ offenses – do not reflect the severity of the violations under international humanitarian law.¹²

In response to these claims, the Attorney–General stated that ‘in practice, Israel’s criminal law is to a great extent commensurate with the offenses stipulated by international law’. He provided the example of ‘the offense of murder... which encompasses acts constituting murder as a crime against humanity’.¹³ The Attorney–General further noted that ‘the Ministry of Justice has, over the years, monitored developments in international law’, and ‘assessed these developments against Israel’s obligations’ and the practices of various States ‘in incorporating international crimes into their domestic legal system’.¹⁴

9. In order to adhere to the requirements of international law ‘to enact any legislation necessary to provide effective penal sanctions’ for those committing war crimes, the Commission is of the opinion that it is

11 Transcript – Part B, session no. 9 “Testimony of Yuval Shany and Amichai Cohen” 23–25 (Apr. 14, 2011); Yuval Shany, Amichai Cohen & Ido Rosenzweig, *Response Document by the Investigators for the Israel Democracy Institute’s ‘Terrorism and Democracy’ Project to the Position Paper Presented to the Commission by the Military Advocate–General Regarding the Investigation of International Humanitarian Law Violation Allegations* 24 (Feb. 10, 2011) [hereinafter: *Shany, Cohen & Rosenzweig, Response Paper to MAG*]; As well as: Transcript – Part B, session no. 8 “Testimony of Eyal Benvenisti” 7–9 (Apr. 14, 2011) [hereinafter: *Benvenisti testimony*].

12 Transcript – Part B, session no. 2 “Testimony of the Association for Civil Rights in Israel” 2 (Apr. 11, 2011); *The Absence of Criminal Law to Prosecute Violations of the Laws of War* 6 (position paper by the Association for Civil Rights in Israel, Oct. 25, 2011).

13 See: letter from Yehuda Weinstein, Attorney–General, to Justice (ret.) Jacob Turkel, Chair of the Commission, *Completion of Attorney–General’s Testimony Before the Commission of 10 April 2011* (Sep. 27, 2011) [hereinafter: *Attorney–General’s letter, Sep. 27, 2011*].

14 *Id.*, at 2–3.

satisfactory to ‘translate’ the behavior amounting to a war crime into an existing offense in the domestic legislation, provided that it reflects the severity of the violation under international law.¹⁵ Thus, even though the majority of the countries surveyed have adopted domestic criminal legislation that incorporates international criminal law, according to their actual practice, and similarly to Israel’s practice, the prosecuting authorities base their indictments on the sections of the ‘regular’ penal code (such as murder, aggravated assault, etc.) and not on sections of the ‘special’ laws that implement international law.¹⁶

Therefore, on the matter of legislating war crimes, the Commission recommends:

Filling Gaps in Israeli Legislation

10. The Ministry of Justice should initiate legislation wherever there is a deficiency regarding international prohibitions that do not have a ‘regular’ equivalent in the Israeli Penal Law, and rectify that deficiency through Israeli criminal legislation.¹⁷ Thus, for example, the Ministry should ensure that there is legislation to transpose clearly into law and practice the absolute prohibition in international law of torture and inhuman and degrading treatment. This is in order to enable ‘effective penal sanction’ for those committing war crimes, as required by international law.

11. Furthermore, the Commission sees importance in the explicit

15 See *supra*, at para. 5.

16 It is possible that this practice is motivated by the desire of the prosecution to bring about convictions which would be more difficult to achieve if the accused was charged with ‘special’ articles of the law drawn from international law. See: Chapter B, para. 15, *fn* 53, also see: Ward Ferdinandusse, *The Prosecution of Grave Breaches in National Courts*, 7(4) JICJ 723, 732 (2009). It should be noted that in the UK, one prosecution has been brought against a member of the armed forces on a charge of ‘inhuman treatment’ under domestic legislation incorporating offenses set out in the *Rome Statute*. (see: chapter B, para. 16). In Germany the practice is slightly different. Any violation of the law of armed conflict will be prosecuted under the VStGB. Only such offences which are committed without any relation or connection to an armed conflict can be assessed under the general criminal law.

17 See: *Attorney-General’s letter, Sep. 27, 2011, supra* note 13, at 3. The letter indicates that there is not a full commensuration between the norms of Israeli criminal law and those of international law.

adoption of the international norms relating to war crimes into Israeli domestic legislation. This is because such legislation goes beyond the *practical* needs (i.e., to charge and punish violators of international humanitarian law), and also serves a *normative* purpose (i.e., to promote deterrence and education).¹⁸ As noted, from the trend reflected in the survey of the six countries it appears that the accepted approach is to incorporate the international criminal offenses into domestic legislation.

12. It should be noted that the Commission's focus in this Report is on violations of international humanitarian law. However, the provisions of the Israeli Penal Law often extend to a broader array of acts. The Commission wishes to emphasize the obvious, that the examination and investigation authorities in Israel must assess whether acts of security forces establish criminal responsibility even if they do not amount to a war crime.¹⁹

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

13. As noted in Chapter A, international humanitarian law places a particular responsibility on military commanders and civilian superiors for violations that were committed by their subordinates. The responsibility of commanders and superiors includes the obligation to exercise their authority by taking steps to prevent violations, and to take appropriate operational, disciplinary or criminal measures against the violators.²⁰

18 For further reading, see: Knut Dörmann & Robin Geiß, *The Implementation of Grave Breaches into Domestic Legal Orders*, 7(4) JICJ 703 (2009).

19 An example of a domestic offense that entails criminal responsibility is negligent killing. On this matter see: THE SAMPLE EXAMINATION, at para. 23 of the Introduction: In file 377/10 it appears that the question of negligence was not examined (i.e., if the shooter was aware of the nature of his actions, the circumstances or the harmful outcomes of his behavior) even though the operational debrief revealed that the death was caused by serious professional misconduct. For an example of an incident where the question of negligence was examined see: letter from Brigadier-General Dan Efroni, The MAG, to Hoshea Gottlieb, the Commission's Coordinator, *Opinion Regarding Assault of the A-Samouni Family's House*, as well as the opinion attached to it (May 6, 2012) [hereinafter: *the A-Samouni Opinion*].

20 See: Chapter A, paras. 26, 35.

14. Chapter B indicated that the United States is the only country out of the six surveyed that does not have an explicit provision in domestic criminal legislation imposing responsibility on commanders and superiors to exercise authority to prevent violations that were committed or planned by their subordinates.²¹ By comparison, in Canada there is a separate indictable offense for commanders and civilian superiors rather than making them liable for a subordinate's offense. That offense applies when commanders know or should have known that their subordinates are committing or are about to commit relevant offenses.²² In Australia, the relevant provisions in the domestic criminal legislation allow for commanders and civilian superiors to be held liable for the failure to prevent or to punish the offenses of their subordinates.²³ Also in the UK there are offenses that establish the liability of commanders and superiors, including as an accessory to the offense of their subordinates.²⁴ In the Netherlands, there are offenses that establish the liability of commanders and superiors.²⁵ In Germany, the punishment for a commander or a superior who fails to prevent an offense by subordinates is identical to that of the actual perpetrator.²⁶

15. As detailed in Chapter C, Israeli criminal law does not explicitly address the responsibility of commanders and superiors and their

21 In the United States, unlike the other countries surveyed, there no is reference to command responsibility in federal or state legislation. There is a debate amongst jurists on the possibility of prosecuting commanders for offenses committed by their subordinates, and there are various rulings on the matter by US courts (see Annex C: *The US Report*, at paras. 21–27). In US military manuals there is reference to command responsibility, see for example: DEP'T OF THE ARMY, FIELD MANUAL 27–10, THE LAW OF LAND WARFARE, para. 501 (1956): 'In some cases, military commanders may be responsible for war crimes committed by subordinate members of the armed forces, or other persons subject to their control. Thus, for instance, when troops commit massacres and atrocities against the civilian population of occupied territory or against prisoners of war, the responsibility may rest not only with the actual perpetrators but also with the commander. Such a responsibility arises directly when the acts in question have been committed in pursuance of an order of the commander concerned. The commander is also responsible if he has actual knowledge, or should have knowledge, through reports received by him or through other means, that troops or other persons subject to his control are about to commit or have committed a war crime and he fails to take the necessary and reasonable steps to insure compliance with the law of war or to punish violators thereof.'

22 See: Chapter B, para. 11.

23 *Id.*; See also Annex C: *The Australian Report*, at para. 33.

24 See: Chapter B, *Id.*; See also Annex C: *The UK Report*, at para. 1.46.

25 See: Chapter B, *Id.*; See also Annex C: *The Netherlands Report*, at para. 28.

26 See: Chapter B, *Id.*; See also Annex C: *The German Report*, at para. 119.

obligation to prevent offenses. IDF commanders are required ‘to strictly maintain discipline and compliance with the law and the orders’, and to take disciplinary action against any offender.²⁷ According to the Military Advocate-General (hereinafter: the MAG), ‘it is the obligation of each commander to prevent and suppress violations of the laws of war by his subordinates, insofar as these are incorporated in military orders’.²⁸ The question of the criminal liability imposed on commanders for the failure to prevent offenses of their subordinates was dealt with in rulings of the courts martial.²⁹ In one case, a commander was convicted when he was in the field with his subordinates as aiding the offense, because he did not prevent it, and a separate charge was brought for unbecoming conduct.³⁰ However, it should be noted, that in most of the cases where IDF commanders were indicted for an offense of their subordinate, the commanders were charged with the crime that was committed, and not with the responsibility for the failure to prevent or the failure to report the offense to the appropriate authorities.³¹

Therefore, on the matter of responsibility of commanders and civilian superiors, the Commission recommends:

A. Filling Gaps in Israeli Legislation

16. The responsibility of commanders and superiors is one of the most significant obligations codified in international humanitarian law and international criminal law. Five out of the six countries surveyed have incorporated command responsibility into primary legislation, and they

27 See: Chapter C, para. 7.

28 *The Public Commission Public Commission for Examining the Maritime Incident of May 31, 2010 – Supplementary Material 23* (position paper of the MAG Corps, Aug. 9, 2011) [hereinafter: *MAG Position Paper 2011 – Supplementary Material*].

29 *Id.*

30 See: A/78/88 *First Sergeant Danino v. Chief Military Prosecutor*, CM 227, 239 (1988).

31 See for example: HCJ 7195/08 *Abu Rahme v. Brigadier-General Avichai Mandelblit, Military Advocate-General* (unpublished, Jul. 1, 2009); THE SAMPLE EXAMINATION: File 38/09 which dealt with an incident where the force commander was indicted.

were not satisfied with merely incorporating the obligation into the rules and procedures of their armed forces.

The Commission recommends enacting provisions that impose direct criminal liability on military commanders and civilian superiors for offenses committed by their subordinates, where the former did not take all reasonable measures to prevent the commission of offenses or did not act to bring the matter to the competent authorities when they became aware of the offenses *ex post facto*.

B. Investigation of Commanders

17. Orders by commanders may in themselves (as distinct from omissions by commanders) also constitute violations of international humanitarian law. The Commission emphasizes that such orders by commanders should also be subject to examinations and investigations.

B. THE GROUNDS FOR CARRYING OUT THE OBLIGATION TO EXAMINE AND INVESTIGATE (‘WHEN TO INVESTIGATE?’)

18. In this section of the chapter, we will examine the processes that lead to opening an examination or investigation in Israel. Prior to assessing the grounds that establish this duty and whether they conform to international law, we will examine the procedures that obligate soldiers to report suspected violations, including the requirement to document the scene of an incident. Reporting duties are essential because they form the basis for establishing grounds for an examination and investigation.

Recommendation No. 3: Reporting Duties

19. As detailed in Chapter A, military commanders have a general obligation to prevent and report violations of international humanitarian law and to ensure that appropriate measures are taken in response to suspected violations.³²

20. The reporting duties play a significant role in the examination and investigation mechanisms of the countries that were surveyed in Chapter B.

In the United States the armed forces are required to report to the chain of command any ‘reportable incident’. A reportable incident is a suspected violation of international humanitarian law that does not amount to a war crime.³³ In addition, there is a special requirement to report Category 1 serious incidents, i.e., suspected war crimes. Category 1 serious incidents require reporting both to military commanders and also to military legal advisors. As part of the reporting duties commanders

³² See: Chapter A, para. 26.

³³ See: Dep’t of Defense Directive 2311.01E, *DoD Law of War Program*, para. 5.11 *et seq.* (May 9, 2006); Chairman of the Joint Chiefs of Staff, Instruction 5810.01D, *Implementation of the DoD Law of War Program*, paras. 6.f.(4)(e)(1)–(3) (Apr. 30, 2010).

are instructed to take steps to preserve potential evidence pending their transfer to appropriate authorities.³⁴

In Canada, the officers and non-commissioned members must report to the 'proper authority' on every violation of relevant statutes, regulations, rules, orders and instructions.³⁵ Moreover, according to the designated reporting procedures for specific operations, any and all 'significant incidents' must be reported immediately. This covers an incident that may undermine the public values or lead to the discredit of Canada at home or abroad.³⁶

In Australia, the armed forces must report all 'notifiable incidents' to different authorities depending on the nature of the incident.³⁷ Notifiable incidents include any incident that raises a reasonable suspicion of an offense against the Australian military disciplinary rules or penal code. It also covers incidents involving civilian death, serious injury or disappearance even where there may be no reasonable suspicion of an offense. The report must include information about the time, the location and the circumstances of the incident, and details about the individuals involved. As part of the reporting duties, the commanders have the responsibility, following consultation with the military police, to take any possible steps in order to gather and protect potential evidence and to prevent injury to potential witnesses or their testimony.³⁸

In the UK, commanders must report 'Schedule 2 offences' to the service police. Schedule 2 offences include general criminal law offenses

34 See: Chapter B, para. 32; See also Annex C: *The US Report*, at para. 102.

35 See: Chapter B, para. 42; See also Annex C: *The Canadian Report*, at para. 108.

36 Id., *The Canadian Report*, at para. 117, referring to, for example: Joint Task Force Afghanistan Theatre Standing Order 304 (Significant incident Reporting).

37 See: Defence Instructions (General), DI(G) ADMIN 45-2: The reporting and management of notifiable incidents (Mar. 26, 2010).

38 See: Chapter B, para. 49; See also Annex C: *The Australian Report*, at para. 48.

such as murder and manslaughter as well as allegations of war crimes.³⁹

In the Netherlands, all members of the armed forces are required to report any suspected violation of the laws of armed conflict to the responsible authorities.⁴⁰ Furthermore, it is the field commander's obligation to report to the public prosecution service any incident in which there was a use of force.⁴¹

In Germany, there are no distinct reporting obligations aside from the general obligations to report suspected criminal offenses to civilian prosecutorial authorities.⁴²

21. As detailed in Chapter C, the obligation in the IDF to report suspected offenses is codified in the Military Justice Law: 'a commander who knows or has reasonable grounds to believe that one of his subordinates has committed an offense', must prepare a complaint and bring it before a competent officer.⁴³ In 2005, the Chief of Staff adopted a Reporting Procedure for Incidents in which Palestinian Civilians were Injured to deal with the reporting of 'any incident involving IDF soldiers where a person who was not involved in life threatening combat was killed or injured' or 'in any case of doubt concerning the involvement of a person in the aforesaid type of combat' (hereinafter: the Reporting Procedure).⁴⁴ According to the procedure, such incidents must be immediately reported 'to the office of the Chief of Staff, the Operations Branch and the MAG. *The said report will be submitted no later than 48 hours from the time of the incident*'. The Reporting Procedure sets out guidelines for how to fill

39 See: Chapter B, para. 56.

40 See: Chapter B, para. 67; See also Annex C: *The Netherlands Report*, at paras. 70–72.

41 See Annex C: *The Netherlands Report*, at para. 50.

42 See: Chapter B, para. 61.

43 See: Chapter C, para. 72; See, also: Article 225 of the Military Justice Law, 5715–1955, LA 189 [hereinafter: the Military Justice Law].

44 IDF OPERATIONAL BRANCH INSTRUCTIONS Op–B–015, *Reporting Procedure for Incidents in which Palestinian Civilians were Injured* [hereinafter: THE REPORTING PROCEDURE].

out a Preliminary Report Form. The commanders that are enumerated in the Procedure are responsible for submitting the ‘Preliminary Report of an Incident involving the Death or Injury of a Palestinian Civilian’ form (hereinafter: the Preliminary Report Form) to the MAG within 48 hours. The Preliminary Report Form must indicate the location of the incident, the time of the incident, details of the soldiers involved, the number of casualties including their condition, gender, age and other details. According to the Reporting Procedure, ‘copies of the relevant Operation Log Books, the daily reports and any other relevant material must be attached to the Preliminary Report Form’. The Reporting Procedure further requires that ‘it is the responsibility of the regional brigade commander and the unit commander... to ensure photographing and documenting of the scene immediately after the incident provided it does not endanger the forces and it is possible under the circumstances’, and ‘insofar as there are grounds that prevent photographing and documenting... the reasons must be detailed’.

From the material submitted to the Commission, it appears that the commanders do not fill out Preliminary Report Forms following incidents as required by the Reporting Procedure,⁴⁵ and that the relevant scenes are not documented.⁴⁶ In the MAG’s testimony and submissions, it was argued that although the Reporting Procedure is not literally complied with, he usually learns about these incidents in a relatively short period of time, even quicker than the procedure requires. Notwithstanding, there were instances in which the MAG learned of relevant incidents only after

45 See also: Chapter C, para. 73. The Commission also asked to receive that forms that were completed by the units and prepared according to the Reporting Procedure, but it was told that no such forms exist.

46 See, for example, THE SAMPLE EXAMINATION: File 34/09 included materials which indicated that the scene was not documented; in the case of Jihad al Sha’ar’s killing where a Palestinian was killed when assaulting a soldier with a knife, there was no documentation of the knife (the case was not examined by the Commission and it arose during the examination of file 359/07). Following this case, an instruction was issued that ‘a command clarifying instructions would be issued’ about the documentation of the scene and of the assault weapons. See also: Meeting between Hoshea Gottlieb, the Commission’s Coordinator, and Major-General Avichai Mandelblit, The Military Advocate-General 1 (Aug. 10, 2011) [hereinafter: *Meeting with MAG*]. See also: Chapter E, paras. 32–36.

a long period of time, and only through complaints by injured parties or their representatives.⁴⁷ These delays even occurred when, at the time of the incident, the IDF units involved in the operation already knew the outcome.⁴⁸

Therefore, on the matter of reporting duties, the Commission recommends:

A. Assimilating Reporting Procedures

22. Reporting duties are enshrined in international law and regulated in five of the countries surveyed as well as in Israel. The obligation to report an incident leads to examination and investigation procedures, and is therefore essential in fulfilling the obligation to investigate. Consequently, a failure to comply with these obligations hinders the ability to initiate any necessary examination or investigation.

23. The Commission concludes that *in practice* the Chief of Staff's Reporting Procedure is not implemented. In order to ensure its implementation the Reporting Procedure should be incorporated into the Supreme Command Orders. Moreover, it should be assimilated by all IDF units and sanctions should be imposed on commanders who do not comply with the Procedure.

47 See: Transcript – Part B, session no. 2 “Testimony of the Military Advocate-General” 17 (Apr. 11, 2011) [hereinafter: *MAG's Testimony – Part B*]; *Meeting with MAG*, *supra* note 46, at 2; See also: Chapter C, para. 73, citing the MAG: ‘As to the reporting from military authorities there are cases in which the information is not submitted in time either because of lack of awareness or failure to observe the procedure, or because in certain cases military authorities are unaware that an operation caused the injury of an individual’.

48 See: THE SAMPLE EXAMINATION: File 377/10 was opened in December 2010 into the incident in which a man was killed during an activity in July 2010. The file was opened following a letter from B'Tselem even though the death was determined by a military doctor immediately after the incident and an operational debrief was commenced; File 359/07 was opened one month after the incident in question (following a letter from B'Tselem) even though it appears that the unit involved was required to report the incident to the MAG immediately.

The Commission's view is that the *substance* of the Reporting Procedure established by the Chief of Staff complies with Israel's international legal obligations. The Commission, nonetheless, recommends broadening the scope of the Procedure beyond incidents during which an uninvolved person was killed or injured, so that it should apply to *every* incident involving the IDF or forces for which the IDF is responsible, that raise questions as to whether a violation of international humanitarian law has occurred.

B. Documentation of the Scene

24. Documentation of an incident scene is part of the reporting duties and it contributes to a subsequent examination and investigation.⁴⁹ In Israel, as in the United States and Australia, the Reporting Procedure obligates documenting the scene immediately following an incident.⁵⁰ The Commission therefore emphasizes this obligation, which includes the seizing of each exhibit and all documents that may assist the examination and investigation, and also storing the exhibits (such as clothing, ammunition, or weapons seized) in conditions that will best preserve them for proper examination at a later date.

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

25. As detailed in Chapter A, international humanitarian law establishes the obligation to investigate when there is a credible accusation or a reasonable suspicion of the commission of a war crime. The existence of a reasonable suspicion that a war crime has been committed is dependent both on the facts of the incident, and the legal context. Therefore, when the information is partial or circumstantial and it does not establish a reasonable suspicion that requires an investigation, a fact-finding

⁴⁹ See: Chapter A, paras. 82, 101–102.

⁵⁰ See for example Annex C: *The US Report*, at para. 92.

assessment must be held in order to clarify whether there is a need to investigate.⁵¹

26. The survey of the countries in Chapter B suggested that two of the countries implemented a ‘fact-finding assessment’ mechanism. In the United States, commanders have an obligation to conduct a Preliminary Inquiry when there is information about a soldier who was involved in what amounts to a reportable incident, or when a soldier is responsible for such an incident, or when the circumstances require it by law.⁵² In Australia, an assessment is conducted, at the discretion of the commander, after he becomes aware of a significant incident or of an allegation that such an incident occurred. This assessment is known as a Quick Assessment (QA). The information gathered in the QA will assist in the decision about whether or not to open an investigation.⁵³

27. As detailed in Chapter C, according to the current investigation policy in the IDF, an investigation by the Military Police Criminal Investigation Division (hereinafter: CID) is opened immediately when complaints raise a *prima facie* suspicion of criminality (e.g. looting). Moreover, the CID will usually investigate operations in Judea and Samaria (hereinafter: the West Bank) that result in the death of a person except when the incident involves ‘actual combat’. In these cases, the decision to open an investigation is delayed until the operational debrief is transferred to the MAG who then examines whether the circumstances of the incident justify the initiation of an investigation.⁵⁴ This is an existing policy that was developed without explicit basis in Israeli law. The only basis is a CID commander’s discretion provided by an Order of General Staff which allows him, upon consultation

51 See: Chapter A, paras. 46, 49, 59.

52 See: Chapter B, para. 32; See also Annex C: *The US Report*, at paras. 64, 105.

53 See: Chapter B, para. 50; See also Annex C: *The Australian Report*, at para. 49; Likewise, according to the policy currently practiced in Australia, a full administrative inquiry is launched in any case of a soldier’s death; significant damage to property; or the death of an uninvolved civilian (see on this matter Annex C: *The Australian Report*, at para. 50).

54 See: Chapter C, paras. 67–71.

with a member of the MAG Corps, to refrain from opening an investigation when ‘in his opinion there is no objective justification for doing so’.⁵⁵

Therefore, on the matter of the grounds for opening an examination and an investigation, the Commission recommends:

The Investigation Policy in the IDF

28. The Commission concludes that on the whole the Investigation Policy in the IDF is consistent with Israel’s international legal obligations (see Recommendation No. 5 for the issue of delaying the decision to begin an investigation until the operational debrief is received). However, the authority to determine such a policy should be defined explicitly in the appropriate rules. The Commission further recommends that upon receiving the Preliminary Report Form, the MAG Corps should immediately classify the legal context of the incident, i.e., whether it is an incident involving ‘actual combat’, and therefore subject to the rules regulating the conduct of hostilities, or any other incident subject to law enforcement norms. This will aid in directing, as quickly as possible, the assessment of a complaint to the correct channel.

55 *Id.*, at paras. 67, 69.

C. METHOD OF CONDUCTING THE EXAMINATION AND INVESTIGATION (‘HOW TO INVESTIGATE?’)

29. According to the Investigation Policy described above, in certain cases a CID investigation is opened, and in other cases the decision to initiate an investigation is delayed pending the outcome of the operational debrief, based on which it will be determined if there is a suspicion of criminality. This section on ‘how to investigate?’ will therefore be divided into two. Firstly, we will assess whether the way in which the IDF conducts an operational debrief renders the debrief useful for a fact-finding assessment; and how a decision is reached to open an investigation. Secondly, we will discuss the manner in which investigations are conducted into complaints and claims against the IDF, the ISA, the police, prison wardens and senior decision-makers.

IDF PROCEEDINGS PRIOR TO AN INVESTIGATION

Recommendation No. 5: Fact-Finding Assessment

30. As noted in Chapter A, the purpose of a fact-finding assessment is to collect information in order to provide data on which it is possible to decide whether to open an investigation. If a reasonable suspicion of the commission of a war crime is revealed, a decision will be made to open an investigation. The fact-finding assessment must be conducted professionally, with proper expertise, and promptly so that it facilitates a potential investigation and does not hinder it.⁵⁶

31. As described in Chapter B and as noted in paragraph 26 above, the equivalent to a ‘fact-finding assessment’ is practiced in some of the countries surveyed. For example, in the United States, although there is

⁵⁶ See: Chapter A, paras. 49, 109–112.

no detailed guidance on the conduct of a Preliminary Inquiry, it is usually carried out by the commander himself or by a member of the command. The Manual for Courts Martial provides that the Preliminary Inquiry for a suspected offense should gather all reasonably available evidence bearing on guilt or innocence.⁵⁷ In Australia, a QA comprises of only a brief statement of the facts. The officer undertaking the QA would usually speak to the personnel involved in the incident to understand what occurred, and in what context. The individual conducting the QA must have no involvement or personal interest in the matter.⁵⁸ The QA is submitted within 24 hours to the Commander Joint Operations (CJOPS) in order for him to decide whether to continue an administrative inquiry or to initiate a criminal investigation.⁵⁹

It is important to note that in all of the countries surveyed, operational debriefs are conducted after military operations. In the US these are called ‘after action reviews’ and in the Netherlands they are called ‘after action reports’.⁶⁰

32. As detailed in Chapter C, and in paragraph 27 above, in Israel when complaints or claims of international humanitarian law violations are filed as a consequence of an incident involving ‘actual combat’, the decision to commence an investigation is delayed until an operational debrief is received. This allows the MAG to consider whether the circumstances of the incident justify the opening of an investigation.⁶¹ Thus, the operational

57 See: Chapter B, para. 36; See also Annex C: *The US Report*, at para. 64.

58 See: Defence Instructions (General), DI(G) ADMIN 67–2–10: Directing a Quick Assessment Officer (Aug. 7, 2007): ‘QAOs must be free, to the maximum extent feasible, from any suggestion of bias or conflict of interest involving any issue or witness surrounding the occurrence. A member of a unit or workplace in the direct chain of command or line management of the commander/supervisor instigating the QA may be selected as a QAO provided that they have no involvement or personal interest in the matters or people involved in the QA, which is likely to compromise their objectivity or impartiality’.

59 See: Chapter B, paras. 49–50; See also Annex C: *The Australian Report*, at para. 49.

60 See also: Chapter B, paras. 34, 67.

61 See: Chapter C, paras. 67–71, 92–93; The Commission has learned of the operational debrief procedures from the testimonies and materials submitted to it and particularly from an in depth examination of the operational debriefs as part of the THE SAMPLE EXAMINATION as well as from a

debrief is used as an assisting tool in the conduct of a fact-finding assessment. According to the guidelines on conducting an operational debrief, outlined in Chapter C, the commander that conducts the debriefing must gather and verify facts, identify the findings that bear relevance on the activity in question, and draw conclusions.⁶² The guidelines emphasize the importance of conducting the operational debrief as close as possible to the time of the incident in question. In order to ensure the credibility of the data gathered in the framework of the debriefing, the individual conducting it is not subject to the rules of evidence and is authorized to record the testimony of any soldier and to collect all relevant documents. It is the duty of every soldier participating in the debriefing to cooperate and provide any relevant information. Supplying false details or withholding important information during an operational debrief are considered offenses punishable by imprisonment.⁶³

Besides the operational debrief which is conducted within the framework of the IDF unit being investigated, there is also an ‘experts debrief’, which is conducted in cases of complicated incidents at the discretion of the commanding ranks.⁶⁴ An experts debrief is conducted by individuals possessing the appropriate expertise in the matter, who are not part of the chain of command and were not involved in the incident in question.

33. Academics and representatives of the human rights organizations, who testified before the Commission, raised reservations about the MAG’s reliance on the operational debriefs as a basis for subsequent decisions on opening an investigation.⁶⁵ Thus, it was contended before the Commission

meeting between Hoshea Gottlieb, the Commission’s Coordinator, and Colonel Erez Katz (Nov. 11, 2011) who headed one of the experts debriefs established following Operation Cast Lead [hereinafter: *Meeting – Colonel Katz*].

62 See: Chapter C, para. 88.

63 *Id.*

64 *Id.*, at para. 91.

65 See: *Benvenisti testimony*, *supra* note 11, at 15, where he claimed that: ‘international law has not

that: (1) the operational debrief is tainted by an inherent conflict of interest because it is conducted by the same forces whose activity is under scrutiny;⁶⁶ (2) the debriefing might hinder a future investigation, because it has the potential of causing a ‘coordination of testimonies’ by the soldiers who were debriefed;⁶⁷ (3) the operational debrief is not limited in time and therefore might unreasonably delay the investigation;⁶⁸ (4) the operational debrief is generally based on soldiers’ accounts without collecting evidence from complainants or from other witnesses;⁶⁹ (5) the commanders, who conduct the debriefings, lack professional training for performing investigations, and often these take place in a superficial and non-exhaustive fashion;⁷⁰ (6) there is no right of appeal on the conclusions of the debriefing.⁷¹

On the other hand, the MAG argued that in his decision about whether to initiate an investigation he treats the findings of the operational debrief as only one of the factors to be considered and these findings are compared with additional information that is available. Therefore, the findings of the debriefing should be viewed as merely a ‘supporting tool’ for his decision.⁷² Additionally, the MAG may instruct that the debriefing be clarified or supplemented to provide further information or clarify its findings, in order to reconsider the issue. On this matter the MAG emphasized that the *main role* of the debriefing is ‘operational’: i.e., it is an organizational tool in order to ‘improve the performance of military units’ and in order to learn

reached such a resolution that it can tell us exactly what method of investigation is preferable to the other methods. I think that the overall guiding test is the proportionality test... in other words, if the operational debrief is really essential for the army and hinders... the potential criminal process, it is necessary... to find the proper balance, in a proportionate manner’.

66 See: *Is the Customary Mechanism for Investigation Violations of the Laws of War Suitable for Israel’s Obligations* 20–21 (position paper by the Association of Civil Rights in Israel, Mar. 28, 2011) [hereinafter: *ACRI – Position Paper*].

67 See: *Shany, Cohen & Rosenzweig, Response Paper to MAG*, *supra* note 11, at 13.

68 *Id.*, at 14; See also: *The Duty to Investigate: Compatibility of Israel’s Duties under International Law with the Examination and Investigation of Complaints Regarding Violations of the Law of Armed Conflict* 34 (position paper by ‘Yesh Din’ – Volunteer for Human Rights Organization, Mar. 23, 2011) [hereinafter: *Yesh Din – Position Paper*].

69 *Yesh Din – Position Paper*, *supra* note 68, at 32.

70 See: *ACRI – Position Paper*, *supra* note 66, at 21.

71 See: *Yesh Din – Position Paper*, *supra* note 68, at 34.

72 See: *Position Paper of the MAG Corps* (Dec. 19, 2010) 69–70 [hereinafter: *MAG Position Paper 2010*].

lessons. In other words, the MAG's use of the debriefing, for assessing whether the circumstances of the incident justify opening an investigation, is only secondary.⁷³ The MAG stated that: 'the debriefing is not a tool of the MAG it is a tool of the commander'.⁷⁴

Therefore, on the matter of conducting a fact-finding assessment, the Commission recommends:

A. Fact-Finding Assessment

34. It appears that the MAG uses the operational debrief for the purpose of fulfilling his obligation to conduct a fact-finding assessment. The Commission discerned a number of difficulties in using the operational debrief for assessing the existence of a reasonable suspicion of a 'serious violation' of international humanitarian law. Thus for example, the use of an operational debrief may unreasonably delay the decision on initiating an investigation.⁷⁵ Likewise, the operational debrief is not focused on questions of criminality.⁷⁶

35. The Commission's view is that the operational debrief should primarily serve the *operational* needs of the military. Therefore, the Commission recommends that a *separate* mechanism shall be established in order to conduct a fact-finding assessment, similar to the Australian model, which will enable conducting an assessment that complies with the international legal requirements, as detailed in Chapter A, i.e., a prompt

73 *Id.*, at 15, 69; See also: *Meeting with MAG*, *supra* note 46.

74 *MAG's Testimony – Part B*, *supra* note 47, at 29.

75 See: Chapter C, para. 90, *fn* 271; THE SAMPLE EXAMINATION: File 203/10 reveals that the MAG Corps received the debrief six months after the date of the incident; File 279/07 reveals that the MAG Corps received the debrief approximately ten months after the incident; File 427/07 reveals that the MAG Corps requested to receive the debrief five months after the incident (unclear when the debrief was submitted); File 375/09 reveals that the MAG Corps located the debrief two years after the incident; In addition, as part of file 359/07 the Commission came across a summary of a meeting between the MAG and a certain General, during which the MAG raised the difficulty of receiving debriefs.

76 See: THE SAMPLE EXAMINATION: File 375/09. See also: Chapter E, para. 39

and professional assessment, which facilitates a potential investigation and does not hinder it.⁷⁷

The Commission recommends that immediately upon receiving the Preliminary Report Form and its annexed materials, as required by the Reporting Procedure, the MAG or whomever he delegates to do so, shall decide on one of the following possibilities:

- a. That there is reasonable suspicion of criminal activity and that an investigation should be opened immediately.
- b. That there is no reasonable suspicion of criminal activity and that the case is closed.
- c. That additional information is required in order to determine whether there is reasonable suspicion of criminal activity.

If the MAG decides that more information is required, he shall order a special team, established for this purpose, to examine the circumstances of the incident (hereinafter: the fact-finding assessment team). The members of the team shall be comprised of experts in the theatre of military operations, international law, and investigations. The function of the team will be to provide the MAG with as much information as possible, within a timeframe that is stipulated in procedures, in order to enable the MAG to make a decision about whether to open an investigation.

This recommendation does not prevent the MAG from reading the operational debrief (subject to Recommendation No. 6(A)).

⁷⁷ It should be noted that such a separate mechanism responds to the conflict of interest criticism outlined above in para. 33.

B. Limited Investigation within the Fact-Finding Assessment

36. During the review of the files it surveyed, the Commission learned of a practice known as a ‘limited investigation’. According to this practice, the MAG occasionally requests additional information in order to receive a more complete factual picture than that provided by the operational debrief. Such information is acquired by collecting testimonies of complainants and additional witnesses alongside the operational debrief.⁷⁸ The Commission endorses this practice and recommends that a limited investigation should be conducted, where necessary, within the framework of the fact-finding assessment.⁷⁹

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

37. As stated in Chapter A, one of the principles required for an ‘effective investigation’ is promptness. In addition to creating an obligation in and of itself, the principle of promptness strengthens the principle of effectiveness and thoroughness. The principle of promptness dictates that an investigation must commence as soon as possible and that it should proceed without unreasonable delays. Therefore, *the decision on whether to open an investigation* must satisfy this requirement.

38. There is no defined timeframe for the MAG’s decision to open an investigation.⁸⁰ Furthermore, from the material surveyed by the Commission,

78 See: *Meeting – Colonel Katz*, *supra* note 61, where it was learned that, in the context of one of the experts debriefs following Operation Cast Lead, contact was made with residents from Gaza who were involved in the incident; See also: THE SAMPLE EXAMINATION: File 492/09 where the MAG ordered that a *limited investigation* should be opened, and within the framework of this investigation testimonies of the witnesses mentioned in the complaints, and any material or evidence in their possession should be collected; see also file 229/09.

79 It should be noted that this practice also responds to the criticism relating to the failure to collect evidence from complainants or from other witnesses outlined above in para. 33.

80 On this matter, see: HCJ 9594/03 *B’Tselem – The Israeli Information Center for Human Rights in the Occupied Territories v. Military Advocate-General* (still unpublished, Aug. 21, 2011), at para. 14 of President Beinisch’s judgment: ‘The MAG should make his decision with reasonable and appropriate promptness based on the material transferred to him, and he must refer to the need to make a decision quickly in order to avoid reaching a nullification of the ability to conduct an effective criminal

it is evident that, occasionally, the decision to begin an investigation lingers for a long time.⁸¹ One of the factors that may contribute to this is the MAG's obligation to consult. As stated in Chapter C, when the debrief's material reveals a suspicion that an offense has been committed, and prior to the MAG ordering that an investigation be opened, he must consult with the commanding officer responsible for the unit involved in the incident (of the minimum rank Major-General). The purpose of this consultation is to ensure the relevant operational circumstances are brought to the attention of the MAG. The MAG, nonetheless, retains his discretion regarding the decision to open an investigation.⁸²

Therefore, on the matter of the decision to open an investigation, the Commission recommends:

A. Timeframe

39. The Commission recommends the establishment in procedures of a timeframe of a few weeks during which the MAG shall decide whether to open an investigation based on the material in his possession. As noted, the Preliminary Report Form is submitted to the MAG no longer than 48 hours after the incident. In cases where the Preliminary Report Form does not provide adequate factual information for making a decision about opening an investigation, the MAG shall instruct the fact-finding assessment team to examine the circumstances of the incident within a shorter period of time than the timeframe set for his decision to initiate an investigation (See Recommendation No. 5(A)).

investigation with the passage of time. However, the professional judgment obligates an in-depth investigation, and a formal time limit might damage the level of the decision'.

81 Thus for example *The A-Samouni Opinion*, *supra* note 19, is concerned with the investigation of an incident that led to the death of 21 members of one family on Jan. 5, 2009. From the Opinion it appeared that the decision to open the investigation was made on Jul. 6, 2010; See also: THE SAMPLE EXAMINATION: File 359/07 where the decision on opening an investigation was made approximately eight months after the event in question. For additional examples see: *Yesh Din – Position Paper*, *supra* note 68, at 34; *ACRI – Position Paper*, *supra* note 66, at 22.

82 See: Chapter C, para. 93.

40. In addition, the MAG should not be *obliged* to consult with the Major-General responsible for the unit involved in the incident, but rather he shall be *allowed* to consult with *any* commander as he sees fit. The Commission came to the conclusion that the MAG's duty to consult contributes to understanding the operational aspects of an incident; however, it can cause delays in reaching a decision. The MAG must consider, therefore, whether the benefits of consulting with a commander outweigh the disadvantages, and make his decision accordingly.

B. Duty to Provide Reasoning

41. According to Israeli law, the MAG, who is an administrative authority, must provide reasoning for his decisions.⁸³ As described in Chapter C, the MAG examines the operational debriefs in a designated 'debrief meeting', and decides whether to open investigations into the many cases reviewed during this meeting. From the files surveyed by the Commission, it appears that the reasoning behind these decisions is not always given.⁸⁴

The Commission recommends that every decision of the MAG not to open an investigation shall state the reasoning for that decision. This is important from a public and legal perspective, as well as a practical perspective, because such reasoning enables appeal and review of the MAG's decision.

83 See: HCJ 142/70 *Shapira v. Regional Committee of the Bar Association*, 25(1) 325 (1971); HCJ 4733/94 *Naot v. Haifa City Council*, 49(5) 111 (1996), at paras. 12–14 of Justice Matza's judgment; HCJ 7177/95 *Eurogum Ltd. v. Investments Center*, 50(2) 1 (1996), at paras. 1–3, 5–7 of Justice Zamir's judgment; HCJ 2159/97 *Hof Ashqelon Regional Council v. Minister of the Interior*, 52(1) 76 (1998), at para. 18 of Justice Zamir's judgment.

84 See for example: THE SAMPLE EXAMINATION: File 203/10 included a summary of a debrief meeting that dealt with 16 files. In 14 of the files it was decided that 'there is no room to instruct that a CID investigation be opened' without stating the reasoning for the decision; File 375/09 included a summary of a debrief meeting that dealt with 40 files without stating the reasoning for the decisions not to open an investigation. It should be noted, however, that the reason for not stating the reasoning within the MAG's decisions may be due to his reliance on the legal opinions of the MAG Corps for Operational Matters which themselves provide reasoning. Notwithstanding, in file 359/07 the MAG's decision not to open an investigation did not contain a written reason even though it was contrary to the legal opinion of the MAG Corps for Operational Matters.

C. Submitting Material to the Commanding Ranks

42. Sometimes, command sanctions must be considered in order to draw operational conclusions and ensure compliance with international humanitarian law.⁸⁵ Therefore, in such cases, after an examination process or a CID investigation (irrespective of the outcome) the MAG shall refer the relevant material to the commanding ranks.⁸⁶

CONDUCTING THE INVESTIGATION

43. In the framework of assessing the manner of conducting an investigation ('how to investigate?') we will also examine the Israeli investigative bodies ('who investigates?'). As detailed in Chapter A, an investigation must comply with the international legal principles of independence, impartiality, effectiveness and thoroughness, promptness, as well as transparency. An investigation that conforms with these principles is considered an 'effective investigation'.

THE INVESTIGATIVE BODIES

44. In this subsection, the Commission will examine whether the bodies in Israel that investigate violations of international humanitarian law are competent to conduct an 'effective investigation' as defined by international law. As evident from Chapter A, international law, generally, does not determine the appropriate investigative bodies, but rather determines principles which the appropriate bodies must fulfill. However, conclusions can be inferred from these principles as to the investigative bodies.

⁸⁵ See: Chapter A, paras. 23, 26, 61.

⁸⁶ An example for such conduct is *The A-Samouni Opinion*, *supra* note 19, at 2, which recommended against taking legal measures following a CID investigation: '*the findings of the investigation and debriefing were presented to the Chief of Staff, who decided to take command sanctions against the Givati Brigade Commander... and instructed that he not be promoted further in the operational-command route*'.

45. As detailed in Chapter C, there are a number of bodies in Israel that are also responsible for the investigations of complaints and claims of violations of international humanitarian law:

- a. The MAG Corps and the CID (that investigate complaints and claims directed at IDF soldiers);⁸⁷
- b. The Israel Police (that investigates complaints concerning shooting incidents by Police Officers in the West Bank);⁸⁸
- c. The Interrogatee Complaints Comptroller (hereinafter: the Mavtan), the Mavtan's Supervisor, and the Police Internal Investigations Department in the Ministry of Justice (hereinafter: the PIID) (investigating complaints directed at ISA investigators);⁸⁹
- d. The National Prison Wardens Investigation Unit (hereinafter: the NPWIU) (that investigate complaints involving violations occurring in the detention facilities, directed at wardens);⁹⁰
- e. Commissions of Inquiry (that usually handle the investigation of incidents involving senior decision-makers).⁹¹

Therefore, the Commission will examine whether the various investigative bodies and the mechanisms these bodies employ are compatible with the international legal principles of an 'effective investigation'. First, the Commission will examine the bodies and mechanisms that investigate complaints against IDF soldiers. Second, the Commission will examine the bodies and mechanisms that investigate complaints against police officers,

87 See: Chapter C, paras. 15–26, 31–38.

88 See: *Id.*, paras. 44, 46.

89 See: *Id.*, paras. 48–49.

90 See: *Id.*, para. 51.

91 See: *Id.*, paras. 55–58.

against ISA investigators, against wardens and against senior decision-makers.

1. THE BODY THAT INVESTIGATES COMPLAINTS AGAINST IDF SOLDIERS

46. In examining whether the mechanisms in the bodies investigating complaints and claims against IDF soldiers are compatible with the principles of an ‘effective investigation’, we will begin by examining the independence of the MAG and the MAG Corps. Second, we will examine the MAG’s ‘dual hat’ and whether it conforms with the principle of impartiality. Third, we will discuss the effectiveness and thoroughness of the CID investigations. Fourth, we will consider how to conduct a prompt investigation. Fifth, we will assess the transparency of the investigations in the IDF. Following the Commission’s assessment of the mechanisms according to the principles of an effective investigation, we will examine the oversight and review mechanisms for the IDF investigative bodies.

Recommendation No. 7: Independence of the MAG

47. As established in Chapter A, the mere existence of a military justice system, does not, in and of itself, contradict the principle of independence enshrined in international law.⁹² However, in order to comply with the requirement of independence, an investigation in the military justice system of a reasonable suspicion for a ‘serious violation’ of international humanitarian law, must be conducted outside the chain of command.

48. As detailed in Chapter B, the four common law countries (which is also, by and large, the legal system in Israel) have a discrete military justice

92 See: Chapter A, para. 73.

system.⁹³ Furthermore, in all six of the countries surveyed, investigations into the military are carried out by military police. In the last decade, however, there has been a trend in these countries towards involvement of the civilian system in the military justice system.⁹⁴

49. Complaints of violations of international humanitarian law directed at IDF soldiers are investigated by the military justice system headed by the MAG. As noted in Chapter C, while the MAG is subordinate to the Chief of Staff in rank, from a professional perspective he is subordinate to the guidance of the Attorney-General. This is because the Attorney-General stands at the head of the legal system of the executive branch, including the prosecution and law enforcement system.⁹⁵ In materials he submitted to the Commission, the MAG clarified that according to military orders, while he is subordinate to the Chief of Staff in rank, and he is a part of the professional staff of the General Staff, 'he is only subject to the authority of the law'.⁹⁶ He also emphasized that his independence extends throughout the entire MAG Corps and is not limited to the MAG himself.⁹⁷

The independence of a military justice system is assessed, *inter alia*, according to the procedures for appointing the head of that system: his tenure (including the authority to extend it) as well as the determination of rank.⁹⁸ In Israel, the MAG is appointed by the Minister of Defense, on

93 For details, see: Chapter B, para. 2.

94 In Australia it was established by law that the JAG is appointed by the Governor-General for a fixed period. Though he has a two star rank the JAG does not have any command or administrative liability over the officers in professional matters, he is not part of the chain of command and is subordinate to the Minister of Defense and reports directly to him (see: chapter B, para. 25; Annex C: *The Australian Report*, at para. 51). In Canada it was also established by law that while the JAG supplies the chain of command with the legal services it requires, he is subordinate to the Minister of Defense and reports directly to him (and see: chapter B, para. 23; Annex C: *The Canadian Report*, at para. 97). In the UK an independent military prosecuting authority was established by law in 2006, headed by an appointee by the Queen, in coordination with the Minister of Defence, and he may be a civilian, as he currently is. Finally, as of 2011 the head Military Police officers are appointed by the Queen (and see: chapter B, para. 27; Annex C: *The UK Report*, at paras. 3.32–3.33).

95 See: Chapter C, para. 18. See also: HCJ 4723/96 *Atiya v. Attorney-General*, 51(3) 714 (1997), at para. 11 of Justice Beinisch's judgment [hereinafter: *Atiya case*].

96 See: Chapter C, para. 18.

97 *Id.*

98 Thus for example the US congress wished to enhance the independence of the JAGs from their

the recommendation of the Chief of Staff.⁹⁹ Thus, the Chief of Staff and the Minister of Defense must be in agreement in order to appoint a MAG. The MAG's tenure is not fixed, and thus, for example, the last MAG served for approximately eight years and his predecessor served for approximately four and a half years. It should be noted that both these MAGs were promoted to the rank of Major-General during their tenure.¹⁰⁰ On this matter the Commission was informed by the Chief of Staff's Office that due to the importance of the MAG's independence, the Chief of Staff and the Minister of Defense agreed to limit the term of office of the current MAG to four years and his promotion in rank, to Major-General, was set in advance.¹⁰¹

Therefore, on the matter of the MAG's independence, the Commission recommends:

A. Professional Subordination

50. The Commission's view is that the MAG's professional subordination to the Attorney-General is consistent with the international legal requirement for independence. It is also consistent with the trend of civilian involvement identified in the countries surveyed. However, this professional subordination is not sufficiently institutionalized. This should be remedied by legislation and organizational arrangements. Below, we will outline recommendations on this matter.

commander – the President of the United States – by revoking the President's ability to promote their ranks during their tenure. See on this issue: The National Defense Authorization Act for Fiscal Year 2008, Sec. 543 (Public Law 110-181, 122 Stat. 3-604) (Jan. 28, 2008).

99 Article 177 of the Military Justice Law.

100 See also: *Meeting with MAG*, *supra* note 46, at 5.

101 See: letter from Colonel Hod Betzer, Assistant to the Chief of Staff, to Hoshea Gottlieb, the Commission's Coordinator, *Status of the Military Advocate-General* (Nov. 10, 2011). It was further stated in the letter that it was decided to 'fix the MAG's position at the rank of Major-General'.

B. The MAG's Appointment

51. The Commission recommends that, in order to strengthen the independence of the MAG, the Minister of Defense, should appoint him on the recommendation of a public–professional committee. This committee shall be composed in a similar manner to the public–professional committee that recommends the appointment of the Israeli Attorney–General.¹⁰² Furthermore, in order to institutionalize the professional subordination of the MAG to the Attorney–General, the latter should be the chair or a member of the public committee.

C. The MAG's Tenure and Rank

52. In order to ensure the independence of the MAG, the Commission recommends that his tenure should be fixed, like that of the Attorney–General, at one term of six years that *may not be extended*.¹⁰³ In addition, the MAG shall be given a fixed rank.

Recommendation No. 8: The MAG's 'Dual Hat'

53. As detailed in Chapter A, the principle of impartiality is intended to ensure that the investigation is conducted objectively and without bias. As distinct from the principle of independence, impartiality focuses on the performance of the investigator, including the perception of his

102 See: The Public Commission to Assess the Methods of Appointing the Attorney–General and Issues Related to his Tenure REPORT (1998) [hereinafter: *The Shamgar Commission Report*]; See also: Resolution No. 2274 of the 28th Government of Israel, *Public Commission to Assess the Methods of Appointing the Attorney–General* (Aug. 20, 2000); Resolution No. 1773 of the 31st Government of Israel *Determining the Methods and Conditions for Appointing the Attorney–General – Government Decision Amendment* (Jun. 10, 2007).

103 See: *The Shamgar Commission Report*, *supra* note 102, at 69: 'In order for the Attorney–General to perform his duty without improper influences, either obvious or hidden, it is proper for a predetermined tenure to be established to bolster his independence, as is practiced in relation to other public office holders in the country (such as the State Comptroller or the Governor of the Bank of Israel)... [I]t should be taken into account that the position carries, as detailed, very broad authorities, and too long of a tenure should not be established since it would create a concentration of power for an extended period which could, in light of past experience and reasonable estimates, detract from the balance necessary in a proper democratic government. In light of these considerations the Commission suggests a single tenure of six years which is not extendable'.

performance. We will assess whether the way the MAG conducts an investigation conforms with this principle. This assessment will take into account the ‘dual hat’ worn by the MAG as he is the head of the military prosecution system, and the legal advisor to the military authorities, and whether there is a conflict of interest inherent to these dual roles.

54. As detailed in Chapter B, in some of the countries surveyed, the head of the military justice system also wears such a ‘dual hat’. However, safeguards have been instituted to reduce the potential conflict of interest. These safeguards include weakening the prosecutorial functions of the MAG by strengthening the position of the director of military prosecutions (hereinafter: the DMP), despite his subordination to the MAG. Thus, in Canada, the following safeguards have been put in place: the Judge Advocate–General (hereinafter: the JAG) does not head the chain of command of the investigating authorities;¹⁰⁴ the orders received by the DMP from the JAG, regarding a specific prosecution, are submitted concurrently to the Minister of Defense and insofar as possible, they are made publicly available; the DMP is appointed by the Minister of Defense (and not by the JAG) for a period of four years (which may be extended).¹⁰⁵ Even though the Australian military justice system is different, similar safeguards exist: the DMP is appointed by the Minister of Defence for a fixed term not exceeding five years (which may be extended up to ten years), at the rank of Brigadier–General;¹⁰⁶ the DMP stands outside the military chain of command, and reports to the Minister of Defence; the DMP’s independence is protected in statute and it is an offense to interfere with the DMP’s prosecutorial decisions.¹⁰⁷

55. As detailed in Chapter C, the Israeli MAG is in charge of two arms: the military prosecution system and the legal advice system. The Chief

104 See Annex C: *The Canadian Report*, at para. 91.

105 *Id.*, at para. 92.

106 See: Chapter B, para. 25.

107 *Id.*

Military Prosecutor (hereinafter: the CMP) heads the military prosecution, and his role is to assist the MAG and his deputy in utilizing their powers in the criminal sphere. However, only the legal advice system may give legal advice to the various military authorities. In light of this division within the MAG Corps between the prosecution system and the legal advice system, the MAG contended that a potential for a conflict of interest remains only with the MAG and his deputy (who wear ‘dual hats’) and does not extend throughout the military justice system.¹⁰⁸

56. The Commission was presented with submissions that were critical of the MAG’s ‘dual hat’ and its consistency with the principle of impartiality.¹⁰⁹ For example, in the submission to the Commission by the Israel Democracy Institute, it was argued: ‘[The MAG] effectively manages the Corps and is personally involved in a variety of decisions, relating both to consultancy [advisory] and to opening investigations. The conflict of interest between the consultancy role and the prosecution role is therefore clearly expressed in the role of a senior functionary in the military legal system, which is in *a potential conflict of interest* in investigations relating to decisions that he himself made’.¹¹⁰

On the other hand, the MAG contended before the Commission that, ‘insofar as the phenomenon of the “dual hat” does in fact create alleged difficulties in fulfilling the enforcement duties of the MAG’, it does so only in a few cases where there is overlap between the advice and the allegations. In such cases an appeal can be submitted to the Supreme Court.¹¹¹ The MAG further strengthened his position by comparing his ‘dual hat’ to the

108 See: *MAG Position Paper 2010*, *supra* note 72, at 68; For more on the division in the MAG Corps between the prosecution and the legal advice, see: Chapter C, para. 21.

109 See: *ACRI – Position Paper*, *supra* note 66, at 24.

110 See: *Shany, Cohen & Rosenzweig, Response Paper to MAG*, *supra* note 11, at 22; See also: Eyal Benvenisti, *The Examination and Investigation Duties regarding Violations of the Laws of Armed Conflict that apply to the State of Israel* 23–25 (Apr. 13, 2011) [hereinafter: *Benvenisti Opinion*].

111 See: *MAG Position Paper 2010*, *supra* note 72, at 69.

Attorney-General who advises the executive branch of government and also heads the Public Prosecution.¹¹²

57. Relevant to this discussion is the connection between legal advice and the initiation of an investigation, because a suspect of an offense might have the defense that he was acting upon legal advice, whether it was the MAG's or a different legal advisor's.¹¹³ However, the dual hat of the MAG may give rise to a *perception of partiality*. In order to prevent this, the Commission recommends taking two measures: strengthening the status and the independence of the CMP so that it is similar to the status of the Israeli State Attorney, and regulating in legislation a procedure for appealing the MAG's decisions to the Attorney-General (Recommendation No. 13(A)).

Therefore, on the matter of the roles of the MAG, the Commission recommends:

Appointment of the CMP

58. Currently, the CMP has no unique status and he is appointed just like any military prosecutor.¹¹⁴ This is contrary to the equivalent role in the civilian system – the State Attorney – who is appointed by a government resolution upon the recommendation of a search committee and whose term of office is fixed.¹¹⁵ The current situation is also different from the way the aforementioned countries regulate the status of their DMPs.

112 *Id.*, at 68.

113 See also: *Shany, Cohen & Rosenzweig, Response Paper to MAG, supra* note 11, at 21.

114 See: Article 181(a) of the Military Justice Law which determines that: 'the Chief of Staff, or whoever was authorized by him to do so, will appoint, upon the recommendation of the Military Advocate-General, officers with legal training to the position of military prosecutor; one of them, of at least four years legal experience, will be appointed as Chief Military Prosecutor'.

115 See: Resolution No. 1585 of the 30th Government of Israel, *Appointment Process for the Position of Attorney-General* (Feb. 29, 2004); See also: Resolution No. 2077 of the 31st Government of Israel, *Change in the Composition of the Committee to Locate Candidates for the Position of Attorney-General* (Jul. 22, 2007).

Therefore, the Commission recommends that the CMP be appointed by the Minister of Defense, on a recommendation of a committee chaired by the MAG. The CMP's tenure and rank should be determined in advance.¹¹⁶

Recommendation No. 9: CID Investigations

59. As detailed in Chapter A, one of the requirements that can be derived from the principle of effectiveness and thoroughness is that an investigation be conducted professionally.¹¹⁷

60. As evident from Chapter B, one of the ways countries ensure an effective and thorough investigation is by establishing special units for investigating incidents which raise a suspicion of a violation of international humanitarian law. For example, in both Australia and Canada, independent investigating units exist (ADFIS and CFNIS respectively) whose function is to investigate complex or especially serious incidents (including violations of international humanitarian law).¹¹⁸ A similar unit exists within the Military Police of the Netherlands.¹¹⁹

61. As detailed in Chapter C, in 2007, the IDF established the MAG Corps for Operational Matters within the framework of the military prosecution system. This team specializes mainly in handling examination and investigation files for offenses arising from operational activity of the IDF, and offenses of IDF soldiers that are committed against a civilian population in territory administered by the IDF or during combat. The advocates in this branch undergo special training, including relevant legal training, operational seminars, study tours in the operational units and instructions by military professionals. The purpose of establishing

116 It should be emphasized that this recommendation may have wider implications. Thus, for example, it is possible that there would be a need to similarly regulate the status of the Chief Military Defender.

117 See: Chapter A, paras. 80, 102.

118 See: Chapter B, paras. 42–43, 46, 53; See also Annex C: *The Canadian Report*, at para. 62.

119 See: Chapter B, paras. 67–69; See also Annex C: *The Netherlands Report*, at para. 2.

this branch was to improve the handling of cases and strengthening the effectiveness and thoroughness of conducting investigations.¹²⁰ It should be noted that in the CID there is no investigative unit that is equivalent to the MAG Corps for Operational Matters, which specializes in the investigation of such complaints.

Therefore, on the matter of CID investigations, the Commission recommends:

CID for Operational Matters

62. The Commission has reached the conclusion that alongside the MAG Corps for Operational Matters within the military prosecution, there is a need to establish a department for Operational Matters within the CID. The military police officers that will be appointed to the CID for Operational Matters shall undergo training in international humanitarian law, generally, and the obligations on investigating violations of international humanitarian law in particular. In order to ensure direct communication with witnesses, complainants and other relevant parties to the investigation, the investigators should include persons that are fluent in Arabic. In order to promote the CID's accessibility to complainants, the CID for Operational Matters should have military bases deployed throughout the areas where the incidents under investigated occur.

Recommendation No. 10: Establishing the Investigation Timeframe

63. As detailed in Chapter A, and as stated in paragraph 37, the principle of promptness includes the obligations to quickly commence and conduct an investigation in a timely manner. An investigation conducted within a reasonable period of time contributes to the thoroughness and effectiveness

¹²⁰ *MAG's Testimony – Part B, supra* note 47, at 25–27.

of the investigation and also to public confidence in the investigative system, and to the sense that justice is achieved.

64. The discussion in Chapter C demonstrated that in Israel there is no time limit allotted to an investigation, and from the files surveyed by the Commission, it appeared that the duration of these investigations sometimes extends over many years.¹²¹

65. Recently, Attorney-General Guideline 4.1202 became operative. The Guideline calls for the shortening of the duration of criminal proceedings (until the submission of an indictment) in the Public Prosecution. According to the Guideline:

Prompt criminal procedures that clearly demonstrate the relationship between the perpetrator and the punishment are of vast importance as an educational and deterring factor towards perpetrators and even towards the public... As time passes the greater the difficulty to access full and credible evidence...

Improving the pace of handling cases is also most important in terms of public confidence in the prosecution system. A prolonged delay in handling cases has a significant adverse impact on public confidence in the law enforcement system.¹²²

The rationales detailed in the Attorney-General Guideline are valid for investigations into violations of international humanitarian law.

Therefore, on the matter of the duration of the investigation, the Commission recommends:

121 See: *The A-Samouni Opinion*, *supra* note 19, in which the decision to close the file was made on 11 April 2012, approximately three and a half years after the incident; See also: THE SAMPLE EXAMINATION: File 154/09 where the MAG Corps request to expand the investigation was delivered to the CID a year and half after the original CID investigation file was handed to the MAG Corps.

122 See: *Duration of Handling a Claim until Submission of an Indictment*, ATTORNEY-GENERAL GUIDELINE 4.1202 (2010).

Establishing a Timeframe

66. The Commission concludes that a timeframe should be set for conducting investigations. The MAG in coordination with the Attorney-General shall set a period of time between the decision to open an investigation and the decision to adopt legal or disciplinary measures or to close the case. In order to guarantee that the regulated timeframe is adhered to, and in order to allow for adequate review, the MAG shall publish, at least once a year, statistical data on the period of time taken to handle files.

Recommendation No. 11: Transparency of Proceedings

67. As evident from Chapter A, the principle of transparency that is required for an 'effective investigation' has two aspects: the first is intended to guarantee the rights of the victims, and the second ensures public scrutiny of the investigative and prosecutorial processes.

68. The first aspect of the principle of transparency does not apply to investigations into incidents of 'actual combat'.¹²³ It should be noted that the Rights of Victims of Crime Law, 5761–2001 regulates the rights of victims of crime to access information about a criminal proceeding.¹²⁴ Thus, the Rights of Victims of Crime Law applies only to offenses investigated by the Israeli police or the PIID while the offenses investigated by the CID are excluded from this Law.¹²⁵

In relation to the second aspect of the principle of transparency, the Commission found that in some of the MAG Corps' files that were examined,

123 See: Chapter A, para. 106.

124 Article 8 of the Rights of Victims of Crime Law, 5761–2001, LA 183.

125 *Id.*, at Article 2, states that the Law applies only to offenses that are investigated by the Israel Police or the PIID.

the documentation in the file was overly brief, and in some of the cases it did not accurately reflect the procedures that were performed.

Therefore, on the matter of transparency, the Commission recommends:

A. Victims' Rights

69. The Commission recommends that the arrangements provided in the Rights of Victims of Crime Law relating to the receipt of information on criminal proceedings shall also be applied *mutatis mutandis* to persons injured by *law enforcement activity* by the security forces that are investigated by the CID. (It should be noted that below we will present a recommendation that the CID should also investigate incidents involving police forces, to which the Rights of Victims of Crime Law already applies (Recommendation No. 14)).

B. Documenting in a File

70. As noted above, the MAG Corps' files form a base of information that facilitates periodic internal checks and reviews by the MAG Corps. This base of information can also be relied on by oversight and review mechanisms. Documentation also assists and guides prosecutors with regards to administering files. The Commission recommends that the MAG Corps implement a strict documentation procedure, especially in files of investigations of violations of international humanitarian law.

OVERSIGHT AND REVIEW OF THE MAG CORPS

71. The obligation to establish oversight and review mechanisms and the manner in which such mechanisms should be conducted, are generally derived from domestic legal principles and from the international law principles of independence and effectiveness for an ‘effective investigation’. The survey of the six countries in Chapter B and the overall structure of Israel’s justice system can also aid in understanding the scope of these mechanisms. First we will assess the way the MAG’s decisions in his role as legal advisor to the military authorities are subject to oversight by the Attorney–General. Subsequently, we will assess the way the MAG’s decisions in his role as head of the military prosecution system are reviewed. The recommendations concerning oversight and review are largely institutional and are therefore based on Israeli law and practice.

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

72. In the civil justice systems of some of the countries that were surveyed in Chapter B, there are bodies that advise on the application of international humanitarian law. In the United States, the Department of Justice advises in the field of the laws of war to other arms of the executive branch, and it is the final arbiter in cases where controversy exists regarding legal interpretation between the Department of Defense and the military justice system and other authorities (such as the State Department).¹²⁶

73. As specified in Chapter C, the Attorney–General has the authority to give professional guidance to the MAG.¹²⁷ According to the Supreme Court, ‘like all government systems, also the MAG is subject to the professional

¹²⁶ See: Chapter B, para. 21; See also Annex C: *The US Report*, at para. 85.

¹²⁷ See: Chapter C, para. 62.

directives of the Attorney-General and to his legal opinion'.¹²⁸ Attorney-General Guideline 4.5000 determines that the professional independence of the MAG is 'internal', since the MAG does not operate 'detached and separately from the general law enforcement system and the protection of the rule of law over which the Attorney-General is in charge'.¹²⁹

The issue of the MAG's professional subordination to the Attorney-General was raised before the Commission. Professor Eyal Benvenisti was critical of the performance of the Attorney-General in exercising his oversight powers. He contended, *inter alia*, that 'in practice the Attorney-General is satisfied with a broad and full delegation of his power in the vital area of the laws of war and by so doing abdicates his duty'.¹³⁰ Also, the representative of B'Tselem – The Israeli Information Center for Human Rights in the Occupied Territories testified: 'unfortunately in all of our attempts to conduct a conversation with the Attorney-General regarding questions of policy, he referred us to the MAG'.¹³¹ On this matter, the Deputy State Attorney (Special Assignments) testified that the expertise in international humanitarian law lies primarily in the military.¹³²

Therefore, on the matter of oversight of the MAG Corps, the Commission recommends:

International Law Unit in the Ministry of Justice – Advice

74. The material that was submitted to the Commission and presented

¹²⁸ *Atiya* case, *supra* note 95, at para. 11 of Justice Beinisch's judgment.

¹²⁹ *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 (2002) [hereinafter: ATTORNEY-GENERAL GUIDELINE 4.5000].

¹³⁰ See: *Benvenisti Opinion*, *supra* note 110, at 25.

¹³¹ See: Transcript – Part B, session no. 2 "B'Tselem Testimony – The Israeli Information Center for Human Rights in the Occupied Territories" 16 (Apr. 11, 2011).

¹³² See: Transcript – Part B, session no. 11 "Testimony of Attorney-General and Testimony of Deputy State Attorney (Special Assignments)" 87 (Apr. 10, 2011) [hereinafter: *Testimony of the Attorney-General and Testimony of the Deputy State Attorney (Special Assignments)*].

in Chapter C suggests that the advice in the field of international humanitarian law is decentralized and is spread out over various bodies in the civil system. There is no advisory body within the Ministry of Justice that coordinates the international legal aspects of the security forces activity. In contrast, in the legal advice system at the MAG Corps there is an International Law Department (hereinafter: ILD).

In order to strengthen the Attorney-General in exercising his oversight powers over the MAG, the Commission recommends establishing a unit within the Advice and Legislation Department at the Ministry of Justice that shall specialize in international humanitarian law. For this purpose, administrative work should be undertaken to formulate positions and suitable training for this unit. Additionally, a permanent communication channel should be formed between the bodies dealing with this issue – the MAG Corps, the Ministry of Defense, the State Prosecution, the Ministry of Foreign Affairs, the National Security Council, etc. – and the unit that will be established. This recommendation has no intention of detracting from the roles of the ILD in the legal advice system of the MAG Corps and the ILD should be preserved as the center of expertise in the field of international law within the IDF.

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

75. As detailed in Chapter B, review mechanisms exist in some of the countries surveyed. In Canada, the military police are subject to the review of the Military Police Complaints Commission (MPCC). The MPCC is a civilian body with quasi-judicial status, established to strengthen the accountability and independence of military police in relation to military police investigations.¹³³ In Australia, the Inspector-General of the ADF (IGADF) is intended to provide the Chief of the Defence Force with a

¹³³ See: Chapter B, para. 23; See also Annex C: *The Canadian Report*, at paras. 104–105.

mechanism for internal audit of the military justice system which has the ability to expose, examine and remedy failures and flaws in the military justice system. The IGADF assesses such matters as abuse of authority and lack of procedural fairness as well as instances of cover-up or failure to act.¹³⁴ In the UK, the Service police are subject to inspection by Her Majesty's Inspectorate of Constabulary (HMIC). Since 2011, HMIC reports to the Secretary of State on the independence and effectiveness of military police investigations.¹³⁵

76. As described in Chapter C, the Attorney-General has review discretion over the military justice system.¹³⁶ On this matter the Israeli Supreme Court held that:

The Attorney-General is entitled to intervene, and even instruct the MAG on how to conduct himself in decisions that in his opinion are of *a special interest to the public* or where he finds that their *implications exceed beyond the areas of the military framework*. The intervention of the Attorney-General in these matters should be performed in the framework of his role as the person who bears supreme responsibility for the various prosecution authorities and the legal bodies in the executive branch.¹³⁷

Thus the Court ruled that fatal accidents in the IDF bear 'special interest to the public' in which there is room for the Attorney-General to intervene. The Court asserted that, 'this intervention derives from the issue being a matter of public interest of the first order and concerns the protection of human life that was entrusted to the military system'.¹³⁸ The Attorney-General's authority to intervene in such cases is expressed in a designated

134 See: Chapter B, para. 25; See also Annex C: *The Australian Report*, at para. 66.

135 See: Chapter B, para. 27; See also Annex C: *The UK Report*, at para. 3.44.

136 See: Chapter C, para. 63.

137 *Atiya case*, *supra* note 95, at para. 11 of Justice Beinisch's judgment [emphasis added].

138 *Id.*

guideline, according to which a complainant can object to the Attorney–General the MAG’s decision not to investigate or not to indict due to a fatal accident.¹³⁹ In the words of the guideline:

Where, in the opinion of the Attorney–General, a decision of the military prosecution not to investigate or not to prosecute and especially in connection with a fatal incident requires the Attorney–General’s intervention because it is not consistent with appropriate law enforcement policy, he is entitled, and may even be obliged to intervene. This is due to his unique position as head of the Public Prosecution and the legal advice, and as the authoritative interpreter of the law to all arms of the executive branch including the military and security systems.¹⁴⁰

77. The Deputy State Attorney (Special Assignments), in his testimony before the Commission, highlighted the importance of complaints regarding violations of international humanitarian law, and claimed that the public interest that these cases raise, justifies the option of providing the right of appeal against decisions of the MAG not to open an investigation. In his words:

... You sir proposed, why shouldn’t an appeal procedure be established? In fact it exists. We announce this everywhere. It’s written on paper... Families [of the injured and the deceased] know this. People are familiar with this. In issues that have public interest that exceeds the military’s boundaries, and in general an allegation that a soldier killed a person while violating the laws of war is a matter that has public interest exceeding the military boundaries, *an appeal can be filed*.¹⁴¹

However, the Deputy State Attorney (Special Assignments) noted that

139 ATTORNEY–GENERAL GUIDELINE 4.5000, *supra* note 129, at 20.

140 *Id.*, at para. 4.

141 See: *Testimony of the Deputy State Attorney (Special Assignments)*, *supra* note 132, at 25 [emphasis added].

an appeal procedure was never formally regulated.¹⁴² The MAG, on his part, opposed institutionalizing the appeal procedure. He argued that institutionalizing the appeal in legislation could erode the authority and status of the MAG.¹⁴³

It should be noted, that the Commission is unaware of any decision by the Attorney-General to open an investigation against the MAG's position.¹⁴⁴

78. In the framework of the discussion of review of the military justice system in Israel, the question of systemic review should be addressed. The appeal to the Attorney-General (discussed above) is an individual procedure for review of a specific case. In contrast, systemic review deals with an over-arching review of a system's general functioning. Over the past few years, public debate has arisen over whether an over-arching review body of the civilian enforcement system should be established. Recently, the Attorney-General transferred to the Knesset State Control Committee a draft of a summary report prepared by the Team for Examining the Establishment of a Complaints Commission on the Civilian Prosecution. The team recommended designing 'a designated review mechanism that deals with proactive and constant review over the prosecution system'.¹⁴⁵ Amongst the justifications for establishing the complaints commission, it was emphasized that there is 'a serious deficiency specifically in systemic review'.¹⁴⁶ According to the team, the proposed body will provide the Attorney-General with a 'managerial and review tool to deal with the manner in which the prosecution system operates'. This tool is 'intended to

¹⁴² *Id.*, at 26.

¹⁴³ *Meeting with MAG*, *supra* note 46, at 6.

¹⁴⁴ See: *Shany, Cohen & Rosenzweig, Response Paper to MAG*, *supra* note 11, at 28: 'Practically, to the best of our knowledge, there are no recent examples of cases where the Attorney General ruled against the MAG's position to open a military investigation due to an IHL violation'.

¹⁴⁵ See: *Draft Summary of the Team's Summarizing Report to examine the applicable possibility of establishing a complaint authority for the State Attorney* (draft accurate to Feb. 12, 2010).

¹⁴⁶ Protocol of meeting no. 240 of the State Control Committee, the 18th Knesset (Feb. 13, 2012).

reinforce public confidence' because systemic review by an institutionalized body will improve the performance of the prosecution system.¹⁴⁷ These comments are also valid for our purposes.

Indeed, it is important to note, for the sake of completeness, that the MAG's decision not to open investigation is of course subject to the review of the Supreme Court within the framework of petitions submitted to the Court.¹⁴⁸ In practice, however, the ability of the Court to review such decisions is rather limited. This is because, *inter alia*, a petition to the Supreme Court is usually submitted long after the incident in question.¹⁴⁹ In the words of the Supreme Court:

... [T]he request for the remedy of a criminal investigation or instituting a criminal proceeding... is a request with an 'expiration date'. When time passes from an event that is in the subject of a request of this type, there is longer any point to the request.¹⁵⁰

The Court's function as a review mechanism of the MAG's decision not to open an investigation is therefore limited.

Therefore on the matter of individual and systemic review over the MAG Corps, the Commission recommends:

¹⁴⁷ *Id.*

¹⁴⁸ See: *Testimony of the Attorney-General*, *supra* note 132, at 12–13: 'the Supreme Court, in its role as High Court of Justice supervises the decisions of the Attorney-General and the State Attorney's Office, as well as the decisions of the MAG. The Court, in the past, intervened in decisions on indictment, including in cases where it was claimed that soldiers should be indicted for actions performed during a military operation or in relation to it. The High Court of Justice's supervision also constitutes part of the examination mechanism regarding complaints and claims of violations of the laws of war'.

¹⁴⁹ For example, see: HCJ 5817/08 *Aramin v. Attorney-General* (still unpublished, Jul. 10, 2011) [hereinafter: *Aramin* case] which dealt with the decision not to indict Border Police officers for an incident where a ten year old girl from the West Bank died from a head injury. The High Court of Justice decision was given more than four years after the incident. For the extent to which the HCJ intervenes in the MAG's decisions see also: Chapter C para. 65.

¹⁵⁰ See: HCJ 3292/07 *Adalah – The Legal Centre for Arab Minority Rights v. Attorney-General* (still unpublished, Dec. 8, 2011), at para. 15 of President Beinisch's judgment.

A. Individual Review – Appeal to the Attorney–General

79. It appears that according to the accepted normative approach in Israel, there is a requirement to regulate the review of the civilian system over the military system on issues that bear ‘special interest to the public’ or that ‘their implications exceed beyond the areas of the military framework’.¹⁵¹ The Commission therefore recommends the enactment of an appeal procedure to the Attorney–General concerning decisions of the MAG. This legislation should determine the period of time for filing an appeal and for the Attorney–General to hand down his decision on the appeal.¹⁵²

B. Systemic Review – The Complaints Commission for the State Prosecution

80. The Commission recommends that when the complaints commission for the civilian Prosecution is established, it should be authorized to review all the branches of the military prosecution and to monitor the bodies at the IDF that conduct examinations and investigations. This is in order to ensure that the MAG’s regulations and policy are being implemented *de facto*.

2. THE BODY THAT INVESTIGATES COMPLAINTS AGAINST POLICE OFFICERS

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

81. The principles required for an effective investigation, outlined in Chapter A, apply equally to the conduct of investigations of suspected

151 *Atiya case, supra* note 95, at para. 11 of Justice Beinisch’s judgment; See also: ATTORNEY–GENERAL GUIDELINE 4.5000, *supra* note 129, at 2.

152 See: Article 65 of the Criminal Procedure Law [Consolidated Version], 5742–1982, LA 1043; ATTORNEY–GENERAL GUIDELINE 4.5000, *supra* note 129.

violations of international humanitarian law, whether carried out by the army, the police or any other investigative body.

82. In Israel, as described in Chapter C, the Police Internal Investigations Department at the Ministry of Justice (PIID) investigates complaints filed against police officers, including complaints of violations of international humanitarian law.¹⁵³ It therefore appears that investigations of complaints against police officers are not conducted within the police. However, there are exceptions to this rule.¹⁵⁴ The main exception is shooting incidents by the Border Police ('green police') in the West Bank which *are* investigated by the police. It should be noted that most complaints against police officers for violations of international humanitarian law are such shooting incidents.

When the PIID was established in 1992 such shooting incidents were supposed to be handled by them. However, in that year the handling was transferred to the investigative branch of the Judea and Samaria District of the Israel Police. In 2007, the State Attorney decided to cancel this change of policy and to return the investigation of shooting incidents that occur in the West Bank to the PIID in a gradual process that was to have been completed by 1 January 2009.¹⁵⁵ The State Attorney's decision, on handing back responsibility for investigating police shooting incidents to the PIID, was never fully implemented and thus the *de facto* responsibility remained in the hands of the Judea and Samaria District of the Israel Police.¹⁵⁶

83. For our purposes, it is relevant to consider whether the IDF is the appropriate body to handle these investigations because, according to the Security Provisions Order, police activity in the West Bank is subordinate

153 See: Chapter C, paras. 43–44.

154 *Id.*, at para. 44.

155 *Id.*

156 *Id.*

to the IDF commander in the region, and their powers are equivalent to the powers of IDF soldiers.¹⁵⁷ Furthermore, the characteristics of the ‘green police’ activity in the West Bank resemble the characteristics of IDF activity.¹⁵⁸ As discussed in Chapter C, there is a dispute between the Ministry of Justice and the police on the question of the appropriate body to investigate police officers that were involved in such incidents. In 2011 the head of the PIID recommended that shooting incidents involving police in the West Bank should be investigated by the military.¹⁵⁹ One of the reasons he gave was that the PIID do not have adequate expertise: ‘the investigations require cumulative knowledge about the realities on the ground and about the military orders and their compatibility – where required – with international law. This complex issue is in the clear field of expertise of the military investigative authorities and the military legal experts... This is a field which is alien to the work of the department [PIID]’.

84. In practice, investigations into shooting incidents by green police in the West Bank are handled by the police (Judea and Samaria District of the Israel Police). Therefore, it is necessary to assess whether these investigations conform with the principles for an effective investigation as outlined in Chapter A. The accepted approach in Israel is that the investigation of police by police, at least in terms of perception, compromises the independence of the investigation.¹⁶⁰ The Commission is of the view

157 *Id.*, at para. 42; Order Regarding Security Instructions [consolidated version] (Judea and Samaria) (no. 1651), 5770–2009; This order replaced the Order Regarding Police Forces Operating in Judea and Samaria in Coordination with the IDF (no. 52) 5727–1967, which regulated police activity in the West Bank and their powers. See particularly: Article 1 according to which police forces operating in the West Bank are viewed as ‘policemen and officers in the Israel Police, placed under the command of the IDF forces commander in the territories’, and Article 4 according to which every police officer is granted the powers equivalent to any soldier set out in the security legislation.

158 See: Chapter C, para. 42. Border Police soldiers are recruited as an alternative to military service, they undergo infantry basic training and their officer training course is shared with the IDF rather than the Police. See further: *Border Police*, IDF website, available at: www.aka.idf.il/giyus/general/?catId=23067&docId=31509.

159 See: letter from Herzl Shaviro, Head of the PIID, to Attorney-General, Moshe Lador, *Identity of Investigating Body for Border Police Shooting Incidents in Judea and Samaria and Stalling the Decisions to Transfer Investigation Authority on the Matter to the CID* (Jan. 30, 2011); See also: Chapter C, paras. 44–45.

160 This approach is reflected in, *inter alia*, the establishment of the PIID (See: Chapter C para. 43) and in the State Attorney’s decision of 2007 (*Id.*, at para. 44).

that the handling of complaints against police, in the format described in Chapter C, also occasionally hinders the promptness of the investigation. The reason for this is that the identity of the perpetrator (a soldier or a Border Police officer) impacts upon the determination of the appropriate investigative body. The lack of clarity – both for complainants and for those responsible for investigations – on the question of who will investigate, IDF or Israel Police, often causes complications for the investigation process and causes significant delays.¹⁶¹ Moreover, when the complaint concerns an incident in which both soldiers and police officers participated together, or when it is unclear which of these forces participated in the incident, the investigation process has a number of stages. First the MAG Corps examines the identity of those involved in the incident and only after it has reached conclusions about the involved soldiers or after it becomes clear that the complaints are only against police officers (and not soldiers) is the file handed over to the police.¹⁶² From this point on, there is no orderly structure for how complaints are handled: sometimes the Deputy State Attorney (Criminal Matters) makes a decision on whether to open an investigation, and sometimes the file is transferred directly to the police and an investigation is opened without a preliminary decision of the Deputy State Attorney.¹⁶³ This situation detracts from the promptness of the investigation and also from its effectiveness and thoroughness. It is important to emphasize that, in order for investigations of suspicions of violations of international humanitarian law in the West Bank to meet

161 See for example: THE SAMPLE EXAMINATION: File 427/07 which dealt with an incident in which the Police Undercover Unit were involved. The transfer of the operational debriefs to the Deputy State Attorney (Criminal Matters) occurred approximately three and a half years after the incident.

162 See for example: *Summary of Discussion of Aug. 7, 2011 Regarding Transfer of CID case 195/07 – The Injury of Mahmud Abu Slalcha in Nablus on Jan. 18, 2007* (Deputy State Attorney's Office (Criminal Matters), Aug. 15, 2011). The discussion dealt with a file that concerned an incident involving both Border Police and IDF soldiers. First the file was examined by the military prosecutor who decided that 'there is insufficient evidence to prosecute any IDF soldiers'. Following this, the file was transferred to the Deputy State Attorney 'in order to examine the need for a continued investigation into the Border Police forces who took part in the operation'. The file reached the Deputy State Attorney on 29 March 2011 (over four years after the incident) and it was decided that the file would be transferred to the police for further investigation. In the summary discussion of this file the Deputy State Attorney determined that the investigation method practiced in cases that involved both forces 'is not efficient and it is doubtful whether it is sufficient to arrive at the truth, and this is clear'.

163 See: Chapter C, paras. 46, 102.

the principles of effectiveness and thoroughness, the investigators must be professional and have experience in the fields of their investigations and they also must be equipped with the appropriate tools that are necessary to perform the examination and investigation process in the relevant area.¹⁶⁴

Apart from the difficulty posed by the fragmented handling of complaints – especially between the IDF and the police – the Commission was presented with material suggesting practical difficulties in the way the Judea and Samaria District manages investigations.¹⁶⁵

Therefore, on the matter of the handling of complaints against police, the Commission recommends:

Examining and investigating Police activity under IDF command

85. The Commission is of the view that where there are alleged violations of international humanitarian law following *police activity carried out under the IDF command*, these allegations should be examined and investigated by the IDF and not by the police. The Commission was satisfied that the examination and investigation bodies in the IDF, and especially the MAG Corps, have the experience and requisite expertise to handle such investigations, as well as proficiency in the applicable law to such activity (in this context see also Recommendation No. 9, on the CID for operational matters).

The Commission therefore recommends that the examination and investigation of complaints against police officers assigned to the IDF for

164 Meeting between Hoshea Gottlieb, the Commission's Coordinator, and Uri Carmel, Head of the Police Internal Investigation Department, 1–2 (Sep. 22, 2011); See also: *Testimony of the Deputy State Attorney (Special Assignments)*, *supra* note 132, at 50.

165 See, for example: *Aramin case*, *supra* note 149, at paras. 18–19 of President Beinisch's judgment. See also summaries of Discussions at the Deputy State Attorney's office (Criminal Matters): *Summary of May 16, 2007 Meeting – Transfer of Police Inquiries Regarding Shooting Incidents* (May 20, 2007); *Shooting Incident Without Inquiry* (Feb. 25, 2009); *Summary of Jul. 28, 2009 Discussion – Police Inquiries* (Oct. 15, 2009).

violations of international humanitarian law in the West Bank shall be carried out by the IDF.¹⁶⁶

3. THE BODY THAT INVESTIGATES COMPLAINTS AGAINST ISA INTERROGATORS

Recommendation No. 15: The Handling of Complaints against ISA Interrogators

86. As stated in Chapter A, according to international law – namely, international humanitarian law and international human rights law – an investigation does not necessarily mean a criminal investigation.¹⁶⁷ In other words, investigations of soldiers, police officers or other security agents can take various forms as long as the investigation adheres to the principles of an ‘effective investigation’.

87. As detailed in Chapter C, in 1992 Israel established a special investigative mechanism to examine complaints against ISA interrogators made by interrogated persons.¹⁶⁸ According to this mechanism, the complaints are transferred to the Interrogatee Complaints Comptroller (Mavtan) who is a senior ISA employee that never worked in the Investigations Department of the ISA, and who is authorized as a disciplinary investigator.¹⁶⁹ The Mavtan investigates the complaints and transfers his findings to ‘the Mavtan’s Supervisor’. The Mavtan’s Supervisor formulates a recommendation on whether there is a basis

¹⁶⁶ This recommendation has broader ramifications and extends beyond police activity in the West Bank to include *all* activity under the IDF command, for example the Israel Prison Service’s activity under the Navy’s command during the maritime incident of 31 May 2010.

¹⁶⁷ See: Chapter A, paras. 62, 65; It should be noted that the ISA activity may take place either in Israel or in the West Bank and the complaints submitted are usually allegations of torture or inhuman treatment which are offenses according to international humanitarian law as well as according to international human rights law.

¹⁶⁸ See: Chapter C, paras. 47–49.

¹⁶⁹ *Id.*, at para. 48.

for opening a criminal investigation, whether it should be referred to disciplinary proceedings, whether the matter should be investigated further or whether the file should be closed. The findings of the Mavtan and the recommendation of the Mavtan's Supervisor are transferred to the Attorney-General, or to whomever the Attorney-General delegates his power, who makes a decision on whether to open a criminal investigation. If it is decided to open a criminal investigation, the file is transferred for the PIID to investigate.

88. Representatives of the Public Committee against Torture in Israel claimed before the Commission that since the establishment of the Mavtan in 1992, 'over 700 complaints [were submitted to the Mavtan] and not a single criminal investigation was opened'.¹⁷⁰ And indeed, from the material submitted to the Commission, it appears that the Mavtan and the Mavtan's Supervisor have never recommended that a criminal investigation be initiated on the basis of a complaint, and the Attorney-General has never instructed that such a criminal investigation be opened.¹⁷¹ The head of the ISA presented the Commission with an explanation for the discrepancy between the number of complaints that were filed and the lack of criminal investigations. He contended that the large number of complaints submitted to the Mavtan stems, *inter alia*, from the fact that the interrogatees who confessed, or incriminated others, sometimes falsely accuse their interrogators so that they are not considered to be persons who had 'broken' under investigation or as collaborators with Israel.¹⁷² Following such allegations criminal investigations are not opened.

89. In 2007, the State Attorney's Office conducted an examination of

170 See: Transcript – Part B, session no. 11 "Testimony of Public Committee Against Torture in Israel" 2 (Apr. 12, 2011).

171 It should be noted that there were complaints that led to disciplinary measures or to a change in interrogation procedures without holding the interrogators accountable. See also on this issue: *Testimony of the Deputy State Attorney (Special Assignments)*, *supra* note 132, at 55–56.

172 See: Transcript – Part B, session no. 12 "Testimony of the Head of the Israel Security Agency" 15 (Apr. 12, 2011) [hereinafter: *ISA Testimony*].

this investigation mechanism which was prompted by criticism leveled against the Mavtan. The conclusions and recommendations that were formulated by the State Attorney's Office were based on their day-to-day experience working with the Mavtan, and on a sample examination of files that the Mavtan investigated.¹⁷³ The examination's conclusions included the finding that the Mavtan 'is very limited in his skills as an investigator' and his questions are 'laconic'. It further determined that the Mavtan 'does not know how to confront his interogatees with diverse findings and conflicting testimonies, and he does not always investigate all of the interrogators relevant to the complaint. This problem is exacerbated by the fact that he has to investigate talented and experienced interrogators'. The conclusions of the State Attorney's examination also found that the investigation process of the Mavtan takes too much time. An additional flaw that the examination identified was that ISA interrogations are not sufficiently documented, and that this lack of documentation creates a difficulty for the Mavtan's investigations. The examination did, however, note that 'a significant improvement in documenting the interrogation has taken place'.¹⁷⁴

Following the conclusions of this examination, in 2010 the Attorney-General decided that the Mavtan will no longer be an ISA worker, but a worker at the Ministry of Justice. Two of the main reasons behind the decision were:

The *first reason* concerns a *problem of performance*, i.e., the inherent difficulty of the Mavtan to fulfill his role, by virtue of the fact that he is a worker of the Israel Security Agency, who is inspecting the activity of his colleagues. *The second reason* primarily concerns the *problem of perception*, i.e., the difficulty to justify a situation where an individual who is perceived to be

173 See: letter from Deputy State Attorney (Criminal Affairs), Mr. Yehoshua Lamberger, to State Attorney Eran Shendar, *Sample Examination of Mavtan Files* (Oct. 9, 2007).

174 *Id.*

internal to the Israel Security Agency examines complaints – ostensibly criminal – against his colleagues in the service.¹⁷⁵

To date, the Attorney–General’s decision has not been implemented.

90. The flaws described above raise serious doubts about the ability of the Mavtan to conduct an ‘effective investigation’. Due to these flaws described in the conclusions of the State Attorney’s examination, there are serious failures in the effectiveness and thoroughness and also in the promptness of the investigation process. To this we should add that the said 2010 decision of the Attorney–General emphasized the lack of independence in the Mavtan’s investigation process, as well as a perception of a lack of independence, because ‘he is a worker of the Israel Security Agency who is inspecting the activity of his colleagues’. The fact that no criminal investigations were ever opened only exacerbates these concerns.¹⁷⁶

Therefore, on the matter concerning the handling of complaints against ISA interrogators, the Commission recommends:

A. Transferring the Mavtan’s role to the PIID

91. The Commission recommends transferring the Mavtan’s role to the PIID at the Ministry of Justice so that the Mavtan’s Supervisor will be the Head of the PIID. The Attorney–General will continue to decide whether to open a criminal investigation on the basis of the findings of the Mavtan and the recommendation of the Mavtan’s Supervisor. Transferring the Mavtan’s role to the PIID creates consistency with the other investigative

¹⁷⁵ *Transfer of the Mavtan to the Ministry of Justice* (Summary of Discussion of Oct. 4, 2010, Attorney–General’s office, Nov. 11, 2010).

¹⁷⁶ It should be noted that meanwhile the Supreme Court handed down a decision on the legality of the special investigative mechanism to examine complaints by ISA interrogatees against their interrogators. See: HCJ 1265/11 *Public Committee Against Torture in Israel v. Attorney–General* (still unpublished, Aug. 6, 2012);

processes in which the discretion to open an investigation is limited to the Attorney-General.¹⁷⁷

B. Documenting ISA Interrogations

92. Documenting ISA interrogations will reinforce the thoroughness and effectiveness of the Mavtan's investigation. In the said examination by the State Attorney's Office, and in testimonies presented to the Commission, the issue of documenting ISA interrogations arose. The head of the ISA suggested that visual recording of ISA interrogations should be seriously considered. In his words: 'even if not everyone always likes it I think that it would be proper'.¹⁷⁸ The Commission therefore recommends that there shall be full visual documentation of the interrogations, according to rules that will be determined by the Attorney-General in coordination with the head of the ISA.

4. THE BODY THAT INVESTIGATES COMPLAINTS AGAINST WARDENS

Recommendation No. 16: The Handling of Complaints against Wardens

93. As discussed in Chapter A, the responsibility to investigate includes maintaining mechanisms that ensure that investigations are conducted effectively and thoroughly.

94. As discussed in Chapter C, the National Prison Wardens Investigation Unit (NPWIU) is responsible for examining and investigating claims of criminal offenses by members of the Israel Prison Service. Therefore, this

¹⁷⁷ See: *Investigation of Public Figures*, ATTORNEY-GENERAL GUIDELINE 4.2200 (2003).

¹⁷⁸ See: *ISA Testimony*, *supra* note 172, at 22-23. See also: Criminal Procedure Law (Investigating Suspects), 5762-2002, LA 1855, at Article 17.

is the unit that handles complaints and claims concerning violations of international humanitarian law. Most of the investigators of this unit are appointed to the position after training as police investigators and serving in the National Unit for International Investigations.¹⁷⁹

Therefore, on the matter of training investigators, the Commission recommends:

Training

95. The head of the Investigations and Intelligence Department at the police should ensure that in the framework of training the investigators, proper emphasis is placed on the relevant rules of international law, especially the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,¹⁸⁰ the UN Standard Minimum Rules for the Treatment of Prisoners,¹⁸¹ the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment,¹⁸² and the Istanbul Protocol (Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment).¹⁸³ This recommendation applies to all of the bodies that deal with investigations into incidents to which international law applies (see above Recommendation No. 9).

179 See: Chapter C, para. 51; It should be noted that the commission did not meet an NPWIU representative and it did not thoroughly assess the conduct of this organization.

180 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 U.N.T.S 85 (1984) (Israel signed the convention on Oct. 22, 1986 and ratified it on Oct. 3, 1991).

181 Standard Minimum Rules for the Treatment of Prisoners, adopted Aug. 30, 1955 by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, U.N. Doc. A/CONF/611, annex I (1957), amended E.S.C. res. 2076, 62 U.N. ESCOR Supp. (No. 1) at 35, U.N. Doc. E/5988 (1977).

182 U.N. Commission on Human Rights Working Group on Arbitrary Detention, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment regarding the situation of immigrants and asylum seekers, U.N. Doc. E/CN.4/2000/4/Annex 2 (1999).

183 Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ('Istanbul Protocol'), U.N. Doc. HR/P/PT/8/Rev.1 (Aug. 9, 1999).

5. THE BODY THAT INVESTIGATES COMPLAINTS AGAINST THE CIVILIAN ECHELON

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

96. As noted in Chapter A (and above in paragraph 86 regarding the ISA), when there is an obligation according to international law to open an investigation, it does not necessarily have to be a criminal investigation but it must adhere to the principles for an ‘effective investigation’. An example of an effective investigation that is not criminal, but is recognized by international law, is a commission of inquiry.¹⁸⁴

97. As detailed in Chapter B, it is accepted practice in the six countries surveyed to use commissions of inquiry as a tool for investigating allegations of violations of international humanitarian law by senior military personnel or civilian echelons. These commissions can be initiated by parliament or government.¹⁸⁵ Furthermore, the government may order commissions of inquiry into events of public interest or concern, including an apprehension that violations of international humanitarian law occurred. In Canada, the government is authorized to appoint a public inquiry to investigate important events. One example is the Commission of Inquiry into the Deployment of the Canadian Forces in Somalia (1994–1997) which examined, *inter alia*, accusations of torture and murder of a Somali prisoner captured by Canadian soldiers.¹⁸⁶ In the UK, the Inquiries Act of 2005 authorizes any minister to initiate a public inquiry into an event arousing public interest, and to appoint the members of the commission.¹⁸⁷

184 See also: Chapter A, paras. 62, 65.

185 See: Chapter B, paras. 54, 59, 71; See also Annex C: *The US Report*, at paras. 15, 52; *The Australian Report*, at para. 28. See also on this matter: Senate Foreign Affairs, Defence and Trade Committees, *Duties of the Australian Personnel in Iraq* (Aug. 18, 2005), available at: www.aph.gov.au/Senate/committee/fadt_ctte/completed_inquiries/2004-07/iraq/report/index.htm.

186 See Annex C: *The Canadian Report*, at para. 24.

187 See: Inquiries Act (2005 c. 12), s. 4.

Two examples that are pertinent to our discussion are the Baha Mousa and Al Sweady Inquiries. The Baha Mousa Inquiry, established in 2008 and chaired by a former judge of the UK Appeals Court, involved a public inquiry to examine the death in UK custody in Basra of an Iraqi citizen. The Al Sweady Inquiry, established in 2009 and chaired by a retired UK High Court judge, involved a public inquiry into allegations of unlawful killing and mistreatment of Iraqi detainees by British soldiers in Basra.¹⁸⁸

98. As discussed in Chapter C, in Israel, aside from the criminal examination and investigation process,¹⁸⁹ the government establishes, when necessary and at its discretion, State or Government Commissions of Inquiry, to investigate subjects of special importance.¹⁹⁰ Some of them – such as the Kahan Commission, the Winograd Commission and the Turkel Commission – dealt with issues concerning violations of international humanitarian law.¹⁹¹ It should be noted that commissions of inquiry are established on an *ad hoc* basis to investigate exceptional events which allow the permanent investigation mechanisms to invest their resources in routine events and refrain from diverting resources to management by exception.

Therefore, on the matter of the handling of complaints against the civilian echelon in the framework of commissions of inquiry, the Commission recommends:

188 For further reading, see Annex C: *The UK Report*, at paras. 1.33–1.37.

189 See: Chapter C, paras. 52–54.

190 See: Chapter C, paras. 55–58.

191 See also: *Testimony of the Deputy State Attorney (Special Assignments)*, *supra* note 132, at 37.

Commissions of Inquiry

99. The Commission concludes that the system of investigation by commissions of inquiry (and examination) which is well established in Israel satisfies Israel's legal obligations under international law to investigate acts, decisions or omissions¹⁹² that give rise to a suspicion of serious violations of international humanitarian law (for example, the Kahan Commission).¹⁹³ The Israeli commissions of inquiry system allows those commissions to meet the requirements of an 'effective investigation'. The Commission is of the opinion that according to international law and the accepted practice in the countries surveyed, the fact that the government establishes a commission of inquiry does not, in itself, compromise the independence of the commission.¹⁹⁴

The government must take steps to ensure that a commission's terms of reference guarantee that it will operate in an independent fashion and that the members of a commission have no conflict of interest with the subject of the investigation. Moreover, the terms of reference must ensure an effective and thorough investigation, by appointing professional members with experience and knowledge in the subject of the commission's mandate, as well as by defining the commission's powers, including allowing access to all evidence. It is desirable that when investigating a subject of alleged violations of international humanitarian law, a term shall be set in advance for the duration of the commission and the submission of its recommendations.

192 This conclusion should be read in light of Recommendation No. 2 on incorporating into legislation the criminal responsibility of civilian superiors. See also: Chapter A, para. 26.

193 See also: Chapter A, para. 65.

194 See: Chapter A, para. 72

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

On the matter of implementing this Report, the Commission recommends:

A. MAG Guidelines

100. The Commission recommends that, similar to the State Attorney Guidelines and the Attorney-General Guidelines, the MAG shall also publish a comprehensive and updated handbook for the examination and investigation mechanisms at the IDF. The handbook should lay down guidelines for the examination and investigation mechanisms that shall be publicly available.¹⁹⁵ The MAG's guidelines will form the IDF guide on examining and investigating complaints and claims regarding violations of international humanitarian law. Some of the recommendations in this Report deal with practices and rules that derive from Israel's obligations under international law. The MAG's guidelines should incorporate the guidelines and procedures that will be formulated pursuant to the recommendations of this Report. The handbook could, in the future, be part of a chapter in a comprehensive military manual on Israel's international humanitarian legal obligations and practices.

B. An Implementation Team

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

¹⁹⁵ It should be noted that there are internal MAG Corps guidelines. The Commission was informed that work is being carried out to update the CMP guidelines, including the writing of a guideline related to operational incidents.

SUMMARY OF THE CONCLUSIONS AND RECOMMENDATIONS

In this Report the Commission reached the following recommendations and conclusions:

Recommendation No. 1: 'War Crimes' Legislation

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

2. Moreover, the Commission regards as important the specific inclusion of international 'war crimes' norms in Israeli domestic legislation. The accepted approach in the countries surveyed is to enshrine international criminal offenses in domestic legislation.

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

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

Recommendation No. 3: Reporting Duties

4. The 2005 Reporting Procedure determined by the Chief of Staff, following an undertaking to the High Court of Justice, has not been implemented. The Reporting Procedure should be incorporated into the Supreme Command Orders and shall apply to every incident involving the

IDF or forces for which the IDF is responsible. The Reporting Procedure should be implemented and sanctions should be imposed on commanders who do not comply with it.

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

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

6. The Investigation Policy in the IDF, whereby a CID investigation is not begun immediately following the death of a person during combat operations unless there is a reasonable suspicion that an offense has been committed, is consistent with Israel's obligations under international law. However, this policy is not properly enshrined in Israeli law. It should therefore be enshrined in appropriate rules and guidelines.

7. In order to expedite the investigation of complaints, initial reports should be classified according to the legal framework of each incident, namely whether the incident occurred during combat operations and is therefore subject to the rules regulating hostilities, or whether it is any other incident subject to law enforcement norms.

Recommendation No. 5: Fact-Finding Assessment

8. An operational debriefing is not designed for deciding whether to begin an investigation. A mechanism should be established for carrying out a fact-finding assessment, which should form the basis for the MAG's decision as to whether an investigation is necessary. For this purpose a

special team shall be established in the IDF with expertise in the theatres of military operations, international law and investigations. The function of the team will be to provide the MAG with as much information as possible, within a period of time stipulated in procedures, in order to enable the MAG to decide whether to begin an investigation.

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

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

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

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

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

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

Recommendation No. 7: Independence of the MAG

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

15. The MAG should be appointed by the Minister of Defense, upon the recommendation of a public professional committee. In order to institutionalize the professional subordination of the MAG to the Attorney-General, the latter should be the chairman or a member of the public committee.

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

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

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

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

Recommendation No. 9: CID Investigations

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

**Recommendation No. 10: Establishing the Investigation
Timeframe**

20. The MAG, in coordination with the Attorney–General, should set a maximum period of time between the decision to begin an investigation and the decision to adopt legal or disciplinary measures or to close the case. The MAG should publish, at least once a year, statistical data on the period of time taken to handle cases.

Recommendation No. 11: Transparency of Proceedings

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

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

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

23. In order to strengthen the Attorney–General in exercising his

oversight powers over the legal advice given by the MAG, a unit specializing in international humanitarian law should be established in the Advice and Legislation Department at the Ministry of Justice.

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

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

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

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

26. The examination and investigation of complaints against police officers operating under IDF command for violations of international humanitarian law in the West Bank should be carried out by the IDF, rather than by the Israel Police or by the Police Internal Investigation Department at the Ministry of Justice.

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

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

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

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

29. The head of the Investigations and Intelligence Department at the police should ensure that during investigators' training, proper emphasis is placed on the relevant rules of international law.

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

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

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

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

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

CHAPTER E: THE EXAMINATION AND INVESTIGATION OF THE MARITIME INCIDENT OF 31 MAY 2010

INTRODUCTION

1. In the Government Resolution of 14 June 2010 to appoint the Commission (hereinafter: the Government resolution to appoint the Commission), the Commission was also asked to address the manner in which the mechanism to examine and investigate complaints and claims of violations of international humanitarian law generally practiced in Israel, was implemented with respect to the investigation of the maritime incident of 31 May 2010 – the same incident that the Commission examined in great detail in the Report it submitted to the Prime Minister on 23 January 2011 (hereinafter: the Commission's First Report).¹ In this chapter we will address this issue, i.e., the examination and investigation proceedings that took place following the events of 31 May 2010. In the first section of this chapter we will briefly summarize the events of the maritime incident of 31 May 2010 (hereinafter: the maritime incident). In the second section of this chapter we will survey the examination and investigation undertaken by the various Israeli mechanisms. In the third section of the chapter we will analyze a number of issues related to the examination and investigation mechanisms and the way in which they functioned in investigating the maritime incident, taking into consideration the principles of international law, as analyzed in this Report. This analysis will also illustrate the importance of the recommendations formulated by the Commission in chapter D, and will demonstrate how the implementation of the recommendations will improve and optimize the IDF's examination and investigation mechanisms.

¹ Resolution No. 1796 of the 32nd Government, *Appointment of an Independent Public Commission, Chaired by Supreme Court Justice (ret.) Jacob Turkel, to Examine the Maritime Incident of 31 May 2010* (Jun. 6, 2010), para. 5 [hereinafter: *the Government resolution to appoint the Commission*].

A. THE MARITIME INCIDENT OF 31 MAY 2010 – A BRIEF SUMMARY²

2. On 31 May 2010, a flotilla of six ships whose stated destination was the Gaza Strip approached the Israeli coast. The six flotilla ships departed from the ports of Ireland, Turkey and Greece, and they joined at a meeting point approximately 30 miles south of Cyprus.³ The largest of the ships was the *Mavi Marmara*, which departed from the port of Istanbul but picked up most of its passengers at the port of Antalya. On board the ship were approximately 590 passengers and crew members, who were primarily of Turkish nationality.

3. When the flotilla neared the Israeli coast, a number of warnings were transmitted to the ships. At 4:26 a.m., after the ships reached a distance of approximately 70 miles from the coast of Atlit and after they did not respond to the warnings, a military operation was launched. The goal of the operation was to take control of the ships. The rules of engagement that were given to the forces (hereinafter: the Rules of Engagement) reflected a use of force similar to that which is applied in a law enforcement operation.⁴

4. On the deck of the *Mavi Marmara*, the IDF soldiers confronted extreme violence. Two soldiers were wounded by gunfire, three soldiers

2 For a comprehensive survey of the events and relevant documentation, see: *The Public Commission to Examine the Maritime Incident of 31 May 2010: The Turkel Commission* REPORT PART ONE, at para. 113–160 (2011) [hereinafter: THE COMMISSION'S FIRST REPORT].

3 As discussed in THE COMMISSION'S FIRST REPORT, *supra* note 2, eight vessels departed with the purpose of joining up and reaching Gaza together. Two of the vessels were delayed along the way for various reasons and it was decided not to wait for them. One of the vessels, the CHALLENGER 2, did not take part in the flotilla due to a technical malfunction and some of its passengers transferred to the deck of the *Mavi Marmara*, see *IDF Supplementary Response to the Commission's Questions of 15 November 2010*, para. A [hereinafter: *IDF Supplementary Response to the Commission's Questions, Nov. 15, 2010*]. The second vessel, the Rachel Corrie, tried to reach the Gaza Strip at a later stage, after the events of the flotilla in question. This ship reached Israel's shores on 5 June 2010, and after it was stopped by the IDF, its cargo was unloaded at the Ashdod port and the merchandise on board was transferred to Gaza, after inspection, through the land border crossings. See: Resolution No. 1759 of the 32nd Government, *Handling of the Rachel Corrie Flotilla to Gaza* (Jun. 6, 2010); see also: Transcript of session no. 4, "Testimony of the IDF Chief of Staff" (Aug. 11, 2010).

4 For a detailed analysis of the Rules of Engagement given to the armed forces involved in the *Winds of Heaven 7* operation, see: THE COMMISSION'S FIRST REPORT, *supra* note 2, at paras. 204–211.

were taken to the hold of the ship after they had been wounded, and others suffered serious injuries. The IDF soldiers responded with physical force, shooting from both less-lethal and lethal weapons. As a result of these events, nine of the flotilla participants were killed, approximately 55 of them were wounded, and nine IDF soldiers were wounded.

Aboard the other ships, the IDF soldiers encountered less or no resistance, and there was no loss of life.

5. After the takeover of the ships was completed, the wounded were evacuated to various hospitals. The bodies of the dead were cared for, and they were ultimately transferred to Turkey, at Turkey's request, after only an external examination was conducted at the Abu Kabir Forensic Institute. The ships and the remaining flotilla participants were taken to the port of Ashdod. In Ashdod, the flotilla participants underwent a medical examination and a security check and they were also issued a detention order (in the language of each of the flotilla participants). Some of them were required to provide biometric measurements (the taking of fingerprints and a photograph). Subsequently, the flotilla participants were transferred to detention facilities. On 2 June 2010, the participants were taken to Ben-Gurion Airport and flown to the countries from which they embarked on the flotilla.

6. After the maritime incident, there were demands both in Israel and internationally that Israel investigate the incident immediately. Already the next day, the UN Secretary-General expressed the need for a full investigation to examine the incident.⁵ Shortly thereafter, an urgent meeting of the UN Security Council was held on this issue, resulting in a call for a prompt, impartial, credible and transparent investigation conforming

⁵ See: Statement by the President of the Security Council, UN Doc. S/PRST/2010/9 (Jun. 1, 2010) [hereinafter: *UN Security Council, Jun. 1, 2010*].

to international standards.⁶ This call led, *inter alia*, to the establishment of two international committees of inquiry: on 2 June 2010, the UN Human Rights Council, which was holding its 14th session at the time the events of the flotilla occurred, announced the establishment of a Fact-Finding Mission;⁷ on 2 August 2010, the UN Secretary-General announced the formation of a UN review panel, headed by the former Prime Minister of New Zealand, Sir Geoffrey Palmer, with participation of the former President of Colombia, Mr. Alvaro Uribe, an Israeli representative (Mr. Joseph Ciechanover), and a Turkish representative (Mr. Özdem Sanberk).⁸

6 *Id.*; Note that this statement is not a decision of the Security Council under Articles 25 and 27 of the UN Charter, and thus is not binding.

7 See: The Human Rights Council, *Report of the International Fact-Finding Mission to Investigate Violations of International Law, Including International Humanitarian and Human Rights Law, Resulting From the Israeli Attacks on the Flotilla of Ships Carrying Humanitarian Assistance*, UN Doc. A/HRC/15/21 (Sep. 27, 2010); *The Grave Attack by Israeli Forces Against the Humanitarian Boat Convoy*, G.A. Res. 14/1, UN Doc. A/HRC/RES/14/1 (Jun. 23, 2010).

8 See: Geoffrey Palmer, *Report of the Secretary-General's Panel of Inquiry on the 31 May 2010 Flotilla Incident, delivered to the Secretary-General* (Sep. 3, 2010).

B. DESCRIPTION OF THE EXAMINATION AND INVESTIGATION PROCEEDINGS CONDUCTED IN ISRAEL

THE ISRAELI POLICE INVESTIGATION INTO OFFENSES COMMITTED BY FLOTILLA PARTICIPANTS

7. Pursuant to the instruction of the Israeli Attorney-General on 31 May 2010, the Israel Police began an investigation focusing on suspicions of offenses involving the use of violence by the flotilla participants against the IDF soldiers who took control of the vessels as well as of other offenses.⁹ It should be emphasized that the Police were not requested to examine complaints or allegations regarding violations of international humanitarian law by IDF soldiers, but rather only offenses that were committed by the flotilla participants against IDF soldiers.¹⁰

8. Within the framework of this investigation, attempts were made to identify the attackers by showing their photographs to the wounded soldiers. The police also seized evidence, including various types of

9 Ministry of Justice, *Decision of the Attorney-General to close the investigation file that was opened with respect to the suspicion of commission of offenses by the Israeli civilians who participated in the flotilla to Gaza on 31 May 2010 (Dec. 22, 2011)* [hereinafter: *Attorney-General's Decision to Close the Investigation File of the Flotilla's Israeli Participants*].

10 See: letter from Brigadier-General Varda Shaham, head of the Investigations Division of the Israel Police, to Hoshea Gottlieb, the Commission's coordinator, *Request of the Public Commission to Receive Materials Collected During the Police Investigation* (Sep. 12, 2010) [hereinafter: *Police Response – Receipt of the Police Investigation Materials*]. The Police Response stated that 'the investigation was opened pursuant to the Attorney-General's instruction, and was conducted pursuant to his instructions, as received from time to time [...]. In accordance with those instructions, the Israeli police opened an investigation on 31 May 2010, into the suspicions concerning the commission of offenses against the soldiers on the *Mavi Marmara*, including the grave attack on the soldiers, disturbing the peace, endangering the lives of soldiers, seizing their weapons, and so forth (hereinafter: the Violent Offenses)'. It continued: 'The police were instructed, first, to conduct an investigation only with respect to the Israeli and foreign passengers against whom there was a concrete evidentiary foundation for the commission of violent offenses against the soldiers, and not with respect to all of the passengers. In addition, with respect to the Israelis, an instruction was given that they would also be investigated for any other offense as to which an evidentiary foundation would materialize, including the suspicion of an attempt to enter the Gaza Strip contrary to orders of the Implementation of the Disengagement Plan Law, 5765–2005. [...] and approval was also given for the investigators to board the vessel to collect relevant evidence. Subsequently, the police were also instructed to investigate all of the Israelis on suspicion of participating in the commission of the various violent offenses against the soldiers, and later the instruction was broadened to require the police to also investigate all of the wounded foreign passengers on suspicion of cooperation in commission of the violent offenses'.

ammunition, samples of material suspected to be blood, pipe wrenches, knives and bars covered with what was suspected to be blood, two bullets and a Nokia mobile phone.¹¹

9. The Police investigation with respect to the foreign suspects (i.e., the flotilla participants who were not Israeli citizens) was halted after a short time. As discussed above, in a presidential statement issued on 1 June 2010, the UN Security Council called for the release of the vessels and the detainees, as well as for the return of the corpses of the deceased to Turkey.¹² On the same day, the Israeli Ministers' Committee for National Security Matters met and recommended, for political reasons, to release all of the flotilla participants and not to take legal measures against them.¹³ The Attorney-General adopted this position, and on 2 June 2010, he issued a written order to immediately deport 'the foreigners who arrived on the flotilla who are suspected of committing criminal offenses' in consideration of the recommendation of the political echelon which was based on public, political and security interests, and on the grounds that 'the continuation of the detention of these individuals in Israel will cause more harm than benefit to the essential interests of the State'.¹⁴ Three petitions were submitted to the Supreme Court against this decision of the Attorney-General and were rejected.¹⁵ The Supreme Court held that there were no grounds to intervene in the Attorney-General's decision, because it was within the realm of his discretion, and that intervention in his discretion in decisions pertaining to investigations or prosecutions is limited to

11 *Id.*, at para. 9; The Division of Investigations and Intelligence – Lachish District, *Summary of the Turkish Flotilla Investigation, Computer File No. 207206/10* (Aug. 2, 2010).

12 See: *UN Security Council, Jun. 1, 2010, supra* note 5: 'The Security Council requests the immediate release of the ships as well as the civilians held by Israel. The Council urges Israel to permit full consular access, to allow the countries concerned to retrieve their deceased and wounded immediately'.

13 Decision no. IS/39 of the Ministerial Committee for National Security Matters, *Israel's Policies Toward Gaza (Military and Civilian)* (Jun. 1, 2010).

14 See: Decision of the Attorney-General of 2 June 2010, submitted in the context of HCJ 4221/10 *Ben Yaakov v. Israel Police* (unpublished, Jun. 2, 2010) [hereinafter: *Decision of the Attorney-General Concerning Release of the Flotilla Participants*].

15 See: HCJ 4169/10, 4193/10, 4220/10, 4221/10, 4240/10, 4243/10, *Cohen v. Minister of Defense* (unpublished, Jun. 2, 2010), in which the three petitions, which sought to prevent the release of the foreigners, were rejected.

exceptional and unusual instances. The Court also stated that due to the unusual nature of the maritime incident and the political aspects involved, the Attorney–General was entitled to take into consideration those political aspects.¹⁶

Following the Attorney–General’s decision, ‘the police engaged in a concerted effort in order to locate the suspects among the foreigners’, and according to the police investigators, an evidentiary basis was found for suspicions against 11 of the foreigners.¹⁷ A short time before their deportation from Israel, these suspects were questioned under warning,¹⁸ but following a meeting held on 7 July 2010, the Attorney–General instructed the police not to continue the investigation concerning the offenses attributed to the suspects. However, he instructed them to complete the investigations concerning the Israeli nationals who were suspected of committing the offense of attempting to enter Gaza illegally, and to submit the investigative material to him along with their recommendations.¹⁹ Despite the recommendations of the Investigations and Intelligence Division of the Police that there is an evidentiary basis for the commission of offenses by the Israeli flotilla participants, and that there is a public interest in prosecuting them, the Attorney–General notified the Government on 22 December 2011 that the file was to be closed. The Attorney–General based his decision on the significant evidentiary and legal difficulties in proving the elements of the offense and on the application of Israel’s criminal law to crimes committed outside the country’s borders.²⁰

16 *Id.*, at para. 7.

17 *Police Response – Receipt of the Police Investigation Materials*, *supra* note 10, at para. 6.

18 *Id.*, at para. 7.

19 See: *Decision of the Attorney–General Concerning Release of the Flotilla Participants*, *supra* note 14; See also: *Police Response – Receipt of the Police Investigation Materials*, *supra* note 10, at para. 8.

20 *Attorney–General’s Decision to Close the Investigation File of the Flotilla’s Israeli Participants*, *supra* note 9.

It should be noted that, pursuant to the Turkel Commission's request, the police investigation materials were submitted to the Commission in September 2010.

THE EXAMINATIONS CONDUCTED BY THE IDF

1. General Staff Experts Debrief

10. On 7 June 2010, approximately one week after the maritime incident, the Chief of Staff, upon the recommendation of the Military Advocate-General (hereinafter: the MAG), appointed Major-General (ret.) Giora Eiland to head a General Staff team of experts which would examine the incident (hereinafter: the Eiland Team) by means of an 'experts debrief'.²¹ The Eiland Team was instructed to examine the preparations for the operation, the operational method that was chosen for the operation and the possible alternatives, the preliminary arrangements, and the mode of implementation. The actions of Shayetet 13 (the IDF unit that took over the vessels) in the maritime incident were also examined. This examination was coordinated by Colonel Rafi Milo, who met with officers and soldiers of Shayetet 13 that participated in the maritime incident, and composed a detailed picture of the events that occurred. The Eiland Team tabled their conclusions on 11 July 2010 (hereinafter: the Eiland Report). The Eiland Team noted the deficiencies in a number of areas and provided operational recommendations to the Chief of Staff.

In addition to the experts debrief by the Eiland Team, the IDF conducted additional internal operational debriefs within the units that took part in the maritime incident, including a debriefing by the Navy, a debriefing by the head of Israel Military Intelligence, and a debriefing by the head of the

²¹ For an explanation of this term and the distinctions between the types of operational debriefs, see: Chapter C, paras. 88–91.

Operations Division. These reports were submitted to the Turkel Commission.²²

2. The MAG's Decision

11. After the incident, the MAG decided not to conduct an immediate investigation by the Military Police Criminal Investigations Division (hereinafter: the CID) into the deaths of the nine civilians who were killed during the takeover of the *Mavi Marmara* and the wounding of 55 of the flotilla participants. The MAG stated that the deaths and the wounding of civilians during the IDF takeover of the *Mavi Marmara* 'constitute – in many respects – a unique "interim situation" with respect to the issue of the manner in which the investigation policy is implemented'.²³ On the one hand, the forces that carried out the takeover operation were instructed to refrain, as far as possible, from the use of lethal weapons, and were even equipped with less-lethal weapons. In other words, the death of a civilian, and certainly nine civilians, was unexpected and was considered an exceptional event. On the other hand, upon commencement of the takeover, it became clear that the situation was not as expected, and that the forces that landed aboard the *Mavi Marmara* encountered a planned ambush by violent activists who were organized and armed, such that the forces faced a real and immediate threat to their lives.²⁴ The MAG elaborated the considerations he took into account for the decision of whether to open an immediate CID investigation. One such consideration was that the incident was being investigated by the Israel Police (with respect to offenses allegedly committed by flotilla participants), which ensured the preservation of the physical evidence found on the vessels. He also took into account the fact that the incident was being examined by a Chief of Staff team of experts headed by Major-General (ret.) Giora Eiland. The MAG also pointed out that an examination by means of an operational debrief is

22 See: THE COMMISSION'S FIRST REPORT, *supra* note 2, at para. 10.

23 *Military Advocate-General Position Paper* 82 (Dec. 19, 2010) [hereinafter: *MAG Position Paper 2010*].

24 *Id.*

the most expeditious way to obtain a complete factual picture, and that such a debriefing does not prevent conducting a criminal investigation if the debriefing findings raise suspicions that illegal activity occurred.²⁵

12. The MAG stated that, alongside his aforementioned decision, complaints and claims based on concrete information regarding theft of property that was aboard the ships, were investigated by the CID in accordance with the investigation policy. In this context, criminal investigations were commenced with respect to 18 soldiers who had participated in the search of the *Mavi Marmara* after it anchored in the Ashdod port.²⁶ Criminal indictments were filed against eight soldiers and disciplinary actions were taken against five soldiers.²⁷

ESTABLISHMENT OF A PUBLIC COMMISSION OF INQUIRY (THE TURKEL COMMISSION)

13. As noted above, on 14 June 2010, the Government of Israel resolved to establish the Public Commission to Examine the Maritime Incident of 31 May 2010 (the Turkel Commission). The resolution provided, *inter alia*, that with regard to the examination of the military operations that Israel undertook to enforce the naval blockade on 31 May 2010, the Commission ‘will receive for its review the documents it requires and will also be able to request from the head of the Expert Military Investigative Team appointed by the IDF Chief of Staff to transfer for its review the summary findings of the operational investigations carried out following the incident’ (i.e., the Eiland Report).²⁸

14. The Commission heard 26 testimonies, and also received a great

²⁵ *Id.*, at 83.

²⁶ *Id.*, at 83–84.

²⁷ See: Letter from Major Roni Katzir, MAG Corps, to Hoshea Gottlieb, the Commission’s coordinator, *Investigation Data Regarding the Marmara Events* (Aug. 13, 2012).

²⁸ *The Government resolution to appoint the Commission*, *supra* note 1, at para. 6(c).

deal of additional material from a number of authorities, comprising over 150 exhibit files, which included various synopses of issues relating to its work (some of which were prepared at the Commission's request); transcripts of meetings held at various governmental levels; summaries of work meetings of various parties; internal–organizational investigations; documentation of objects and documents that were seized on the *Mavi Marmara*, material that was seized from computers on the *Mavi Marmara*; and medical documents and medical certificates (including documents that were received from Magen David Adom, documents that were received from the Abu Kabir Forensic Institute, and documents that were received from hospitals where the injured were hospitalized and treated).²⁹

15. As stated in the Commission's First Report, the Commission exercised its authority (granted in its terms of reference) to request that the military operational debriefs be deepened and more extensive.³⁰ Military personnel were appointed for this purpose, and they conducted new operational debriefs in accordance with the detailed instructions of the Commission's representative. In the framework of these new debriefs, documented testimonies were taken from 38 combat personnel and other military personnel who were directly involved in the events, and the Commission received extensive additional material documenting all aspects of the maritime incident.³¹ Additional supplementary debriefs were conducted, during which written testimonies were taken from another 20 combat personnel, and 23 combat and other military personnel provided testimonies a second time.³² These debriefs enabled the Commission to

29 See: THE COMMISSION'S FIRST REPORT, *supra* note 2, at para. 10.

30 *The Government resolution to appoint the Commission*, *supra* note 1, at para. 6(c); It should be noted that, in the context of HCJ 4641/10 *Uri Avneri v. Prime Minister* (unpublished, Jul. 12, 2010), a statement agreed upon by the parties was submitted to the Court providing that, if the Turkel Commission shall request to *subpoena* soldiers to testify before it and the Government does not permit the soldiers to testify, then the Court will deal with the matter. In practice, the Commission did not find it necessary to *subpoena* soldiers, other than the Chief of Staff, who was *subpoenaed* to testify before the Commission twice.

31 See: *Deepening and Broadening the General Staff's Experts Debrief* (Sep. 20, 2010) [hereinafter: *Debrief Expansion*, Sep. 20, 2010].

32 See: THE COMMISSION'S FIRST REPORT, *supra* note 2, at para. 9; Altogether, the Commission approached the IDF six times, in addition to the *Debrief Expansion*, Sep. 20, 2010, *supra* note 31, with requests

examine each use of force that was reported by the IDF soldiers in their testimonies (with certain limitations, which shall be addressed below).³³

16. The Commission also invited relevant Turkish parties to testify by means of the Turkish Embassy in Israel. In addition, British citizens who had expressed interest in submitting evidence to the Commission were invited to furnish synopses of the matters they wished to present to the Commission. The Commission also offered to hear these testimonies by means of a video-conference. None of these invitations received a response.

17. On 23 January 2011, the Commission submitted its first report. The Commission's main conclusions were that (i) considering the security circumstances and Israel's efforts to fulfill its humanitarian obligations, imposition of the naval blockade on the Gaza Strip was lawful and complied with international humanitarian law; and (ii) despite the regrettable consequences of the actions Israel undertook, on 31 May 2010, to enforce the naval blockade, the actions were lawful and complied with international law. On this issue, the Commission examined 133 incidents in which there was a use of force by IDF soldiers (including the use of firearms, less-lethal weapons, shooting as a deterrent, threatening with a weapon, use of a Taser, and in certain circumstances the use of physical force), that was described by the soldiers or depicted on electronic media. These examinations were elaborated in the First Report's confidential annex.³⁴ With respect to 127 of these incidents, it was determined that the use of force was in conformity with international law. With respect to six incidents in which force was used, the Commission concluded that it

to supplement the information that it had obtained (see: *IDF Supplementary Response to the Commission's Questions of 7 November 2010*; *IDF Supplementary Response to the Commission's Questions, Nov. 15, 2010*, *supra* note 3; *IDF Supplementary Response to the Commission's Questions of 29 November 2010*; *IDF Supplementary Response to the Commission's Questions of 7 December 2010*; *IDF Supplementary Response to the Commission's Questions of 8 December 2010* [hereinafter: *IDF Supplementary Response to the Commission's Questions, Dec. 8, 2010*]; *IDF Supplementary Response to the Commission's Questions of 30 December 2010*).

33 See: THE COMMISSION'S FIRST REPORT, *supra* note 2, at paras. 232–238.

34 *Id.*, at para. 239(a).

did not possess sufficient information to be able to make a determination regarding the legality of the use of force. Three of these six incidents involved the use of firearms; two of these incidents involved the use of physical force (kicking); and in one incident a participant was struck with the butt of a paintball gun.³⁵

INTERNAL EXAMINATIONS BY OTHER AUTHORITIES

18. Internal debriefs were also conducted by other authorities involved in the maritime incident, such as the Israeli Prison Service, the Foreign Ministry, and the Population and Immigration Authority of the Ministry of the Interior. These internal debriefs were submitted to the Turkel Commission.

THE STATE COMPTROLLER'S PROBE

19. On 15 June 2010, the State Comptroller notified the Knesset (by means of the chair of the Knesset's State Control Committee) of his decision to examine certain procedures related to the government's decisions making processes, intelligence matters, and the handling Israel's public relations. The State Comptroller stated that the probe of these subjects would be carried out, *inter alia*, 'in the framework of conducting follow-up reports of prior probes conducted in relation to these subjects, and in particular during the period after the Second Lebanon War'. He also stated that the investigation would not address 'the operational activity of the forces being investigated internally by the IDF [by the Eiland Team], [and] the legal issues to be addressed by the committee established by the Government, with international participation [the Turkel Commission]'. On 4 and 5

³⁵ *Id.*, at para. 239(c).

August 2010, the State Comptroller also furnished this notification to the Prime Minister and the relevant ministers.

20. On 16 June 2011, the State Comptroller distributed a summary of his findings (the draft report) to the relevant parties. The report, which addressed the implementation of the National Security Council Law, 5768–2008, and the handling of the Turkish flotilla, was published on 12 June 2012. The State Comptroller focused on the decision–making process within the Government with respect to its handling of the maritime incident and the interaction that took place between the political echelon and the IDF; intelligence matters; and the work of the public relations authorities.³⁶

21. The State Comptroller found that there were significant deficiencies in the decision–making process regarding the maritime incident, including that the process was conducted without any organized, coordinated, and documented staff–work. The Comptroller also found deficiencies in the national public relations apparatus and its functioning with respect to the maritime incident.

SUPPLEMENTARY INVESTIGATIONS CONDUCTED BY THE MAG FOLLOWING THE CONCLUSIONS OF THE VARIOUS COMMISSIONS OF INQUIRY

22. After the submission of the Commission’s First Report and as a consequence of the Report’s conclusions, particularly with respect to the six incidents discussed above, the MAG instructed the Navy to extend the

³⁶ See: State Comptroller, *Inspection Report on Implementation of the National Security Council Law and the Handling of the Turkish Flotilla* (2012).

operational debrief of those incidents.³⁷ Based upon the findings of this extended debrief, the MAG decided that legal measures were not warranted.

23. On 4 April 2012, the MAG submitted an opinion to the Commission regarding two additional incidents which, according to the MAG, ‘were presented in the Palmer Report [the UN Review Panel] as having a concrete evidentiary foundation, which expands upon the analysis of these incidents in the Turkel Report’.³⁸ The MAG had requested ‘a more thorough examination with respect to these two incidents’ and, after that examination, he decided that legal measures were not warranted.

37 See: the MAG Corps for Operational Matters, *Examination of the Six Specific Incidents Mentioned in the Confidential Annex to the Report of the Turkel Commission on the Examination of the Flotilla Incident* (Jun. 29, 2011) [hereinafter: *Examination of the Six Incidents in Light of the Commission’s Conclusions, Jun. 29, 2011*]; See especially at 2: ‘The Navy was requested to conduct a supplement debriefing of all parties who witnessed the events or who may have taken part in them, with an emphasis on the issues as to which the [Turkel] Commission did not find an answer in the information that had been provided to it’.

38 The MAG Corps for Operational Matters, *Supplemental Recommendation to the Military Advocate-General Following the Findings of the Palmer Committee Report on the Examination of the Flotilla Incident* (Feb. 16, 2012).

C. EVALUATION OF THE EXAMINATIONS AND INVESTIGATIONS THAT WERE CONDUCTED

24. As noted above, in the Government resolution to appoint the Commission, the Commission was asked to address the manner in which the mechanism to examine and investigate complaints and claims of violations of international humanitarian law generally practiced in Israel was implemented with respect to the investigation of the maritime incident. The Commission decided to focus on particular aspects concerning the manner in which the use of force in the maritime incident was examined and investigated by the IDF.

25. First we will discuss the issues that were examined and investigated following the maritime incident ('what to investigate?'). Second, we will assess the MAG's decision not to open an immediate CID investigation into the deaths and injuries of the activists on the flotilla following the maritime incident. Additionally we will discuss the documentation of the scene and its consequences ('when to investigate?'). Finally, we will comment on the use of the Eiland Report as a 'fact-finding assessment' with respect to the question of whether it was necessary to investigate the use of force by IDF soldiers in the maritime incident and we will also discuss the measures undertaken by the MAG after the submission of the Turkel and Palmer reports ('how to investigate?').

WHAT TO INVESTIGATE?

26. As stated in the Commission's First Report, some of the flotilla participants were investigated by the Israel Police³⁹ and some by Military

³⁹ Altogether, 42 participants in the flotilla were interrogated by the Police. All of them were notified of their right to consult with an attorney, and the questions were translated for all of them (other than the Israeli citizens, who did not require translation). The overwhelming majority of the participants refused to sign the statements that were taken, a considerable portion of them refused to respond to the questions, and of those who provided some version, it was laconic, and it was not possible to

Intelligence.⁴⁰ However, the method in which force was employed by the IDF in the maritime incident could not be examined based on the versions of the events provided by the flotilla participants because the investigations did not address this issue. The IDF soldiers who were investigated by the Israel Police immediately after the incident were also asked primarily about the force employed against them, and not about the force they used. This is understandable given that the Attorney–General instructed that the investigations should focus on the actions of the flotilla participants.

27. The Commission’s view is that when the criminal investigation of the incident commenced, and statements were taken from the flotilla participants and the soldiers who participated in the maritime incident, it would have been appropriate to take statements from the soldiers concerning the use of force on their part as well. In this context it should be recalled that the MAG’s decision at that stage, with respect to the soldiers’ use of force, was that ‘the necessity of a criminal investigation will be assessed after the completion of the debriefing’ and based, *inter alia*, on the materials collected from the police investigation.⁴¹

28. We note that at every stage of the legal treatment of this matter, there appeared to be a significant absence of a central body to coordinate the assessment of the security force’s activities from an international legal perspective. As discussed in Chapter D, the Commission recommends the establishment of a unit in the Ministry of Justice that will specialize in international humanitarian law and centralize all legal treatment of issues such as those arising in this matter.

derive from their statements a clear description of the employment of force by the IDF soldiers and its circumstances.

40 Altogether, 86 participants in the flotilla were interrogated by Military Intelligence. A review of the investigation reports indicates that only a small number of those interrogated referred to the use of force by the IDF soldiers. Most of the interrogatees did not refer to the events in a manner that enables a legal analysis of the legality of the use of force.

41 *MAG Position Paper 2010, supra* note 23, at 83.

WHEN TO INVESTIGATE?

1. The MAG's Decision Not to Open an Immediate CID Investigation After the Maritime Incident

29. As described above, the takeover of the *Mavi Marmara* resulted in the death of nine and the wounding of 55 flotilla participants. Did these consequences in and of themselves oblige the MAG to open an immediate CID investigation? As stated in the Commission's First Report, the legal basis for the enforcement of the naval blockade is international humanitarian law, and, therefore, the rules that governed the use of force during the takeover of the *Mavi Marmara* were international humanitarian law. Indeed, the paradigm guiding the IDF forces, as well as their preparation for the operation, was that of law enforcement and, therefore, the Rules of Engagement that were given to them conformed to this paradigm and its principles governing the use of force, i.e., self-defense. However, when the takeover of the vessel commenced, it quickly became apparent that this was not an ordinary law enforcement situation but rather a planned ambush by violent, organized and armed activists, i.e., an exchange of military hostilities.

30. As described in Chapter A of this Report, international humanitarian law imposes an obligation to investigate whenever there is a credible accusation or a reasonable suspicion that a war crime has been committed. However, if the information is partial or circumstantial and insufficient to establish a reasonable suspicion requiring an investigation, then a fact-finding assessment must be conducted in order to clarify whether there is a need to investigate.⁴² The existence of a reasonable suspicion concerning the commission of a war crime depends on both the facts of the incident and the legal framework, i.e., whether the incident is governed by the law regulating the conduct of hostilities or law enforcement.

⁴² See: Chapter A, para. 49.

In the case at hand, the IDF forces were given Rules of Engagement suited to law enforcement activity. In any law enforcement operation involving the death of a person, not to mention any such operation which results in the death of nine people, an investigation must be opened. However, as noted, it became clear that the situation was in fact different from that which was expected. The exchange of hostilities altered the legal character of the operation and the consequent applicable legal framework became the law regulating the conduct of hostilities. Accordingly, when the circumstances do not raise a *prima facie* reasonable suspicion that a crime has been committed, a ‘fact-finding assessment’ should be conducted to serve as the basis for a subsequent decision about whether to open an investigation.

Therefore, the Commission finds that the data available to the MAG (see above in paragraph 11) justified his decision not to initiate an immediate CID investigation.

31. It should be noted, that in some of the countries surveyed in Chapter B there are rules providing that, as a matter of policy, an investigation must be opened concerning incidents liable to arouse widespread public criticism, or to raise a public or media outcry (without first conducting a fact-finding assessment). Thus, for example, in Canada a rule was issued in response to actions of the Canadian forces in Afghanistan (Joint Task Force Afghanistan Standing Order 304 (Serious Incident Reporting)), according to which ‘any significant incident be reported immediately’ (including ‘actions by CF [Canadian Force] members that may undermine public values, or lead to the discredit of Canada at home or abroad’).⁴³ A similar order was issued in 2006 by the deputy commander of the American forces in Iraq, requiring the investigation of ‘any use of force against Iraqis that resulted in death, injury, or property damage greater than \$10,000’.⁴⁴

43 See Annex C: *The Canadian Report*, at para. 117.

44 See Annex C: *The US Report*, at para. 108.

The Commission views these approaches favorably, and it recommends that the MAG consider ordering the opening of a CID investigation, *as a matter of policy*, with respect to such incidents even in the context of hostilities, especially when the damage was not foreseen.

2. Documentation of the Scene

32. As discussed in the previous chapters, the reporting duties imposed on units involved in an operation include the obligation to document the scene of the incident. The immediate documentation of a scene after an incident assists the examination and investigation authorities in understanding the incident and in analyzing whether there are grounds for opening an investigation.

33. As stated in the Commission's First Report, at the time the Commission formed its conclusions regarding the maritime incident, the evidence consisted primarily of the documented testimonies of over 40 soldiers and commanders taken during the IDF debriefings.⁴⁵ As noted, the Commission requested additional information to supplement these debriefings and then cross-referenced and verified these testimonies against other relevant testimonies, and compared them to other materials submitted to the Commission. Generally, the Commission found that the soldiers' accounts were credible and trustworthy. However, the Commission found that its ability to construct a complete picture of the incidents was limited because, *inter alia*, the scene in which the events took place had not been kept 'sterile' between the time the events occurred until the investigation commenced. Thus the Commission's First Report stated that: '[s]ome of the bodies of those who were killed were moved from the places where they had been shot, the bullets and shells found on the *Mavi Marmara* were not collected in an organized manner, the various assault weapons used by the IHH activists (knives, clubs, slingshots, etc.) were

45 See: THE COMMISSION'S FIRST REPORT, *supra* note 2, at para. 236.

gathered in one location and not documented as they were apprehended, etc.’⁴⁶

34. It is important to note, as was also discussed in the Commission’s First Report, that a considerable amount of electronic media material was collected from the incident, including videos and photographs from digital cameras and video recorders that were used by the flotilla participants, videos from the CCTV aboard the *Mavi Marmara*, and videos and recordings from the IDF’s recording devices. This material, of course, constitutes objective evidence which is highly reliable, and which must be preserved and documented in an organized manner.

35. Nevertheless, it became apparent during the Commission’s work that the electronic media was not properly preserved nor documented in an organized manner. Due to the great significance that the Commission attributed to the electronic media, the Commission asked to receive all of the electronic media material that was collected from the maritime incident. Altogether, more than 900 hours of video material was received and great efforts were devoted towards viewing and listening to the recordings. However, it appeared to the Commission as though various events that should have been documented were not. Therefore, the Commission again asked the IDF to ascertain whether all of the electronic media that was collected had been furnished to the Commission.⁴⁷ In response to these requests, a number of additional film clips that were not previously in the Commission’s possession were provided to it. It should be further noted that some of the films handed to the Commission were edited. For example,

⁴⁶ *Id.*, at para. 237.

⁴⁷ See, for example: *IDF Supplementary Response to the Commission’s Questions, Dec. 8, 2010, supra* note 32, at 2, para. 6. One issue of concern to the Commission was the fact that three of the soldiers who were abducted and taken below the deck of the ship stated in their testimonies that a ‘press conference’ took place around them below deck, i.e., that the activists who were below deck tried to photograph them with all of the means they had available, including cellular phones, regular cameras, and video recorders. However, in the hundreds of hours of recordings that were furnished to the Commission, and which also included material photographed by flotilla participants, no evidence of this was found.

in some films a computer cursor pointed out certain details of the events. The Commission discussed this in the First Report and, as noted, stated that this limited the Commission's ability to make use of the electronic media.⁴⁸

36. Clearly, assimilation of reporting procedures and meticulous preparation of all aspects of the preliminary report,⁴⁹ especially the preservation and documentation of the scene, would have assisted the various examinations and investigations including the work of the Commission, and it would have contributed to a better understanding of the events. It is important to reiterate that precision in the immediate documentation of a scene upon conclusion of events by the operational unit or by other appropriate authorities contributes significantly to an 'effective investigation'.⁵⁰

With respect to the electronic media, the videos that were provided to the Commission at later stages supported the versions of the IDF soldiers. However, and particularly at a time when the battle is also being waged in the legal and media spheres, it is essential to establish an organized system for the documentation and classification of electronic materials, such as electronic media, which can be used to understand the incident and to ensure that investigative bodies receive all of the available information. The formulation of suitable and written procedures, their assimilation and their enforcement, are an important part of the IDF's preparation for the proper enforcement of international law.

48 See: THE COMMISSION'S FIRST REPORT, *supra* note 2, at para. 237.

49 See: Chapter C, paras. 72–73; Chapter D, para. 21.

50 See: Chapter D, para. 24.

HOW TO INVESTIGATE?

1. The Eiland Report as a ‘Fact-finding Assessment’ Preceding the Decision on Whether to Open an Investigation

37. As discussed above, the MAG’s decision not to open an investigation immediately was based primarily on the fact that the incident was being examined simultaneously by the General Staff team of experts headed by Major-General (ret.) Giora Eiland, which was, in the MAG’s opinion, the most expeditious way to obtain a complete factual picture.

38. As noted, the Eiland Report was submitted in July 2010. The Report was divided into ten chapters, which were prepared by the various members of the investigation team based on their area of expertise. The part of the Report relating to the issues addressed here is the chapter dealing with the actions of the Shayetet 13 Unit during the maritime incident. This chapter surveys the preparations and the takeover of the *Mavi Marmara* while describing the events minute by minute. The chapter details the attempts to board the *Mavi Marmara* from the Israeli navy Morena speedboats, the fast-roping from the three helicopters, the soldiers’ (who fast-roped down from the first helicopter) descriptions of the violence directed against them, their injuries, their use of force in response to the violence, the boarding from the Morena speedboats, the evacuation of the wounded, and the search of the vessel. The chapter also makes a certain attempt to determine the circumstances in which the nine flotilla participants were killed.⁵¹

39. Indeed, the Eiland Team was composed of experts in their fields – senior commanders who were not involved in the planning or command of the operation. In comparison with other operational debriefs, the Eiland Team’s debriefing was conducted thoroughly and in a short period of time, and presumably the detailed examination of the circumstances in which

⁵¹ See: *Winds of Heaven* 7 106–107 (General Staff Experts debrief of Giora Eiland, Jul. 11, 2010).

the activists were killed will ensure that important operational lessons will be drawn for the future.

However, as stated in Chapter C, the operational debrief is not a legal tool but rather an operational tool, intended for use by commanders and not lawyers. On this point the Commission emphasizes that, despite the thoroughness of the Eiland Report, it does not provide an answer to the legal questions which arise with respect to the overall circumstances of the use of force by the IDF soldiers. Thus, for example, the Eiland Report does not examine the circumstances in which 55 flotilla participants were injured.⁵² As the Commission indicated in its First Report, in order to draw conclusions about the legality of the use of force in the maritime incident, the Commission had to collect detailed testimonies from all of the soldiers who had participated in the incident. The MAG also expressed the view that it would have been impossible to make a decision on whether to initiate an investigation based on the Eiland Report and that without the Turkel Report he too would have needed the operational debrief to be expanded.⁵³ This is understandable in light of the fact that the primary purpose of an operational debrief is to draw operational lessons, and not to be used as a tool for a legal assessment.

Ultimately, the MAG relied on the Turkel Commission's examination in making the decision on the necessity (or lack thereof) of opening an investigation into the use of force by the IDF soldiers in the maritime incident.⁵⁴

52 *Id.*, at 108 (there it was stated that 31 people were wounded in the incident, however this number does not correspond to the data provided to the Commission by the Israeli hospitals); see also: THE COMMISSION'S FIRST REPORT, *supra* note 2, at para. 156.

53 Meeting between Hoshea Gottlieb, the Commission's coordinator, and Major-General Avichai Mandelblit, *The Military Advocate-General*, 4 (Aug. 10, 2011).

54 *The Government resolution to appoint the Commission*, *supra* note 1, led to a certain change in the approach of the MAG to the examination process that he had intended to undertake, due to the authority granted to the Commission to request from the head of the 'Experts Debrief' team to deepen the inquiry or to expand it. The MAG's approach was that the implications of this authority were that the 'Experts Debrief' remained pending until such time as the Commission would complete its examination with respect to the circumstances of the event and that, accordingly, the completion of the process of examining the claims raised with respect to the IDF forces in the event would take

40. In Chapter D, the Commission discussed the use of an operational debrief in situations in which a fact-finding assessment needs to be conducted, and pointed out the difficulty in relying on the operational debrief as a supporting tool for a legal decisions. The analysis of the possibility of relying on the Eiland Report – which is a professional and thorough report conducted independently from the operation’s chain of command – as a tool for a fact-finding assessment of the maritime incident highlights the inherent difficulties in relying on an operational debrief. This heightens the importance of the Commission’s recommendation in Chapter D to establish a fact-finding assessment team that will focus on the legal requirement to clarify the circumstances of an incident, using questions and analysis that will assist the MAG in deciding whether to open an investigation within a short period of time.

41. In the margins, the Commission considers itself obliged to discuss a serious deficiency it has found in the use of the operational debrief as a tool to support a legal decision with regard to obtaining the testimony of one of the commanders that participated in the maritime incident. As noted, section 6(c) of the Government resolution to appoint the Commission permitted the Commission to request the General Staff Experts Team which conducted the operational debrief (the Eiland Team) to deepen and expand the debriefings it had conducted. This enabled the Commission to obtain testimonies from all of the IDF soldiers who used force during the maritime incident.⁵⁵ These testimonies, which were documented in writing, were taken in the institutional framework of an operational debrief. The Commission members did not meet with the soldiers; the soldiers’ names and their ranks were not provided to the Commission and they were referred to by numbers given to them in the debriefing.

place after completion of the General Staff Experts Debrief which was being conducted under the guidance of the Commission, and in light of its conclusions. The MAG emphasized in his second position paper that this modification to the regular working methods with respect to examinations of combat events is unique and results from the special mandate given to the Commission in this context. See: *MAG Position Paper 2010*, *supra* note 23, at 83.

55 See above, paras. 13–15.

The Commission accorded special importance to the understanding of the command echelon during the incident, due to its special significance with respect to the issue of the change in the Rules of Engagement provided to the forces. Indeed, as indicated in the letter from Colonel Milo to the Commission, the testimonies submitted to the Commission included the testimonies of all of the commanders who took part in the operation, including the testimony of Soldier no. 21, which started with the words, ‘*My role was to be the commander of helicopter 2. My mission, to fast-rope with my force onto one of the other boats*’.⁵⁶

In one of the supplementary debriefs conducted at the request of the Commission, testimony was received from Soldier no. 42, who had not testified previously. The testimony began: ‘[Soldier no. 42] served as a force commander *in* Helicopter no. 2’.⁵⁷ The testimony was written in the third person, and was very short (the entire testimony is three sentences, and one of them is a quotation from the testimony of Soldier no. 17). After being requested on several occasions to provide additional details regarding the testimony of Soldier no. 42, the military authorities notified the Commission that this soldier had been transferred to another unit and that due to operational reasons it was not possible to obtain more detailed testimony from him. Therefore, the Commission noted in its confidential annex attached to the Commission’s First Report that ‘for operational reasons only limited information was received’ with respect to Soldier no. 42.

42. On 3 February 2011, just after the submission of the Commission’s First Report, an investigative journalist, Dr. Ilana Dayan, contacted the Commission’s Coordinator and reported that in conducting a media investigation a claim was brought to her attention that the commander of the force on the second helicopter was prevented from providing his

56 See: *Debrief Expansion, Sep. 20, 2010, supra* note 31, Testimony of Soldier no. 21, at 1 [emphasis added].

57 [Emphasis added].

testimony to the Turkel Commission, despite his having requested to do so. According to Dr. Dayan, to the best of her knowledge, the commander of the second helicopter was a senior officer who had transferred to another unit. The Commission thus contacted the then–assistant to the Chief of Staff, Colonel Erez Weiner, on 7 February 2011, and asked ‘to receive details about the process of collecting testimonies and materials in the framework of the expansion and deepening of the debriefs, including specific details of the testimonies described above [testimonies of Soldier no. 21 and Soldier no. 42]’.⁵⁸

43. On 31 March 2011, a response was received from the Chief of Staff’s office, signed by the new assistant to the Chief of Staff, Colonel Hod Betzer (hereinafter: the Response Letter).⁵⁹ According to the Response Letter, the Chief of Staff ordered the matter to be inquired by a senior officer who does not serve in the Navy and was not involved in the maritime incident, the head of the ground forces headquarters, Brigadier–General Yoav Har–Even. The Response Letter also stated that because Brigadier–General Har–Even was not knowledgeable about the details of the operation, additional testimony of Soldier no. 42 was collected (with his consent) by the Eiland Team. The Inquiry Report prepared by Brigadier–General Har–Even and the complete testimony of Soldier no. 42 were attached to the Response Letter. It further stated that the conclusions of Brigadier–General Har–Even were presented to the Chief of Staff who accepted them.

The Inquiry Report indicates that the complaints of Soldier no. 42, an officer with the rank of major who commanded the forces that fast–roped from the second helicopter (as distinguished from Soldier no. 21, who served as the commander of *one of the two forces* on the second helicopter), are related to the fact that after giving his testimony to Colonel Rafi Milo

58 Letter from Hoshea Gottlieb, the Commission’s coordinator, to Colonel Erez Weiner, Assistant to the Chief of Staff, *Process of Deepening and Expanding the Inquiries* (Feb. 7, 2011).

59 Letter from Colonel Hod Betzer, Assistant to the Chief of Staff, to Hoshea Gottlieb, the Commission’s coordinator, *The Request of the Public Commission Examining the Maritime Incident of 31 May 2010 Concerning the Process of Deepening and Expanding the Inquiries* (Mar. 31, 2011).

during the Experts Debrief (Eiland Team), he was not called back to appear before the team that conducted the supplementary debriefs for the Turkel Commission, yet his first testimony was given to the Commission. Soldier no. 42 believed that he was intentionally not called to testify during the supplemental debriefs, and that no effort was made to call him. Brigadier-General Har-Even's inquiry found that Soldier no. 42's claim regarding the 'forgery of his testimony/statement' before the Turkel Commission was incorrect, and that all of his statements that were provided to the Commission, although incomplete, were based upon his statements before the Eiland Team during the original operational debrief, and that 'there were no substantive factual problems with the material submitted'.⁶⁰

Nonetheless, in describing the actions that were undertaken in order to complete the taking of Soldier no. 42's testimony, Brigadier-General Har-Even concluded that the handling of taking the officer's testimony was extremely deficient and that he could have been called to testify by means of an explicit order.⁶¹ Because the matter involved an officer serving in the army such that giving his testimony was not of a voluntary nature, Brigadier-General Har-Even added that 'it would be appropriate to draw lessons from this process. How is it that regarding such a material issue, in which the credibility of the operational debrief is under public scrutiny, whatever is needed to "close the chapter" is not done'.

2. The MAG's Decisions after Submission of the Turkel Commission's First Report and the Palmer Report

44. On 29 June 2011, the MAG submitted to the Turkel Commission a legal opinion of the MAG Corps for Operational Matters concerning the six incidents in which the Commission had not made a determination about the

60 *Id.*

61 Brigadier-General Har-Even stated: 'Moreover, precisely because of the sensitivity of the Turkel Commission, it does not seem reasonable to me that when questions are asked and clarifications are requested regarding the use of live fire on the vessel, they make do with an attempt to reach him by telephone, and when they don't succeed, they provide an extremely partial testimony'.

legality of the use of force. The opinion stated that ‘in six of the foregoing incidents, the Navy was requested to conduct a supplementary debriefing of all parties who witnessed the events or who may have taken part in them’ and that issues arising from the electronic media were analyzed by ‘a senior analyst in the naval intelligence... and the intelligence officer of the unit [Shayetet 13] at the time of the events. The analysis of the material was conducted using professional video analysis systems, in the photography and video analysis laboratory of the naval intelligence department [...]’.⁶² The legal opinion determined that the use of force was justified in some of the incidents examined. With respect to two incidents (which, according to the opinion, were actually one incident), it was determined that ‘there is no reason to continue investigating this issue because it will not lead to results in the criminal arena’; with respect to another incident, it was determined that ‘despite efforts by naval personnel... the inquiry process has been exhausted and the file should be closed without taking legal measures’.

On 4 April 2012, the MAG submitted another legal opinion to the Commission concerning two additional events referred to in the Palmer Review Panel Report. With regard to these two events the Palmer Report presented a broader evidentiary basis than the analysis presented in this context in the Turkel Commission Report.⁶³ After examining these incidents, the MAG decided that there is no basis for taking legal measures with respect to these incidents due to the grounds detailed therein.

45. It should be noted that the purpose of the aforementioned ‘supplementary debriefing of all parties who witnessed the events or who may have taken part in them’ (with regard to the six unsolved incidents) is unclear to the Commission. This is due to the fact that the Commission

62 *Examination of the Six Incidents in Light of the Commission’s Conclusions, Jun. 29, 2011, supra note 37.*

63 Letter from Major Roni Katzir, MAG Corps, to Hoshea Gottlieb, the Commission’s coordinator, *Analysis of Events Discussed in the Palmer Report – Decision Not To Open An Investigation* (Apr. 4, 2012).

approached the IDF on seven separate occasions, including several occasions regarding those same six matters that remained open,⁶⁴ and finally the Commission stated that it was ‘unable, with the available tools’⁶⁵ – i.e., the supplementary inquiries of the Navy and the analysis of the videos by its intelligence – ‘to be able to make a determination regarding [the legality of] the use of force’ in those incidents.⁶⁶ Also, the MAG’s decision in this matter does not specify which additional tools – other than the existence of a supplementary debriefing on the part of the Navy and use of the analytical capabilities of naval intelligence – the MAG used to reach a decision concerning these six incidents. If indeed additional tools, which are not described, were utilized, then it is appropriate to question why they were not used when the Commission repeatedly asked about this.

46. In accordance with Chapters A and D, the Commission finds it necessary to reiterate and to clarify that whenever claims and complaints are raised concerning violations of international humanitarian law, the MAG must examine whether there is a reasonable suspicion that a violation has occurred. Upon concluding this examination, he must decide whether or not to open an investigation, and only after the investigation is concluded he must decide whether to take legal action. It is emphasized that precision in the uniform and correct usage of the various terms in the recommendations presented to the MAG and in the MAG’s decisions (examination, reasonable suspicion, investigation, legal actions) is important from both a substantive and procedural perspective because, *inter alia*, it enables the decision to be comprehended and reviewed.

64 See above, *supra* note 32; See also: THE COMMISSION’S FIRST REPORT, *supra* note 2, para. 9.

65 THE COMMISSION’S FIRST REPORT, *supra* note 2, at the confidential annex.

66 *Id.*, at para. 239.

SUMMARY

47. In this Chapter, the Commission discussed certain aspects of the question of whether the examination and investigation mechanism for complaints and claims concerning violations of international humanitarian law, as implemented with respect to the maritime incident, conforms to the obligations of the State of Israel under international law. In this case, one incident was analyzed – and it can be seen as a test case – with respect to the examinations and investigations conducted after the maritime incident concerning the use of force in the incident, according to the international law principles and the recommendations set out in this Report.


Although, all aspects of the incident were ultimately investigated, the Commission saw fit to point out several structural problems that demonstrate the importance of the recommendations in Chapter D. Rectifying these problems will improve the effectiveness of the IDF's investigation mechanisms. In this regard, the Commission discussed the fact that there is no civilian body that coordinates all aspects of the security force's actions from the perspective of international law. The Commission also proposed considering the adoption of a policy that requires investigations into incidents causing serious and unforeseen damage. The Commission emphasized the need for an organized system of documenting the scene of an incident by establishing, assimilating and enforcing this system in written procedures. The Commission found support for its recommendation in Chapter D that the IDF should not rely on operational debriefs in making a decision on whether to open an investigation, but rather should establish a fact-finding assessment team that will focus on the legal aspects of an incident, in cases where there is a possible suspicion of a violation of international humanitarian law. This conclusion resulted from the Commission's analysis of the MAG's possibility to rely on the Eiland Report in his decision on whether to open an investigation into the maritime incident. Finally, the Commission has highlighted the importance

of precision in the uniform and accurate use of legal terms, as determined in Chapters A and D of this Report, in the framework of decisions taken following the process of examining and investigating claims and complaints of violations of international humanitarian law.

Despite the extraordinary nature of the maritime incident, most of the problems identified in this analysis of the examination and investigation processes conducted after the maritime incident were not unique to this incident. Therefore, this Chapter is, an example of the application of the principles set out in this Report on a particular case, and it thus clarifies and emphasizes the significance of the Commission's recommendations.

CLOSING REMARKS

This Second Report concludes the Commission's work of considering the mechanisms and methods of examining and investigating complaints and claims of violations of international humanitarian law. Together with the First Report that we submitted in January 2011, we have now completed the task that the Government of Israel entrusted to the Commission. The Commission hopes that both reports will make a contribution not merely to Israeli law and society, but to the whole community of nations that cherish the rule of law.



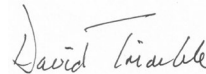
Justice of the Supreme Court (ret.)
Jacob Turkel, Chair



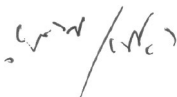
Professor Miguel Deutch, Member



General (ret.) Amos Horev, Member



Lord David Trimble, Observer



Ambassador Reuven Merhav, Member



Professor Timothy McCormack,
Observer

ANNEXES

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**ANNEX A: LIST OF THE WITNESSES APPEARING BEFORE
THE COMMISSION AND THE COMMISSION'S
COORDINATOR, THEIR POSITIONS AND THE DATES
OF THEIR TESTIMONIES**

Witness' Name	Witness' Position	Date
Mr. Yehuda Weinstein	Attorney-General	Apr. 10, 2011
Mr. Shai Nitzan	Deputy State Attorney (Special Assignments)	Apr. 10, 2011
Major-General Avichai Mandelblit	Military Advocate-General	Apr. 11, 2011
Ms. Jessica Montel	B'Tselem – The Israeli Information Center for Human Rights in the Occupied Territories, Director General	Apr. 11, 2011
Mr. Saker a-Tameizi, Ms. Hayfa a-Tameizi	The father and widow of Yasser a-Tameizi	Apr. 11, 2011
Mr. Michael Sfar, Adv.	Yesh Din – volunteers for human rights, Representative	Apr. 11, 2011
Ms. Limor Yehuda, Adv., Mr. Dan Yakir, Adv.	The Association for Civil Rights in Israel, Representatives	Apr. 11, 2011
Mr. Yuval Diskin	Head of the Israel Security Agency	Apr. 12, 2011
A.	Legal advisor of the Israel Security Agency	Apr. 12, 2011
Dr. Ishai Menuhin, Ms. Bana Shoughry Badarne, Adv.	Public Committee Against Torture in Israel, Representatives	Apr. 12, 2011
A.	The Mavtan (Interrogatee Complaints Comptroller in the Israel Security Agency)	Apr. 13, 2011
Ms. Rachel Matar	Former Supervisor of the Mavtan	Apr. 14, 2011
Brigadier-General Meir Ochana	Chief Military Police Commissioner	Apr. 14, 2011
Prof. Eyal Benvenisti, Prof. Yuval Shany, Dr. Amichai Cohen	International law professors	Apr. 14, 2011

Meeting with the Commission's Coordinator

Major-General Avichai Mandelblit	Military Advocate-General	Aug. 10, 2011
Mr. Uri Carmel	Director of the Police Internal Investigation Department	Sep. 22, 2011
1. Mr. Yehoshua Lemberger 2. Commander Ayelet Elisar 3. Superintendent Slaviv Michaels 4. Commander Haim Rachamim	1. Deputy State Attorney (Criminal Matters) 2. Deputy Legal Advisor of the Israel Police 3. Legal Advisor of the Israel Border Police 4. Deputy Head of the investigative branch of the Judea and Samaria District of the Israel Police.	Oct. 5, 2011
Colonel Erez Katz	Former Brigade Commander who carried out many operational debriefs	Nov. 29, 2011

ANNEX B: THE SAMPLE EXAMINATION



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

16 Elul 5771
15 September 2011

Dear
Brigadier-General Danny Efroni
The Military Advocate General

Subject: **Sample Inspection of Files**

First I would like to congratulate you and wish you success in your position as Military Advocate General.

Following on from conversations held with your predecessor, Major General Avichai Mandelblit, on the subject at hand, it is requested that you present the Commission with all of the materials (operational inquiries, investigative materials, documents prepared at the MAG Corps and any other relevant material) related to the events and files detailed in the appendix attached to this letter.

You are also requested to provide the Commission with a random sample of approximately 30 files (and all their materials) dealing with the death or injury of an uninvolved civilian. These files and materials must concern events no earlier than the year 2000 and must be chosen by you according to the following categories:

- 1) Approximately ten events where it was decided that a CID investigation would not be launched following the operational debrief.
- 2) Approximately ten events where it was decided, based on a CID investigation, not to submit an indictment. In relation to these events it is requested that about half the files will be cases where the decision to launch a CID investigation was made after assessing the operational debrief and about half where the decision to launch a CID investigation was immediate.
- 3) Approximately ten events where it was decided, based on a CID investigation, to submit an indictment. In relation to these events it is requested that about half the files will be cases where the decision to launch a CID investigation was made after assessing the operational debrief and about half where the decision to launch a CID investigation was immediate.

We ask that the files in each category be divided between events in the Gaza Strip and events in the West Bank.

I would be grateful for the transfer of at least some of the files before 20 September 2011.

Wishing you a Happy New Year,

Hoshea Gottlieb,
The Commission's Coordinator

Appendix to the letter

Events mentioned in the Tomuschat Report

1. Death of Muhammad Hajji and shooting of Shahd Hajji and Ola Masood Arafat.
2. The Abu Halima family incident.
3. The Abd al-Dayem incident.
4. The attack of al-Quds Hospital incident.

Events mentioned in the Davis Report

5. The Samouni family incident.
6. The Al-Atatra sandpit incident.
7. The Al-Wafa Hospital incident.
8. The Ibrahim Juha incident.
9. Human shields incidents (the Davis Report points to the existence of three separate incidents where human shields were used).
10. The al Matariye family incident in Hebron.
11. The Basam Abu Rahma incident in Bil'in.
12. The Yasser Tmeizi incident in Tarqumiyah.

Incidents mentioned in the B'Tselem report – 'irresponsibility'

13. Rami Samir Naif Shna'a, 25 years old, Nablus resident, killed on 2.6.07.
14. Yasser Sakher Ismail a-Tamiizi, 30 years old, resident of Idhna in Hebron district, killed on 13.1.09 at Tarqumiyah crossing.
15. "Mistaravim" action in Ramallah on 4.1.07 – 4 killed and about 40 wounded.
16. Anam Muhammad Assad a-Tibi, 52 years old, Nablus resident,

killed on 26.2.07.

17. Muhammad Halil Muhammad Salah, 35 years old, resident of Dir Salah in Bethlehem district, killed on 5.12.07 (unclear if killed by military forces or police).
18. Abbad Sacher Muhammad al-Wazir, 69 years old, Nablus resident, killed on 16.10.07.
19. Wahib Muslah Naif a-Dich, 28 years old, resident of a-Dich village in Salfit district, killed on 14.12.06.
20. Abed Al-Aziz Hamed Abed Al-Aziz Al-Matur, 28 years old, killed on 5.4.07.
21. R'azi Maher R'azia a-Zaanin, 12 years old, resident of Beit Hanoun in the Northern Gaza Strip, injured by shooting on 4.9.09 and died of his wounds the next day.

Incidents appearing in documents submitted to the Commission by 'Yesh Din'

22. Notice no. 1237/08 to the Police Investigation Unit in Be'er Sheva. Yaakov Mumhamad Tzalas ala Katzrawi, 15 years old from Hebron, shot and seriously injured.
23. CID file Sharon Samaria 210/09, Muhammad Fasil Musa Salim, 16 years old. Injured by shooting in Azzoun.

Incidents appearing in 'Exceptions' report by 'Yesh Din'

24. Files 08/08, 14/08 at Southern Military Court – beating of bound and blindfolded detainees.
25. File 497/03 at Northern Military Court – killing of 7 year old child.
26. File 186/04 at Northern Military Court, military court appeals file A/59/05 – killing of 3 year old child.
27. File 214/04 at Southern Military Court – killing.

**Incidents appearing in documents submitted to the Commission
by the Association for Civil Rights in Israel**

28. The incident mentioned in Zaharan 6928/08 petition to the High Court of Justice.

Others

All criminal files that are in some way related to the maritime incident of 31 May 2010.



Supreme Court Justice (Ret.) Jacob Turkel, Chair



General (Ret.) Amos Horev, Member



Ambassador Reuven Merhav, Member



Professor Miguel Deutch, Member



Lord David Trimble, Observer



Brigadier General (Ret.) Kenneth Watkin, Q.C., Observer (untill Apr. 15, 2011)



Professor Timothy McCormack, Observer



Advocate Hoshea Gottlieb, Commission's Coordinator



Professor Michael Schmitt, Special Advisor (untill Sep. 25, 2011)



Professor Claus Krefß, Special Advisor



Professor Gabriella Blum, Special Advisor