



**Response to the Military Advocate General's  
Position Paper on the Investigation of  
Allegations of Violations of  
International Humanitarian Law**

**Submitted to  
The Public Commission to Examine  
the Maritime Incident of 31 May, 2010  
("The Turkel Commission")**

**By  
The Researchers of  
The Israel Democracy Institute's  
Terror and Democracy Project**

**February 10, 2011**

Feb. 10, 2011

Honored Commission,

The following document is a response by the researchers of the Israel Democracy Institute's Terror and Democracy project to the Position Paper regarding the investigation of allegations of violations of International Humanitarian Law (IHL) that the IDF Military Advocate General (MAG) presented to the Public Commission to Examine the Maritime Incident of 31 May, 2010, headed by Supreme Court Justice (Ret.) Jacob Turkel.

In this document, we arrive at the following conclusions:

- a. The present standard for opening a criminal military investigation of alleged violations of IHL is too high and is unsuitable for a "mixed" situation that includes elements of armed conflict and territorial control.
- b. As opposed to the current situation, operational investigations should be used very sparingly for clarifying events that are subject to allegations or suspicions of a criminal offense.
- c. Given the existing practice, in which the Military Advocate General (MAG) functions in the dual capacity of both advisor and prosecutor, decisions regarding the opening of criminal investigations pertaining to the legality of orders and army procedures that have been adopted or ratified by the MAG or by superior ranks, including the political echelon, should be removed from the authority of the MAG. Additionally, the external civilian supervision of the military investigational system should be reinforced. In order to achieve this, we recommend that a permanent, external, objective commission be established. This commission would deal with the initial verification of certain complaints and suspicions of violations of international law, and supervise the administration of military investigations by the MAG.

Beyond submitting this document, we would be pleased to present our positions to the Commission orally, if it is deemed necessary.

Respectfully,

Prof. Yuval Shany    Dr. Amichai Cohen    Adv. Ido Rosenzweig

The Terrorism and Democracy Project  
The Israel Democracy Institute



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## A. Introduction

1. According to Paragraph 5 of Government Decision number 1796 of June 14, 2010, the authority to “address the question whether the mechanism for examining and investigating complaints and claims of violations of IHL the International Humanitarian Law (also known as the "laws of armed conflict", hereinafter: IHL), as carried out by Israel in general, and as implemented with regard to the events of May 31, 2010, in particular, complies with the obligations of the State of Israel pursuant to the rules of international law” was entrusted to the Public Commission to Examine the Maritime Incident of 31 May, 2010, headed by Supreme Court Justice (Ret.) Jacob Turkel (hereinafter: the Inquiry Commission).
2. During the month of December 2010, the Israel Defense Forces’ Military Advocate General (MAG) presented the Inquiry Commission with a Position Paper regarding the rules of investigation as they are applied by the State of Israel, and the relationship between them and international law (hereinafter: the MAG’s Position Paper).<sup>1</sup>
3. The current document is being presented to the Commission as a response to the MAG’s Position Paper. The purpose of this response document is to critique a number of points raised in the MAG’s paper that, in our opinion, were insufficiently analyzed or were not raised at all.
4. This response document is submitted by the research team of the Israel Democracy Institute’s Terror and Democracy project. This team, which includes Prof. Yuval Shany, Dr. Amichai Cohen, and Adv. Ido Rosenzweig, operates within the research program of the Institute and deals with topics of national security and democracy. As part of their work, these researchers conduct studies, meetings and working groups that focus on the tension between protecting Israel’s national security and preserving its democratic values, and suggest possible ways to reconcile Israel’s democratic principles with its difficult security situation. They base much of their work on comparative studies that enable them

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<sup>1</sup> See [www.mag.idf.il/sip\\_storage//FILES/9/949.pdf](http://www.mag.idf.il/sip_storage//FILES/9/949.pdf)

to learn from the relevant experiences of other democracies that are dealing with security challenges comparable to those facing the State of Israel.

5. The MAG's Position Paper presents the Commission with a complete set of data. It appears to be the most comprehensive document ever written in Israel on the topic of inquiries by military units. The MAG's Position Paper is noteworthy due to the scope of the comparative information that it presents, the depth of its analysis, and the quality of its application of fundamental principles to concrete situations. In light of this, we believe that this document should serve as a platform for discussing the nature of inquiries in the IDF and the need for such inquiries in general, rather than be limited to the specific events that are being investigated by the Inquiry Commission.
6. In our assessment, the MAG's Position Paper is a high quality and extremely detailed document that clarifies and reveals the problems that exist in the IDF's system of criminal investigation, to the extent that this system is activated with regard to allegations and suspicions of violations of IHL. In light of its exhaustive presentation of the situation, and given the broad authority conferred upon the Inquiry Commission in this regard, we believe that the Commission should deal with an array of issues that arise from the IDF's inquiry of the incidents, and should determine the appropriate policy in such cases. The issues that we see as requiring clarification are:
  - a. What information justifies the opening of a military criminal investigation?
  - b. What is the relationship between conducting operational inquiries and conducting a military criminal investigation?
  - c. Which body or institution should decide whether to open a criminal investigation? Do different types of events warrant special procedures for opening an investigation?
  - d. Which body or institution should supervise the decision to open a criminal investigation, the management of the investigation, and its outcome?

7. It should be emphasized at the outset that we consider the IDF's law enforcement system to be, in essence, appropriate and fair. Therefore, we oppose the position of the report of the Human Rights Council's Fact-Finding Mission regarding Operation Cast Lead ("The Goldstone Report"),<sup>2</sup> which concluded that every inquiry conducted by the IDF regarding suspicions of violations of the law of war is inherently inadequate. This position is extreme and has no basis in the facts as we see them, or in the accepted practices regarding this matter in the rest of the world. Therefore, we do not dispute most of the claims presented in the MAG's Position Paper. It seems to us that precisely due to this fact, the comments and reservations that we present below should be considered seriously both by those who see the current inquiry procedures as essentially reasonable and those who fiercely criticize the current procedures.
  
8. Legal scholars broadly agree that the rules of international law relating to the conduct of military criminal investigations are worded concisely, and frequently leave many questions in need of further clarification.<sup>3</sup> This situation seems to leave states with a wide range of possibilities for exercising their investigative power.<sup>4</sup> However, as is well known, considering the minimum conditions of the "black letter" provisions of international law is insufficient for analyzing the applicable law. International law is a developing legal system in which state practice, decisions of judicial and quasi-judicial bodies, and general principles of law and justice all have significant influence on the law's development and its interpretation. Therefore, adhering to the written rules of international law without taking into account existing trends in political and judicial practice might provide normative guidance that is too limited.

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<sup>2</sup> Human Rights Council, Report of the United Nations Fact-Finding Mission on the Gaza Conflict, 29 Sept. 2009, UN Doc. A/HRC/12/4 (2009).

<sup>3</sup> Michael N. Schmitt, "Investigating Violations of International Law in Armed Conflict," 2 *Harvard National Security Journal* 31 (2011), (hereinafter: Schmitt).

<sup>4</sup> Amichai Cohen and Yuval Shany, "A Development of Modest Proportions," 5 *Journal of International Criminal Justice* 310 (2007).

9. It seems to us that a narrow interpretation of the duties derived from international law may contradict the purpose of the Commission of Inquiry. To the best of our assessment, the role of such a commission is not only to reach conclusions regarding the legality of investigations as they were conducted in the past, but also to formulate procedural guidelines that will guide the State's conduct when similar questions arise in the future. Such guidance should take into account, among other factors, the modes of action that would help the State respond effectively to international criticism, which is likely to arise with regard to future military operations. If indeed this is the role of the commission, all the more so should it relate to the issue of how states interpret their duties in investigating suspicions of violations of IHL, and how international bodies—both judicial and quasi-judicial—interpret these duties.

## B. The Standard for Opening an Investigation

10. The duty of a state to investigate suspicions of serious violations of IHL is uncontested. Numerous international law documents reiterate this obligation.<sup>5</sup> The basic principle, which appears in the Geneva Conventions, declares as follows:

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.

Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article.

In all circumstances, the accused persons shall benefit by safeguards of proper trial and defence, which shall not be less favourable than those

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<sup>5</sup> Convention on the Prevention and Punishment of the Crime of Genocide, Article 4; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 7. Also: Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (hereinafter: Chemical Weapons Convention) Article 7(1); Hague Convention for the Protection of Cultural Property Article 28; and Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (hereinafter: the Ottawa Convention).

provided by Article 105 and those following of the Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949.<sup>6</sup>

11. Professor Michael Schmitt, who recently published a comprehensive article on the duty to investigate violations of the law of war, asserts that according to the authorized interpretation of the Geneva Conventions, the content of an investigation required by the Article cited above includes the following requirements:<sup>7</sup>

- The obligation to conduct an investigation is conditioned upon 1) an allegation 2) that a war crime was committed. It is not necessary to open a criminal investigation if the allegation relates to a conduct that does not amount to a war crime.
- There is no limitation as to the source of a complaint or allegation. The requisite allegation could be leveled by a commander in the field, by non-governmental organizations, etc.
- There is no obligation to open an investigation in response to every allegation contesting the legality of an operation. Only in cases where the allegation possesses a sufficient level of credibility to reasonably merit investigation is an obligation to investigate created.
- The requirements apply to all violations of IHL that constitute war crimes.
- The requirement to investigate possible war crimes extends to the actions of individuals who order the commission of an offense. By the principle of “command responsibility,” such individuals are treated as responsible for the resulting war crime.

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<sup>6</sup> Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (hereinafter: First Geneva Convention) Article 49; Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (hereinafter: Second Geneva Convention) Article 50; Convention relative to the Treatment of Prisoners of War (hereinafter: Third Geneva Convention) Article 129; Convention (IV) relative to the Protection of Civilian Persons in Time of War (hereinafter: Fourth Geneva Convention) Article 146.

<sup>7</sup> Schmitt, *supra* note 3, p. 39.

12. In general, we agree with Professor Schmitt's position. Indeed, IHL do not require using criminal investigative methods to investigate scant allegations or allegations that relate to offenses that do not constitute war crimes. However, the obligation to investigate, which is incumbent on the army, is not merely a reactive obligation. It does not come into being simply as a response to a concrete allegation raised by an outside source that a war crime has been committed; rather, the obligation to investigate can come into being proactively, in cases in which the nature of the wartime incident raises a reasonable suspicion that a war crime has been committed. Indeed, even according to Schmitt, the requirement to investigate may arise in a situation in which credible allegations exist that a war crime has been committed, or **alternatively**, in a situation in which there is credible reason to suspect that a violation has occurred.<sup>8</sup>
13. It is also important to emphasize that according to Schmitt, the duty to conduct a criminal investigation arises **in every case** in which there is credible information (or reasonable suspicion) that a serious IHL violation has occurred, and this duty requires investigation not only of the operational rank that directly committed the violation, but also of the **command level** above the soldiers. Schmitt does not explicitly relate to the responsibility of political echelons for serious violations of IHL in this context. However, it is clear that if substantive criminal law applies to this kind of criminal liability,<sup>9</sup> and the question of whether a military operation constitutes a war crime is being investigated, a duty to investigate the responsibility of the political echelons will emerge in cases in which there is a credible allegation or reasonable suspicion that these echelons were involved in the approval, planning, or execution of the operation, or that they violated their duty to prevent the operation or to punish those responsible for its occurrence.
14. The normative point at which our position departs from Schmitt's position concerns his portrayal of the exhaustive nature of the duty to investigate. In our opinion, in contrast to Schmitt's position, there is an additional source for the requirement to investigate

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<sup>8</sup> Schmitt, *supra* note 3, p. 83.

<sup>9</sup> For example, see Article 28 of the International Criminal Court's Rome Statute.

military operations that exists in international law alongside the duty derived from IHL: international human rights law. Moreover, the duty to investigate derived from human rights law is broader than the duty that arises from IHL.

15. Two main explanations exist for the normative gap between IHL and human rights law, with regard to the scope of the duty to investigate violations of international humanitarian law:

- a. In addition to the first-order duty not to violate human rights, human rights law includes a second-order duty to grant appropriate remedies in cases of human rights violations. Several international bodies, both judicial and quasi-judicial, have determined that the second-order duty includes a (relative) duty to investigate public servants who have violated rights that are considered protected human rights—especially those protecting life and person—and to prosecute offenders in a criminal procedure when necessary. In light of the broad application of human rights law, it may very well be that military operations that resulted in death or injury of citizens will not be considered war crimes, but will still be considered human rights violations that warrant investigation.<sup>10</sup>
- b. Human rights law assumes a reality in which injury to life or person is an exceptional act which demands special justification. For example, the use of firearms by governmental powers, which results in harm to life or person, is perceived as a *prima facie* violation of the first-order laws and requires an investigation into its justification (as a second-order duty).<sup>11</sup>

The basic principle was set out in *McKerr v. United Kingdom*:<sup>12</sup>

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<sup>10</sup> See for example: Human Rights Committee, General Comment 31 (2004), at para. 18; *Isayeva v. Russia*, ECHR judgment of 24 Feb. 2005, para. 209-212; *Las Palmeras v. Colombia*, I/A CHR judgment of 6 Dec. 2001, para. 65.

<sup>11</sup> Kenneth Watkin, “Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict,” 98 *American Journal of International Law* 1 (2004), 1, pp. 17-20, (hereinafter: Watkin).

<sup>12</sup> [McKerr v. United Kingdom](#), ECHR, 2001-111, Eur. Ct. H.R. 475.

[T]he 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.

16. The above being the case, the duty set out in the European Court's decision is to open an investigation in any case in which harm to human life is identified. Even though not all commentators adopt the position that human rights law requires the investigation of every death that occurs during armed conflict, broad consensus can be found in legal literature and court cases regarding the claim that according to human rights law, every deadly incident resulting in harm to uninvolved civilians requires an investigation.<sup>13</sup> It should be noted that a considerable number of the European Court's decisions related to the duty to investigate dealt with situations of active combat (especially in Chechnya, Eastern Turkey and Northern Cyprus). Indeed, the fighting in these cases occurred mainly in territory controlled by these states or within their sovereign territory. However, as explained below, the element of control exists, on some level, within a considerable part of the conflict between Israel and the Palestinians. The aforementioned court cases, therefore, are not irrelevant to a considerable part of Israel's operations in the West Bank.

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<sup>13</sup> See for example: Professor Philip Alston, *UN Special Rapporteur on Extrajudicial Executions, Handbook*, Chapter 5: Investigation and Prosecutions of Killings, at A8. ([www.extrajudicialexecutions.org/LegalObservations](http://www.extrajudicialexecutions.org/LegalObservations))

## Human Rights Law: Application

17. We do not intend to present a comprehensive exploration of the question of whether human rights law and IHL apply simultaneously. The Inquiry Commission's partial report<sup>14</sup> adopted the interpretive perspective that in principle, human rights law applies during times of conflict as well (and certainly to conflicts in occupied territory or in territory controlled by Israel); the relationship between these two sets of laws, however, is one of *lex specialis* to *lex generalis*, that is to say: in any case of conflict between the two sets of laws, international humanitarian law takes precedence over human rights law.
18. What position should be taken with regard to the standard for opening investigations of violations of international law in situations of combat? Should the MAG's position, which holds that humanitarian law is the applicable system, be fully adopted? Or should one adopt the position that holds that the system that applies to investigations should be the more stringent standards of human rights law, exactly as it is written (a position found in the Goldstone Report)?<sup>15</sup> Our position is that an intermediate approach should be taken: IHL should not be viewed as creating a negative arrangement regarding investigations, and as excluding the relevant provisions of human rights law; rather, human rights law should be interpreted in a manner that is compatible with a reality of combat. (As will be seen below, this position was adopted in the Tomuschat Commission report, which examined the implementation of the recommendations of the Goldstone Commission.)<sup>16</sup>

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<sup>14</sup> Paragraphs 98-100 of the partial report.

<sup>15</sup> 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 (Sept. 15, 2009) para. 1611 and thereafter.

<sup>16</sup> Report of the Committee of independent experts in international humanitarian and human rights law 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 64/254, including the independence, effectiveness, genuineness of these investigations and their conformity with international standards, para. 29 [A/HRC/15/50](#) (hereinafter: The Tomuschat Commission).

19. It should be emphasized that determining the relevant law with regard to investigations depends first and foremost on the factual situation in which the allegations or suspicions of violations of IHL are raised. This matter is determined in accordance with the circumstances of each individual case. To the best of our understanding, the Commission's role in examining military investigations is not limited to its duty to investigate the events of May 31, 2010, but is intended to extend to recommending principles for managing future investigations of a wide range of military operations.
20. As the Commission mentions explicitly in its partial report, the facts at hand sometimes point to a "mixed" situation.<sup>17</sup> There are military incidents that more closely resemble "battles," and are obviously more suitable for the application of humanitarian law, while other events are more suitable for analysis pursuant to human rights law, especially if they occur within territory partially or fully controlled by the State of Israel. It should be noted that even in territory where active combat occurs, there may be incidents that will be regulated by human rights law rather than IHL, because they are relatively minor or because of their limited connection to combat (e.g., stone throwing incidents or demonstrations in proximity to the front).
21. In this context, it should be noted that the position regarding the classification of military operations in a "mixed" situation does not require a resolution of the question of whether or not Israel has the status of an occupier in the Gaza Strip. According to the ruling of the Israeli Supreme Court<sup>18</sup> (which the authors of this document support),<sup>19</sup> Israel does not have "effective control" over the Gaza Strip. However, the Supreme Court determined that Israel has certain obligations toward the Gaza Strip, which seem to be based on concepts derived from the realm of human rights law. Moreover, when Israeli military forces enter the Gaza Strip and exercise effective control over parts of the Strip for a few weeks, or, in vastly different circumstances, when Israeli military forces overtake a ship

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<sup>17</sup> Paragraph 185 of the partial report.

<sup>18</sup> HCJ 9132/07 Al Bassiouni v. Prime Minister and Minister of Defense of 30.1.2008.

<sup>19</sup> Yuval Shany, "Faraway, So Close: The Legal Status of Gaza after Israel's Disengagement," 8 *Yearbook of International Humanitarian Law* 369 (2005).

at sea that is sailing toward Gaza, human rights law applies to the military's action, as residual law at the very least.

22. From the factual point of view, the conflict between Israel and the Palestinians conforms to the modern definition of a "hybrid conflict"; that is, a conflict that oscillates between periods of armed conflict and periods of relative calm.<sup>20</sup> In our opinion, the assumption that IDF soldiers are in armed conflict at all times and in every place does not seem to be correct from either a factual or legal point of view.
23. In a mixed situation, an integrated legal regime, which does not rest upon a single system of laws, should be employed.<sup>21</sup> This system should integrate rules and fundamental ideas drawn from the two relevant systems: IHL and human rights law. According to our approach, the rulings of the High Court of Justice regarding targeted killings,<sup>22</sup> incarceration of unlawful combatants<sup>23</sup> and civil compensation for the Intifada<sup>24</sup> can be viewed as expressions of this concept. In each of these decisions, the High Court of Justice used the principles of human rights law in order to increase the protection granted to citizens by IHL.
24. How does this concept of normative integration manifest itself with regard to military investigations? On one hand, it is reasonable to assume that in a case of armed conflict, even one that is not international, a criminal investigation should not be opened in each and every case of death.<sup>25</sup> The position of human rights law, which views every injury to life or person as a *prima facie* violation of law, is unsuitable in cases of armed conflict, in

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<sup>20</sup> Civil Appeal 5964/92 Beni Ouda v. State of Israel (2002).

<sup>21</sup> David Kretzmer, "Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defense?" 16 *Eur J Int Law* 171 (April 2005).

<sup>22</sup> HCJ 769/02 The Public Committee against Torture in Israel v. The Government of Israel of 14.12.2006.

<sup>23</sup> Criminal Appeal 6659/06 A. v. State of Israel of 11.6.2008.

<sup>24</sup> HCJ 8276/05 Adalah – The Legal Center for Arab Minority Rights in Israel et al. v. Minister of Defense et al. of 12.12. 2006.

<sup>25</sup> Watkin, *supra* note 11, p. 33.

which the law permits—or at least accepts—the killing of enemy fighters and even of civilians who are harmed unintentionally (and proportionally).

25. On the other hand, the position that no investigation should be opened in the absence of *prima facie* evidence that a crime has been committed—the criteria proposed in the MAG’s Position Paper—is, in our estimation, an unreasonable and unjustified position. The present conflict between Israel and the Palestinians includes components of confrontation and control. As mentioned above, the legal standard should include components of IHL and human rights law.<sup>26</sup>
26. Since the duty to conduct investigations required by human rights law is relative in nature—that is to say, the pace of its application and the manner in which it is implemented are subject to the tests of reasonability and proportionality—a direct conflict does not exist between the investigative duties according to each of the applicable laws. Since the investigation can be conducted while taking military constraints into account—for example, the number of casualties, the need to focus efforts on continued fighting and accessibility to the investigation scene—there is no real impediment to simultaneously applying the duty to investigate derived from IHL and the duty to investigate derived from human rights law, in a manner that takes the combative context of the incident at hand into account. Thus, for example, there will be situations in which opening an investigation following allegations of violations of international law will only be justified after the military operation has concluded, or there will be situations in which it will be justified to give certain investigations priority over others.
27. A position along such lines was adopted by the Tomuschat Commission, which stated:

There are constraints during armed conflict that do impede investigations. For example, not every death during an armed conflict can be effectively investigated. Similarly, the 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. The nature of

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<sup>26</sup> Watkin, *supra* note 11, pp. 33-34.

hostilities might obstruct on-site investigations or make prompt medical verifications impossible. The conflict might have led to the destruction of evidence, and witnesses might be hard to locate or be engaged in conflict elsewhere. When the fighting is over, some of these constraints tend to lose their relevance. As summarized by the Special Rapporteur on extrajudicial, summary or arbitrary executions: “On a case by-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”.

The purpose and objectives of IHL also affect the legal significance of some IHRL standards of investigation beyond the common criteria of independence, impartiality, thoroughness, effectiveness and promptness mentioned above. 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 violations of IHL.<sup>27</sup>

28. In any case, it is clear that when there are no exceptional considerations that would justify refraining from opening an investigation—for example, when civilians were harmed in Israeli controlled territory in a situation that was not part of a real combative context—we do not think that there is any legal or practical justification to refrain from opening an investigation by virtue of human rights law just because a military conflict exists in that area.

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<sup>27</sup> Tomuschat Commission, para. 32-33.

29. Which situations require opening an investigation in accordance with the aforementioned integrated model? In this case, the rule that credible allegations or reasonable suspicion that a war crime has been committed require the opening of a criminal investigation applies as well. However, according to our approach, in cases of "mixed" circumstances, this rule should be broadened in order to apply to serious human rights violations that do not necessarily constitute war crimes. The investigation of these violations may lead to imposing criminal liability due to certain violations of human rights under international or Israeli law (for example, the prohibition of torture or manslaughter) but may also facilitate the implementation of other, second-order obligations derived from human rights law (for example, compensation liability). We have identified two criteria as appropriate for establishing a broader obligation to investigate: **“the serious, unjustified incident”** and **“the serious, unexpected incident.”** These two criteria stem from an integration of obligations according to IHL and obligations according to human rights law, and are applicable to situations that fall within the area of both legal systems (such as the incident involving the Gaza flotilla).
30. The “serious, unjustified incident” criterion somewhat broadens the regular standard that applies to serious violations of IHL. In cases in which credible allegations are raised or there is a reasonable suspicion regarding a serious and unjustified injury to life, person, honor or property—that is to say, a serious violation of human rights—the state incurs a (relative) obligation to investigate. One example of such a case is if human rights organizations present credible information to the MAG that a terror suspect was targeted and killed even though there was a reasonable opportunity to arrest him. Another example is a case in which civilians are harmed as a result of the use of arms in a manner contradictory to military procedure. In such cases, the MAG must open an investigation.
31. The “serious, unexpected incident” criterion is a broader criterion that covers not only allegations or concerns that criminal violations have occurred, but also allegations of violations of human rights that do not give rise to criminal liability under international law (but only to criminal liability according to Israeli law, or tort liability). This criterion

is based on the assumption that a gap between the subjective expectations of commanders regarding the expected outcome of the operation and the actual outcome in practice raises the possibility—which must be examined—that there was a flaw in the planning or execution of the military operation, which may have implications for its legality. In this context, it should be noted that IHL obligates army commanders to attempt to predict the outcome of military operations and to avoid operations whose outcomes are expected to be disproportional.<sup>28</sup> Additionally, commanders are required to prevent violations of IHL on the part of their subordinates, and are expected to foresee such violations based on the circumstances.<sup>29</sup> The existence of unanticipated damage can indicate (not absolutely, of course) that commanders neglected these duties. Examples of the application of this criterion include a case in which an aerial attack on a military target, which was expected to end without damage to civilians, injured many civilians, and the flotilla incident that is being investigated by the Inquiry Commission, in which taking over a ship at sea ended unexpectedly in the death of civilians. In such cases, it is possible that the gap between prediction and reality can indicate that the planning or execution of the operation was carried out in a deficient manner that does not meet legal requirements, and an investigation is necessary.

32. It should be noted that according to the two criteria mentioned above, the duty to investigate in combat situations does not arise from harm to person or property alone, since such harm may be justified and expected. Something additional is required: an indication of possible illegality or of a flaw in planning or execution. Moreover, even if the injury is unjustified or unexpected, it may be assumed that in combat situations it will be difficult to investigate minor violations of IHL and of human rights using the tools of criminal law. Therefore, only when there is an allegation or a reasonable suspicion of a serious, unjustified or unexpected injury is there reason to open a criminal investigation

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<sup>28</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Article 57(2).

<sup>29</sup> *Supra*, Article 86.

(even though, as mentioned previously, it is possible that human rights law imposes a duty to investigate even less serious violations, albeit not with the tools of criminal law).

33. It should be said immediately that opening a criminal investigation is not necessarily the automatic response required in every case in which the outcome of an operation may indicate a serious violation of IHL or human rights law. As detailed below, the duty to investigate can be implemented in appropriate cases by means of a preliminary factual inquiry that will examine whether there is reason to open a criminal investigation. Nonetheless, as we will argue below, the current form of inquiries that are conducted on the level of the military unit are not an adequate alternative to a criminal investigation.

### **The Duty to Conduct a Non-Criminal Investigation**

34. The duty to conduct an inquiry should be examined from two directions: on one hand, the duty to open an operational inquiry as opposed to a total exemption from investigation, on the one hand, and the seam between the duty to conduct an operational inquiry and the duty to conduct a criminal investigation on the other hand.
35. The MAG's Position Paper mentions two cases in which an "operational inquiry"—that is, a preliminary factual inquiry that is not a criminal investigation—will be conducted. The first is a complaint that is apparently not unfounded.<sup>30</sup> The second is any case of death of individuals who were not involved in the military action.<sup>31</sup> Within this context, the Position Paper lists the inquiry procedures, as well as the various immunities, and the reasoning behind them.
36. As a preliminary remark, we note that according to the MAG's Position Paper, investigation procedures as determined by the MAG and listed in the Position Paper are not anchored in any particular piece of legislation. Therefore, even if these instructions

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<sup>30</sup> MAG Position Paper, p. 15.

<sup>31</sup> MAG Position Paper, p. 13.

are worthy in and of themselves, we see the fact that they can be changed based on the MAG's internal orders as problematic. **These instructions should be anchored authoritatively in Military Judicial Law or in the ordinances issued pursuant to that Law.**

37. With regard to the line between opening an operational inquiry and opening a criminal investigation, the MAG's Position Paper emphasizes that there is not necessarily a connection between these two types of investigation; that is, a criminal investigation can take place even in the absence of an operational inquiry and is not dependent on it. In our opinion, this is the appropriate position: an operational inquiry cannot be an obstacle or condition for a criminal investigation.
38. The MAG's Position Paper, however, glosses over a genuine difficulty regarding the relationship between the operational inquiry, as a foundation for gathering data, and the criminal investigation that is conducted immediately afterwards. The assumption that an operational inquiry that is conducted within a military unit—an inquiry whose principal purpose is to draw operational conclusions, not necessarily to clarify questions regarding possible violations of international law—can lead to findings that will assist the criminal investigation is problematic. It seems that in the framework of an operational inquiry, soldiers usually tend not to reveal issues that may lead to prosecution of their comrades or that may tarnish their unit's reputation. In fact, the very existence of a broad operational inquiry that relates to a serious incident involving several soldiers from the same unit, can give rise to a real concern about "coordination of testimony" by the witnesses participating in the operational inquiry—even if this coordination is not deliberate. Understandably, testimony coordination of this nature can later impede the ability of the body that is conducting the criminal investigation to investigate the case effectively and identify contradictions between the various testimonies.
39. Moreover, a thorough operational inquiry requires valuable time, and the period of time that elapses between the time that the incident occurred and the time when the criminal

investigation is opened can cause important findings to disappear from the scene (similarly, the scene itself may become inaccessible in the interim). This too can harm the quality of the criminal investigation.

40. An example of this problematic issue arises from the events that were investigated by the Inquiry Commission itself. According to the MAG's Position Paper, the MAG avoided ordering an immediate criminal investigation regarding the events of the flotilla, since the matter had been transferred to an "expert inquiry" for examination, as well as to the Inquiry Commission itself. The Position Paper indeed mentions that this does not preclude the possibility that a criminal investigation will take place at a later stage, but it seems to us that at a later stage, the decision to open a criminal investigation will meet with difficulty on the two planes mentioned: the fact that testimonies of soldiers had already been published, would yield concern that testimonies would be coordinated during the criminal investigation, and the physical findings at the scene would no longer be accessible. Indeed, the Inquiry Commission's partial report also mentions that the scene of the events was not preserved properly (even though the Israel Police was responsible for its preservation, according to the MAG's Position Paper), and this made it impossible to arrive at the full truth about the incident.<sup>32</sup>

41. **In order to prevent the above problems, we suggest adopting two complementary solutions:** a "quick assessment" system and a requirement to end the investigation in a case where criminal liability is suspected.

42. The **quick assessment** of facts is a method used in inquiries conducted by the Australian army. If a doubt exists as to whether a criminal investigation is necessary, an officer is appointed to perform a quick assessment and to present conclusions within twenty-four hours.<sup>33</sup> This system minimizes the concern that testimony will be

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<sup>32</sup> Para. 237 of the partial report.

<sup>33</sup> Australian Government Department of Defence, Defence Instructions, Admin 76-2 Quick Assessment ([www.defence.gov.au/fr/Policy/ga67\\_02.pdf](http://www.defence.gov.au/fr/Policy/ga67_02.pdf))

coordinated and decreases the time lapse preceding the opening of an investigation. Thus, it helps preserve the access of the criminal investigators to the scene of the events.

43. Another complementary system is setting a rule that the investigating officer must **stop the operational inquiry** at the moment when *prima facie* evidence for the existence of a criminal violation emerges (an example in this context would be any testimony). A similar rule—which was established, for example, in accordance with ordinances relating to service inquiries by virtue of the British Armed Forces Law of 2006<sup>34</sup>—can considerably decrease the above mentioned concerns.
44. To summarize this point, our position is that the operational inquiry is not an effective tool for managing criminal investigations. On the contrary, it is a tool whose usage may harm these investigations or even disrupt them completely. Obviously, military inquiries have other important advantages, especially with regard to drawing operational conclusions. There is nothing wrong with using such an inquiry if the conditions for opening a criminal investigation (i.e. a credible allegation or reasonable suspicion related to an unjustified or unexpected serious incident) do not exist. However, if suspicion of a serious violation of IHL or human rights law arises incidentally from such an inquiry, the MAG must open a criminal investigation immediately, and not wait for the completion of the operational inquiry.
45. When a decision to open a criminal investigation is taken, the MAG (as a rule) must stop the inquiry. Alternatively, it may be appropriate to determine procedures that will enable important operational inquiries to take place alongside the criminal investigation in a manner that will not harm the sound management of the inquiry (for example, while taking care to separate witnesses from one another and to conduct certain parts of the inquiry only after urgent parts of the criminal investigation have been completed).

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<sup>34</sup> Armed Forces (Service Inquiries) Regulations 2008, Regulations 8 and 9, [www.mod.uk/NR/rdonlyres/88DD291C-8125-4ABE-896D-FC4A38AEF905/0/TheArmedForces\\_ServiceInquiries\\_Regulations2008si2008\\_1651.pdf](http://www.mod.uk/NR/rdonlyres/88DD291C-8125-4ABE-896D-FC4A38AEF905/0/TheArmedForces_ServiceInquiries_Regulations2008si2008_1651.pdf)

46. The combination that exists today, in which there is overly generous use of the operational inquiry tool by the MAG and a high threshold has been set for opening criminal investigations, leads to a situation in which, despite its obvious disadvantages, the operational inquiry is used for the initial filtering of criminal cases—a role that contradicts the original purpose of the inquiry and that is in a state of tension with its principal characteristics. As a result, the duty to investigate violations of international law during times of combat is not appropriately fulfilled.
47. In sum, in our opinion, when the MAG is presented with a credible allegation or a reasonable suspicion that a serious incident has occurred that is unjustified or unexpected, the MAG must open a criminal investigation. In borderline cases, the MAG can be aided by a quick factual assessment procedure. In any case, when an incident is discovered to be of a criminal nature, or is suspected of being so, the MAG must avoid using the operational inquiry as a criminal investigative tool.

### C. The Independence and Impartiality of the Investigation

48. As mentioned above, an integrated system of IHL and human rights law governs the investigation of allegations or suspicions of serious violations of IHL or human rights law that take place in the framework of the Israeli-Palestinian conflict.
49. While IHL does not describe in detail the necessary elements for conducting a proper investigation, most specialists in human rights law agree regarding the components required in criminal investigations of military operations. These components have been described in several decisions of the European Court of Human Rights, and are in fact accepted as the fundamentals of investigations by virtue of human rights law. It should be noted that the European Court decisions were mostly given in the context of violent conflicts in Russia and Turkey,<sup>35</sup> which one might indeed claim are somewhat similar to the situation in Israel. Similar rules have been set by the Inter-American Court of Human Rights, which stated explicitly that certain rules pertaining to investigation of crimes according to human rights law apply to violent conflicts as well,<sup>36</sup> and by the Tomuschat Commission, which examined the IDF's investigation system, among other issues.<sup>37</sup>
50. The two basic principles required in investigations by virtue of human rights law that are relevant to our discussion are independence of the investigations and impartiality of the investigating body. They are also the foundation for conducting a recognized investigation that meets the requirements of the complementarity principle according to Article 17(2) of the International Criminal Court's Rome Statute. An additional rule which we will relate to briefly is the requirement of transparency. Additional rules (which we will not deal with in this document) may be indicated such as efficiency, promptness

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<sup>35</sup> For example: *Isayeva v. Russia*, *supra* note 10.

<sup>36</sup> For example: *Las Palmeras v. Colombia*, *supra* note 10.

<sup>37</sup> See *supra* note 16.

and credibility. As the Tomuschat Commission stated, these principles apply to armed conflict differently than they apply during times of calm.<sup>38</sup>

51. **Independence:** A basic principle that controls military inquiries is the principle of independence of the body investigating the suspicions. The investigator should not be subordinate to the investigated body on a command level. Moreover, the investigator must not be subordinate to another body which has **an interest in the investigation's outcome**, whatever it may be. The independence principle is also a central component of the MAG's Position Paper, and therefore, we do not think it necessary to establish this principle at length.
  
52. **Impartiality:** Although the principle of impartiality is closely related to the independence of investigation principle, analytically it is a separate condition necessary for conducting a proper investigation. As opposed to the independence component, which deals chiefly with the issue of the investigating body's subordination to other interested bodies, the impartiality component includes the detachment of the investigator from any interest that might influence the investigation's outcome. The principle is that whoever makes a decision relating to the investigation is supposed to act in absence of prejudice or any other kind of bias or conflict of interests.
  
53. The independent investigation principle is also accepted by armies of other states. As stated in the MAG's Position Paper, the criminal legal procedure has been removed from the military system in many states worldwide, and is currently part of the regular, civil criminal investigative system of those states. The MAG's Position Paper omitted these states from the comparative law overview chapter of the paper, based on the claim that due to the significant differences between the legal systems of the states that implement the civil investigation model and Israel's military legal system, nothing can be learned from the experience of these states.

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<sup>38</sup> See *supra*, note 16.

54. Even if we were to accept this claim, it is important to place the comparative discussion that appears in the MAG's Position Paper in the following context: common law states, which do not conduct themselves according to the civil inquiry model, act under conditions that challenge the principle of the independence of the military investigation system (the military investigates itself). Therefore, these states tend to adopt "compensation mechanisms" that are intended to minimize the disadvantages embedded in the internal military inquiry system. Such mechanisms, which usually involve civilians in military investigation procedures, enable Common Law states to claim that their military prosecution system is independent, even though it is not managed by the civilian system. We will now briefly survey some of these "compensation mechanisms":
55. **Australia:** The Australian investigative system is currently undergoing various vicissitudes due to a 2007 reform, followed by an Australian High Court decision which invalidated some of the reform's components.<sup>39</sup> The relevant point for our issue is as follows: Australian military inquiries are conducted by a unit (Australian Defence Force Investigative Service) subordinate to the Military Provost Marshall, who is subordinate to the Chief of Staff alone in the commanding hierarchy. It should be emphasized that the Military Provost Marshall is not subordinate to the military's legal consultancy system. The prosecution system is also an independent one. It is headed by the Director of Military Prosecution, a role that is disconnected from the regular chain of command. The Director of Military Prosecution is appointed to the army externally by the Minister of Defense.<sup>40</sup>
56. **United Kingdom:** In the United Kingdom as well, the military prosecution system is disconnected from the military consultancy system. The military prosecution system, the Service Prosecution Authority, is disconnected from the regular system of command and

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<sup>39</sup> Lane v. Morrison (2009) 239 CLR 230.

<sup>40</sup> MAG Position Paper, p. 62. See also: "New ADF Appointments To Enhance Military Justice System", 5 Jul 2006, available at [www.minister.defence.gov.au/Billsontpl.cfm?CurrentId=5784](http://www.minister.defence.gov.au/Billsontpl.cfm?CurrentId=5784)

is headed by a civilian.<sup>41</sup> Recently, in November 2010, a special investigation unit for examining accusations of abuse of local civilians by the British military forces in Iraq during the period between March 2003 and July 2009 (IHAT—Iraq Historic Allegations Team) commenced its operations. A high ranking retired police officer heads the team. The team is composed of Military Police investigators (from the SIB) and former Civil Police investigators. The decision to establish the team was made as early as March 2010 (by the former Government) and the team's work is meant to continue for at least two years. The investigating team is obligated to conduct the investigations in accordance with the Armed Forces Act of 2006 (that is to say, the same way military investigations are conducted).

57. A British court (QB) recently discussed claims raised against the independence of IHAT<sup>42</sup> against the backdrop of the participation of soldiers in the investigating team, in light of the team's subordination to the Armed Forces Act, and due to the fact that many of the abuse allegations relate to military police personnel. The court ruled that IHAT is an independent team and that soldiers participating in its work are not subordinate to the chain of command; they are not even part of the investigated body. In any case, it is sufficient that some of the IHAT team members are civilians who are not subordinate to the military system at all.

58. **Canada:** The criminal investigative body that deals with suspicions of serious violations in the military system is CFNIS—Canadian Forces National Investigation Service. This body functions independently, outside the chain of command, is directly subordinate to the Provost Marshal, and is designated to deal with serious, sensitive violations.<sup>43</sup> In

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<sup>41</sup> <http://spa.independent.gov.uk>

<sup>42</sup> R-v-Ali Zaki Mousa, High Court (QB) judgment of 21 Dec. 2010, [2010] EWHC 3304 (Admin).

<sup>43</sup> [www.vcds-vcemd.forces.gc.ca/cfpm-gpfc/cfp-ggp/nis-sne/index-eng.asp](http://www.vcds-vcemd.forces.gc.ca/cfpm-gpfc/cfp-ggp/nis-sne/index-eng.asp)

practice, most violations of IHL constitute serious violations within the authority of the CFNIS. The other isolated cases are dealt with by the regular military police.<sup>44</sup>

59. In his above mentioned article, Schmitt notes that the independence of investigating bodies and internal investigations is a phenomenon that belongs to domestic law and is not connected to international law.<sup>45</sup> We disagree with this statement.
60. Firstly, as we stated above, the fact that a certain rule does not appear explicitly in “black-letters” in an international treaty does not lead to the conclusion that it is not part of binding international law. International law is based on a broad set of rules founded upon the practices of states, general principles, and appropriate interpretation of the rules of international treaty law and customary international law in the literature and court cases. Secondly, Schmitt’s approach may be correct in cases in which investigation rules derived from humanitarian law alone are implemented. However, as we mentioned above, the rules we are dealing with are based on an integrated model, which includes principles of human rights law alongside IHL.
61. As opposed to the position taken by Schmitt, other scholars such as Watkin are of the opinion that civilians should be involved in investigations, as an expression of the need to integrate human rights law and the rules of humanitarian law.<sup>46</sup>
62. Moreover, review of the implementation of the independence and impartiality principles in the states described above shows a clear progression toward gradual disconnect between investigative bodies and counseling bodies. Therefore, one should not ignore the fact that practice in this area is dynamic. International law does not stand still, but is a constantly developing area of law. Ignoring the direction of its development, as indicated

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<sup>44</sup> Schmitt, *supra* note 3, p. 60. See also: [www.cefcom.forces.gc.ca/pa-ap/nr-sp/doc-eng.asp?id=2960](http://www.cefcom.forces.gc.ca/pa-ap/nr-sp/doc-eng.asp?id=2960)

<sup>45</sup> Schmitt, *supra* note 3, pp. 79-82.

<sup>46</sup> Watkin, *supra* note 11, p. 34.

in the practice of the states, as well as the rulings of legal or quasi-legal international bodies, can at best suggest what international law was **before the development took place**. If the role of the Commission is to order the establishment of an investigative system that is to be a lasting one in the sense of its compatibility with international law, implementing the developing practices and judicial and quasi-judicial decisions is a fundamental component in this area.

63. In this context, it should also be noted that the need to respect independence and impartiality is not obligatory by virtue of treaty law and customary international law alone. The necessity of independent investigation is a general legal principle, supported by considerations of justice and efficiency as well: the independence and impartiality of the investigator ensure not only the fairness of the investigation but also the public's confidence in the investigation, an important component of any investigation.<sup>47</sup>
64. Does the investigative system described in the MAG's Position Paper withstand the standards of independence and impartiality as described above? In this context, three areas in which questions arise with regard to this system may be indicated: 1) The MAG's role as a body that decides whether to open an investigation at all, oversees its execution, and, in its aftermath, decides whether to prosecute; 2) The MAG's responsibility over the body counseling the army as well as the bodies enforcing the law, and the conflict of interest this entails; 3) The MAG's ability to order investigations relating to acts perpetrated by the political echelon. These three problems give rise to issues that require separate attention, as explained below. Nonetheless, all three stem from a single source: the Israeli military legal system concentrates too much power in the hands of a single body that is only minimally supervised by civilians.

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<sup>47</sup>See for example: HCJ 531/79 Likud Party in the Municipality of Petah Tikva v. Petah Tikva Municipal Council, HCJ 1356/96 Ben David v. Prime Minister of Israel.

## D. The Body that Decides to Conduct Criminal Investigations

65. As stated in the MAG's Position Paper, the IDF body that decides whether to conduct criminal investigations is the MAG. The MAG acts in accordance with the above mentioned criteria with regard to opening criminal investigations. Other rules exist with regard to opening operational inquiries, were also partially described above. The identity of the body that determines the opening of a criminal investigation and the criteria this decision is based on are fundamental issues: the initial decision whether to open an urgent criminal investigation or to make do with some type of operational inquiry at the first stage or not to investigate at all, can be a deciding factor in determining the final legal response to the incident in question. The data in the MAG's Position Paper indicates that only a few of the investigations that evolve into inquiries are used, sooner or later, as a foundation for opening a criminal investigation.<sup>48</sup>
66. In this context, it should be noted that a significant portion of the MAG's decisions following "Cast Lead" not to prosecute were founded on the absence of evidence.<sup>49</sup> We estimate that this situation stems in part from evidentiary difficulties that could not be surmounted, and partially due to evidentiary difficulties derived from excessive use of an inappropriate investigation tool—the operational inquiry. It seems that a dimension of path dependence exists here. In other words, from the moment it is selected to relate to an exceptional event with non-criminal tools, the legal system does not tend to renege. Obviously, this is not a conclusive assumption. There is a probability that the

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<sup>48</sup>See for example: Gaza Operation Investigations: An Update, 29 January 2010. Out of 90 incidents transferred to operational inquiries, only 7 were transferred to investigation of the CID.

<sup>49</sup>See for example: The Operation in Gaza: Factual and Legal Aspects  
[www.mfa.gov.il/NR/rdonlyres/E89E699D-A435-491B-B2D0-017675DAFEF7/0/GazaOperationwLinks.pdf](http://www.mfa.gov.il/NR/rdonlyres/E89E699D-A435-491B-B2D0-017675DAFEF7/0/GazaOperationwLinks.pdf)

Also: Gaza Operation Investigations: Second Update,  
[www.mfa.gov.il/NR/rdonlyres/1483B296-7439-4217-933C-653CD19CE859/0/GazaUpdateJuly2010.pdf](http://www.mfa.gov.il/NR/rdonlyres/1483B296-7439-4217-933C-653CD19CE859/0/GazaUpdateJuly2010.pdf)

decision will change. However, it seems to us that this probability is quite low, due to the tendency not to view exceptional events from a criminal perspective, which is manifested in the decision to choose the operational inquiry option itself (despite its being a problematic tool for conducting a criminal investigation). The problems involved in a later investigation that is opened only after the conclusion of an operational inquiry constitute another reason for this low probability. Due to all of these reasons, the choice of an inquiry should not be viewed as a neutral procedure that does not affect the final decision. On the contrary, the decision in the operational inquiry leads, in most cases, to the decision not to prosecute.

67. The legal question at hand is whether the MAG is a body that upholds the requirements of independence and impartiality with regard to military investigations. The provisions of the various treaties cannot assist us directly, since the implementation of these criteria—especially the requirement of independence—is a function of the institutional balance between the bodies that plan, execute and investigate military operations. Moreover, the decision regarding the legal issue will not necessarily be uniform pertaining to each individual case. In our opinion, in most cases, the MAG's authority to order the opening of an investigation does not raise a real difficulty (although as mentioned above, we opine that the criteria the MAG employs are overly inflexible). However, as we will immediately claim, the existence of the MAG's authority to order an investigation creates a legal difficulty in and of itself in certain instances.
  
68. In our opinion, the critical factor that differentiates between cases where the exercise of the MAG's authority to order an investigation creates a fundamental difficulty, and cases in which no such difficulty exists, is the nature of the violation in question. Suspicions regarding IHL or human rights law violations can be divided into two types. One type involves suspicion of a violation of an explicit IDF order or instruction. When it occurs, such a violation is usually carried out by low ranking soldiers (although even senior commanders can violate orders or instructions or fail to prevent their

subordinates from doing so). In this context, we do not think that any structural problem arises from the fact that the decision to open the investigation is made by the MAG.

69. On the other hand, another type of suspicion indicates a *prima facie* problem relating to the order itself or to army procedure. So long as these procedures were established on the part of the MAG or were ratified by a superior in rank, in particular, the Chief of Staff or the political echelon, leaving exclusive discretion in the matter or the opening of an investigation to the MAG, may not withstand the requirements of independence and impartiality.

## E. The Independence of the Investigational System

70. In this context, the MAG's Position Paper suggests the following distinction: independence can be interpreted to mean **functional independence** or **institutional independence**. It claims that it is sufficient that the MAG possesses functional independence, since the MAG is not subordinate to the investigated body.<sup>50</sup>
71. As opposed to this position, comparative law displays a tendency toward fashioning investigation and prosecution systems dealing with military events in accordance with the principle of institutional independence. In other words, many states worldwide have adopted the approach that the investigating body must possess institutional independence from the regular military legal system. This institutional independence, which at times includes the subordination of the investigational system to a civilian who is not subordinate to the military system at all, serves a double purpose—it fortifies the independence of the investigating body, and prevents conflicts of interest in its operation.
72. We agree that in the process of the organizational changes in the MAG Corps, certain progress has been made toward solving this problem: the legal consultancy system was separated from the law enforcement system, as stated in the MAG's Position Paper. This functional separation contributed significantly to the removal of conflict of interest concerns from the actions of the MAG Corps. However, the separation of the legal consultancy system and the prosecution was not complete—the MAG still heads the unified system. *Nota bene*, the MAG's role is not ceremonial or administrative. He effectively manages the Corps and is personally involved in a variety of decisions, relating both to consultancy and to opening investigations. The conflict of interest between the consultancy role and the prosecution role is therefore clearly expressed in

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<sup>50</sup> MAG Position Paper, p. 66.

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.

73. It should be emphasized that we do not doubt the aptitude or sincerity of functionaries who have held this senior position in the past or at present, and it should be mentioned that the current functionary has won approval and appreciation from all sides. However, obviously, the conflict of interest question does not relate to the person but rather to institutional considerations, as well as the external impression of independence and impartiality. Although we have no doubt that in most cases, the MAG's decisions are made in good faith, his "two hat" system is problematic. The higher the echelon that made the decision that is the subject of the allegation or suspicion, the more difficult the conflict of interest problem embedded in the MAG's role becomes.
  
74. The appropriate and most effective solution to this problem—a solution embraced by many states worldwide—is the separation of the law enforcement system from the system counseling the military. Such a separation does not need to begin from junior levels. With regard to a breach of discipline or any other breach of army orders that reflect IHL or human rights law, there is not, to the best of our understanding, a structural problem that necessitates changing the current situation. On the other hand, in an investigation dealing with the legality of the orders or the procedures themselves, the authority of counseling should be separated from that of investigation, and the external supervision component of the decision to open an investigation should be reinforced.
  
75. The MAG's Position Paper contains a comprehensive treatment of the question of splitting of authority. The central answer provided there for the "two hat" problem is that a similar conflict of interest concern already exists in the position of the Attorney General, and that several committees (and the High Court of Justice) have already determined that the "two hats" do not constitute a real problem.<sup>51</sup> Since this issue is at the

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<sup>51</sup> MAG Position Paper, pp. 68-69.

heart of the argument between us and the MAG, it seems appropriate to go into detail regarding this question.

76. Firstly, the question up for discussion is whether the system of military investigations in Israel meets international law requirements. The fact that other investigational institutions in Israel conduct themselves in a similar manner to that of the MAG Corps today is not in and of itself an indication that the Israeli military system meets the international requirements. *Nota bene*, it may be claimed that the unique sensitivities involved in prosecution of soldiers, commanders and persons of the political echelon for violations of International law necessitates a unique institutional solution different from that which exists with regard to regular investigations. As mentioned, in our opinion, one must distinguish between two types of military investigations and change the current procedures only with respect to the type of investigations that indicates inappropriate orders or instructions.
77. Secondly, the comparison between the role of the MAG and the Attorney General is inappropriate for a variety of reasons:
- a. The Attorney General heads a much larger system than the MAG Corps. In a case of conflict of interest, it is easier to separate the role of counsel and the role of law enforcement. On the other hand, the MAG himself deals with legal advice regarding certain military operations,<sup>52</sup> and he is the one who decides whether to prosecute. The separation of his two “hats” is virtually impossible in certain instances.
  - b. The claim against the “dual hat” of the Attorney General arises on an administrative plane and not on a criminal plane. The Attorney General does not usually offer advice that is followed by a suspicion of criminal

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<sup>52</sup> Amichai Cohen, “Legal Operational Advice and the Changing Nature of IHL,” forthcoming 2011 *Connecticut Journal of International Law*.

acts, which he is later required to prosecute. The MAG's role puts him in a far more complex situation, since it is highly probable that the advice he or one of the departments in the Corps provides may in and of itself lead to an outcome that will require verification with criminal tools as well. The conflict of interest exists here at a significantly higher level.

## F. The Problem of Investigating the Political Echelon

78. An additional, unique problem that exists in the Israeli context is the problem of investigating the political echelon. The character of Government and the close relationship between the political and military echelons in Israel leads to the reality that, as opposed to other states worldwide, many of the operational military decisions in Israel are made by the political echelon or at the very least, with its involvement and approval.<sup>53</sup> The result is that in many cases, decisions concerning credible allegations or reasonable suspicion are made by a military echelon superior in rank to that of the MAG or by the political echelon. What should the investigative mechanism be in such cases?
79. Although the MAG's Position Paper does not relate to this problem, the problem is not at all theoretical. The modern trend in international criminal law is imposing legal responsibility, to the greatest extent possible, on the echelon that has the highest decision making authority, according to the doctrine of command responsibility.<sup>54</sup> The attempt to impose criminal responsibility on high commanding ranks and on their political superiors leads to the result that many of the investigations held by international courts or foreign courts that apply international judicial authority focus specifically on the political echelons of the states involved in controversial military operations.
80. Regardless of the MAG's involvement in making the decisions that are the subject of the investigation, it is unreasonable that the MAG be responsible for investigating politicians. This contradicts basic principles of subordination of the military echelon to the political echelon, and of the constitutional system in which the military lacks authority toward the

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<sup>53</sup> Yehuda Ben-Meir, *Civil-Military Relation in Israel*, Columbia University Press (1995), pp. 18-19. Also: Mordecai Kremnitzer and Ariel Bendor, *Hok Yesod Hatzava*, (in Hebrew) (2000), p. 29.

<sup>54</sup> Yuval Shany and Keren Michaeli, "The Case against Ariel Sharon: Revisiting the Doctrine of Command Responsibility," 34 *New York University Journal of International Law and Politics* 797 (2002).

political echelon. Therefore, the MAG's decision to ignore this topic in his Position Paper is somewhat justified.

81. What is the conclusion of this analysis? If concern exists with regard to criminal acts perpetrated by heads of Government in Israel, there exists *prima facie* the possibility that the civil investigation bodies will investigate these allegations and suspicions. However, exercising this authority in the existing legal situation is problematic for several reasons:

- a. As opposed to the situation in a large number of states worldwide, Israel lacks domestic legislation appropriate to the prosecution of perpetrators of international crimes. While the military framework, The Military Prosecution Law, includes general violations that can be suitable for prosecution of violations of IHL, the State of Israel lacks a criminal law that applies the provisions of the Geneva Convention and most of Israel's other commitments in the area of humanitarian and criminal law. Obviously, this situation is problematic from a variety of perspectives, and it should be mentioned that, in and of itself, this omission may constitute a violation of international law.
- b. The civil authorities in their current format lack the legal expertise that is necessary for conducting investigations relating to violations of IHL. Broad cooperative arrangements between the military echelons, that are in proximity to the scene of events and possess expertise and knowledge of conducting criminal investigations due to violations of IHL, and the civil echelons are necessary for this purpose. Such arrangements may raise the above mentioned constitutional problems.
- c. Experience shows that in Israel's history a criminal investigation has never been conducted against a member of the political echelon due to violations of IHL (as opposed to commissions, such as the Cohen Commission on the

slaughter at Sabra and Shatila, which examined certain aspects of the conduct of the political echelons, which could have led to a criminal investigation).

- d. It seems that in the current legal situation in Israel and the practices that exist here, there is no proper solution for verifying suspicions of violations of IHL on the part of the political echelon in Israel. It is obvious that this situation also results in the lack of protection available to decision makers facing international attempts to prosecute them through international or universal jurisdiction, as described below.

82. It is obvious that there would be no reason to open a criminal investigation against heads of state if an independent mechanism, which examined and approved the policy that was the subject of allegations or suspicions of illegality, were to exist. Therefore, in a case where the High Court of Justice or an inquiry commission approved a policy, such as targeted killings or a naval blockade, it is unnecessary to open a criminal investigation against heads of state due to the decision to adopt that policy (although a verification of the military's deviation from the decided policy is still possible). The problem is that there is no routine procedure that enables verification of the legality of these political decisions. The High Court of Justice frequently avoids reviewing the legality of political decisions or specific acts,<sup>55</sup> and the decision of whether to establish a commission of inquiry or open up an investigation is the Government's—the body which, in this case, is the investigated body. **In all of these cases, there is no independent, effective verification procedure that can determine whether an international legal norm has been violated or not.**

83. To conclude this section, we will note that a full solution to the independence and impartiality problem of the MAG must solve each of the problems presented above: the

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<sup>55</sup> See for example: HCJ 4969/04 Adalah v. General Officer Southern Command of 13.7.2005; HCJ 9594/03 B'tselem et al v. Judge Advocate General.

MAG as the body determining investigation; the MAG as a body with “two hats”; and the problem of investigating the political echelon.

84. **Transparency:** An additional rule of international investigation to which we will briefly relate is the principle of transparency. Transparency is necessary in order to clarify to the onlooker that the investigation took place according to familiar, accepted rules, and that its purpose was not to “whitewash” the case. The role of transparency is, first and foremost, to increase the public’s confidence in the investigation process and to ensure its proper supervision.
85. Obviously, when an investigation deals with sensitive military matters, total transparency is impossible.<sup>56</sup> Therefore, it is possible that in certain cases, it will be impossible for the military’s investigation to be conducted in a candid, accessible manner and the details of the investigation, including the analysis of the case, will need to remain classified.
86. The solution adopted in several states, integrating civilians in the criminal investigative process or instituting some form of civilian supervision, is intended to solve this problem as well. Indeed, the character of military investigations is that some of them will remain classified. However, preventing investigations by civilians or bodies outside the military is a disproportional solution to the problem of protecting the confidentiality of the information. There are more than enough civilians in Israel with a security background and public confidence that can be granted exposure to the investigation materials in their entirety and assist with supervision of the procedure.
87. Here too, a clear legal arrangement should be set out. It should include permanent instructions regarding the access of certain civilians (who will be appointed for this purpose) to the investigation materials in a manner that will enable them to express an opinion and critique the manner in which the investigation is conducted and its findings.

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<sup>56</sup> Watkin, *supra* note 11, p. 20.

## G. A Possible Alternative: External Civilian Supervision

88. The MAG's Position Paper courageously recognizes some of the problems raised above. The solution to these problems, as indicated by the MAG, is the existence of an external, civilian supervising system such as the Attorney General or the Supreme Court.<sup>57</sup>
89. In addition to the question as to who is authorized to order the opening of an investigation, we agree that the question of the supervising civilian body is important as well. This question is important on several levels: Firstly, from the perspective of the independence of the investigating military body, it is important that its subordination to external supervision, to the extent that it exists, be to bodies outside the military system of command (in order to reinforce its status as it faces the soldiers being investigated, among other reasons). Secondly, it is important to maintain a certain degree of transparency in the investigative system. As mentioned, it is specifically the limitations of transparency that renders it necessary that an independent, external body supervise the investigation as a compensation mechanism for the lack of transparency in the military investigation system. Thirdly, the civilian supervision of the investigating body is also important for the fortification of the principle of subordination of the investigating military body to the civilian system, which is a fundamental principle in a democratic regime. Fourthly, the existence of a system that supervises the investigation system decreases the ability of others, civilians or soldiers, to try to influence the investigation and compromise its independence.
90. Due to these considerations, some states have formed a system of civilian supervision of the military investigation system. We again emphasize: in a considerable number of states, investigations are already within the responsibility of the civilian system in any case. Therefore, the system will require "compensating" involvement of a civilian body at

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<sup>57</sup> MAG Position Paper, p. 7.

the level of supervision and criticism only in common law states where the investigative system is controlled by the military body (in Canada, for example, the Military Police Complaints Commission, an external commission headed by a civilian that supervises the conduct and investigations of the military police, was established).<sup>58</sup> Here too, the prevalent practice in the other states constitutes not only a reflection of accepted democratic principles, but also a commentary on the international legal duties imposed on them.

91. The MAG's Position Paper attempts to convince us that Israel has a dual level civilian supervision system regarding investigations, which reinforces the independence of the military system: supervision of the Attorney General and supervision of the High Court of Justice. We do not think that these two supervision systems provide sufficient resolution to the independence problem we indicated.
  
92. As a preliminary comment we will note that the necessity to split the military legal system into a law enforcement system and a counseling system, the question of involving civilians in the decision regarding opening investigations, and the question of civilian supervision are three separate questions (although there is a certain interconnection). The civilian supervision of investigations constitutes a separate and additional system of supervision that is part of the general system of the rule of law. It will continue to exist whether law enforcement and the counseling system are integrated or separated, and whether civilians are integrated into the investigative system or not. The opposite is also true: if civilian supervision exists with regard to the investigation, it does not follow that there is no need to separate the investigation system from the counseling system, or that there is no need to involve citizens in the decision whether to open an investigation. These questions interface, but their solutions are independent of each other.

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<sup>58</sup> [www.mpcc-cppm.gc.ca/index-eng.aspx](http://www.mpcc-cppm.gc.ca/index-eng.aspx)

93. **Supervision of the Attorney General:** An essential foundation in the MAG Paper's claim is that the Attorney General supervises the MAG's activities regarding prosecution. On the other hand, the Position Paper states:

In practice, it should be noted, there is today close coordination between the MAG Corps and the State Attorney, and between the MAG and the Attorney General with regard to setting policy, whether in matters of principle or individual decisions of importance, in a manner that almost completely eliminates the need for the Attorney General to become involved in the MAG's decisions later on.<sup>59</sup>

We are of the opinion that the Attorney General's involvement in internal military processes should be viewed in a positive light. This involvement increases the MAG's independence opposite military authorities and even contributes to the civilian echelon's control of the military echelon. However, the fact that the Attorney General is involved in the MAG's decision on a regular basis renders his supervision of the MAG, following the decision, problematic. If a decision to adopt a controversial military method was made by coordinating with the Attorney General, what is the point in stating that the Attorney General can criticize these decisions *ex post facto*? These are decisions that he himself was involved in.

94. 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. This can serve to reinforce the hypothesis that the Attorney General's supervision of the MAG's decisions to open investigations or not is not a close supervision.
95. **Supervision of the High Court of Justice:** The theory that holds that the High Court of Justice's authority to adjudicate upon petitions against the MAG constitutes a substantial

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<sup>59</sup> MAG Position Paper, p. 8.

method of supervision of military investigations was in fact rejected by the Court itself. The Supreme Court has stated in several of its decisions that its supervision of individual investigations, when it sits as High Court of Justice, is not the appropriate form of supervision of complex military investigations.

96. Firstly, in its decision relating to the legality of targeted killings, the Supreme Court stated as follows:

After attacking a civilian who is suspected of having taken a direct part in acts of terror at that time, a thorough verification must (*ex post facto*) be conducted to verify the identity of the attacked individual and the circumstances of the attack. This verification must be independent.<sup>60</sup>

Also:

Since we have determined the provisions of Conventional International law with regard to the issue at hand in this decision, naturally we cannot examine its realization in advance. Judicial review with regard to this issue will be *ex post facto* by nature. **Secondly**, the main part of the verifications should be performed by an inquiry commission which, according to international law, must perform an objective verification which is activated *ex post facto*. The criticism on part of this Court can, by its nature, only be directed at this commission's decisions according to the accepted criteria in this matter.<sup>61</sup>

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<sup>60</sup> *Supra* note 22, paragraph 40 of President Aharon Barak's decision.

<sup>61</sup> *Supra* note 22, paragraph 59 of President Aharon Barak's decision.

97. In effect, the Court has just recently stated, in the *Thabit* case, that concrete allegations regarding violations of IHL should not be clarified in the Court but by an independent inquiry commission:

It is obvious that this Court is not the suitable forum with the necessary means to examine the circumstances of the case in which the deceased was killed. However, the petitioner raised some questions which have not been answered by the defendant, regarding the circumstances of the killing of the deceased and whether they correspond with the criteria set out in the decision regarding focused foiling of terror acts. These questions, as far as they can be verified, should have been verified by the professional forum, which was supposed to have been established for this purpose, although in the circumstances of the matter at hand, before our decision regarding targeted killings such a forum had not yet been established.<sup>62</sup>

98. In our opinion, the High Court's decision regarding targeted killings should be viewed as a general requirement that the legality of certain exceptional events, which are alleged or suspected to have taken place due to a controversial policy or that violations of IHL were involved in their implementation, should be examined by an external examining body. Although President Barak did not describe how the independence requirement is supposed to be carried out in his decision regarding targeted killings, the question of whether the composition of the inquiry commission established pursuant to the Court's decision met requirements of "independent and objective" was raised in the **Hass** case.<sup>63</sup> In that case, the State itself took the position that an independent, objective inquiry commission is a commission composed of persons who are no longer subordinate to the military system (the Supreme Court decided that there is no reason for it to interfere with

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<sup>62</sup> HCJ 474/02 Thabit v. Attorney General of 30.1.2011, decision of President Beinisch.

<sup>63</sup> HCJ 8794/03 Yoav Hass et.al v. Judge Advocate General of 26.12.2006.

the specific composition of the commission so long as no evidence was presented that the commission is not independent).

99. In any case, we are also of the opinion that the Supreme Court when it sits as High Court of Justice is not the optimal institution for clarifying questions concerning decisions to open investigations in particular cases or for policy questions in general. With regard to concrete questions, the High Court procedure is not the appropriate procedure for dealing with fact-intensive issues. With regard to questions of general policy, it may be feared that excessive involvement of the High Court in these matters may harm the separation of powers (in its accepted Israeli version). It seems to us that questions pertaining to military investigations should be addressed with a “surgeon’s scalpel”—an independent, permanent body of experts that operates parallel to the system and supervises its actions in an ongoing and discreet manner—as opposed to the “heavy hammer” of the public adjudication of the High Court.
100. In this context it should be noted that High Court supervision of MAG decisions depends on external variables, which may compromise the existence of this form of supervision. Firstly, a petition to the Court depends on the existence of a petitioner who is capable of presenting the court with evidence and information that he or she has gathered. As a rule, one cannot petition the Court with an allegation or general information about a legal violation without concrete information. Secondly, a portion of the pool of potential petitioners who are those with direct accessibility to the relevant factual information are foreign citizens who do not reside in Israel or in territories under its control, and therefore cannot in effect approach the Supreme Court. For all of these reasons, the Supreme Court is unsuitable to function as the basis of ongoing civilian supervision of the military.
101. Therefore, we opine that an external system, which is chiefly based on petitions to the Supreme Court, does not efficiently fulfill the desired role of a civilian supervision

system. In order to solve the problem of independence and impartiality a different system must be sought out.

102. We again emphasize that the problem in Israel is more difficult than in other states due to a number of factors: the character of the ongoing military conflict, the lack of suitable criminal legislation, excessive involvement of the political echelon in operational decisions and the built-in lack of independence of the MAG's role. Israel is also more exposed than other states to the dangers of international criminal jurisdiction. Ultimately, all of these factors all point toward a single conclusion: **Specifically in the State of Israel, external civilian supervision of military investigations is more important than in any other country.**

## H. Universal Jurisdiction and the Principle of Complementarity

103. A fundamental question which arises in the context of inquiry commissions is that of external judiciary involvement in the military's investigative system. In recent years a supervisory system of domestic law has been developing within international law, whose rules ought to be internalized by each state. International judicial bodies, states and international organizations are employing various means whose purpose is to cause states to respect and implement rules of international law. These rules are especially employed with regard to serious IHL and human rights violations (e.g., crimes against humanity or torture).<sup>64</sup>
104. An important reason for employing international systems of investigation and adjudication is that states may not activate their criminal investigation and adjudication system. This is why an important rule has been created to govern the application of international criminal jurisdiction-the principle of complementarity. This principle determines that no international jurisdiction will be activated with regard to international criminal violations where the state itself activates its criminal jurisdiction. This principle is anchored explicitly in the International Criminal Court's Rome Statute. Additionally, in many states and according to many scholars, this principle is a barrier against the activation of universal jurisdiction.<sup>65</sup>
105. What is the content of the complementarity principle? When will it be activated? There is no consensus regarding the content of the complementarity principle in the framework of activating universal jurisdiction by states, and the principle has in effect

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<sup>64</sup>Amichai Cohen, "*Hamishpat Haplili Habeinleumi*" ("International Criminal Law") (in Hebrew) (2010) pp. 347-399 in Robbie Sabel, *International Law*, 2<sup>nd</sup> edition, 2010; Orna Ben-Naftali and Yuval Shany, *Hamishpat Habeinleumi Bein Milchama L'Shalom*, ("International Law between War and Peace"), 2006 (in Hebrew).

<sup>65</sup>Orna Ben-Naftali and Keren Michaeli, "*Samchut Hashiput Hayisre'li*" (The Israeli Legal Authority) 2004 (in Hebrew).

been activated in different ways by different courts in different states. Since each state activates this principle slightly differently, it is highly logical that the rules listed in the Rome Statute concerning the establishment of an International Criminal Court,<sup>66</sup> (as well as the parallel rules that have developed in the European Court of Human Rights regarding states' investigative duty<sup>67</sup>), be used as guidelines. Another reason that renders it appropriate to turn to the Statute of the International Criminal Court is the possibility that one day the Court may want to activate its investigative authority regarding suspicions of war crimes embodied in Israel's acts. This is not the place to analyze the possibility that the Court may receive such jurisdiction, whether by virtue of Israel's joining the Court or by virtue of other type of grant of authority.<sup>68</sup>

106. Article 17 of the Rome Statute states:

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 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;

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<sup>66</sup> Florian Jessberger, Wolfgang Kaleck, and Andreas Schueller, "Concurring Criminal Jurisdiction Under International Law," in Morten Bergsmo (ed.), *Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes*, Oslo, 2010, 233, at pp. 241-242.

<sup>67</sup> See: Harmen van der Wilta and Sandra Lyngdorf, "Procedural Obligations Under the European Convention on Human Rights: Useful Guidelines for the Assessment of 'Unwillingness' and 'Inability' in the Context of the Complementarity Principle," 9(1) [International Criminal Law Review](#) 39 (2009), p. 39.

<sup>68</sup> Daniel Benoliel and Ronen Perry, "Israel, Palestine and the ICC," 32 *Michigan Journal of International Law* 73 (2010).

- c. The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;
  - d. The case is not of sufficient gravity to justify further action by the Court.
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 intention 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 intention to bring the person concerned to justice.

107. The relevant provision to our discussion is article 17(2) of the Statute. Pursuant to this article, every investigation must be independent and impartial. In other words, our previous discussion relating to independence is relevant for this discussion as well. Since international treaties do not set absolute rules in this matter, it is reasonable to assume that the content given to these topics should be drawn from the content that states and international bodies-judicial and quasi-judicial-give them in this area.

108. It should be emphasized that the independence rule as it appears in the Rome Statute is not limited to investigations of human rights violations, but constitutes part of the requirement to investigate even serious humanitarian law violations. Therefore, it seems that the above discussion regarding the proper standard which meets human rights conditions is also supported by the Statute of the International Criminal Court.
109. In light of the content of this document, it appears that the existing investigative system in the State of Israel today does not provide IDF soldiers or its politicians with a “protective armor” suitable for protection from prosecution abroad by virtue of the complementarity principle.
110. In effect, the IDF’s investigation system was criticized in two recent cases where it was examined by international bodies:
- a. The fact-finding mission of the Human Rights Committee headed by Judge Goldstone determined, unjustly in our opinion, that the IDF’s investigation system is completely inadequate. As we mentioned above, these conclusions are farfetched, but they can testify to the problematic image of the military legal system and the limited credibility it is given by some international jurists.
  - b. The Tomuschat Commission Report is quoted in the MAG’s Position Paper as supporting the claim whereby investigations pertaining to military operations should be conducted according to different rules than those that apply to “regular” human rights violations. However, the Commission also criticized the structure of military investigations.

Let us quote these statements directly. The Commission’s recommendations chapter states:

91. The actual operation of Israel’s military investigations system raises concern in the present context. Specifically, the Committee concludes that the dual role of the Military Advocate General (MAG) to provide legal advice to IDF with respect to the planning and execution of “Operation Cast Lead” and to conduct all prosecutions of alleged misconduct by IDF soldiers during the operations in Gaza raises a conflict of interest, given the Fact-Finding Mission’s allegation that those who designed, planned, ordered and oversaw the operation were complicit in IHL and IHRL violations. This bears on whether the MAG can be truly impartial—and, equally important, be seen to be truly impartial—in investigating these serious allegations....

95. Similarly, there is no indication that Israel has opened investigations into the actions of those who designed, planned, ordered and oversaw “Operation Cast Lead.” The FFM report contained serious allegations that officials at the highest levels were complicit in violations of IHL and IHRL. Israel has not met its duty to investigate this charge. The Committee observes that the military justice system would not be the appropriate mechanism to undertake such an investigation, given the military’s inherent conflict of interest.

111. The topics raised by the Commission have received extensive treatment above. However, we thought that the Commission’s words should be quoted in order to emphasize that the difficulty in the investigative system reflects on the way it is perceived externally, and therefore affects Israel's ability to rebuff international procedures against its citizens and soldiers according to the complementarity principle.

112. The only case we are aware of in which a court in another country explicitly accepted the position that the Israeli investigative system meets the conditions of the

complementarity principle is the case where the Supreme Court of Spain dismissed a demand to prosecute Israeli officials for the bombing of the home of Salah Shehadeh in 2002. However, this decision cannot support the MAG's Position Paper, since it is explicitly founded on the fact that Israel established an external, objective inquiry commission (the Inbar Commission) to investigate the case.<sup>69</sup>

113. All of the above indicates that the investigative system in its present state does not receive broad international acceptance, to say the least. It is obvious that the objective of the investigation is, first and foremost, internal—to know if indeed a violation or breach has been committed. However, protection of IDF soldiers and commanders as well as heads of state against prosecution in foreign states is also a worthy objective among the other objectives of military prosecution. The current investigative system does not achieve this objective.

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<sup>69</sup> For the Spanish Court decision, see:  
[http://estaticos.elmundo.es/documentos/2010/04/13/auto\\_gaza.pdf](http://estaticos.elmundo.es/documentos/2010/04/13/auto_gaza.pdf)

For an analysis of the decision, see:  
[www.idi.org.il/sites/english/ResearchAndPrograms/NationalSecurityandDemocracy/Terrorism\\_and\\_Democracy/Newsletters/Pages/17th%20newsletter/4/4.aspx](http://www.idi.org.il/sites/english/ResearchAndPrograms/NationalSecurityandDemocracy/Terrorism_and_Democracy/Newsletters/Pages/17th%20newsletter/4/4.aspx)

## **I. The Proposed Solution: An External, Objective, and Permanent Inquiry Commission**

114. The basic concept of the MAG's Position Paper is based on two foundations: One, that the possibilities facing the IDF are those of conducting a criminal investigation or holding an internal military operational inquiry. The second is that the State of Israel is obliged to observe the minimum requirements of international law. In our opinion, these two foundations cannot constitute a strong basis for the State's position regarding investigations.
115. With regard to the first foundation: as claimed above, the assumption that a criminal investigation is the only way to deal with violations of IHL is incorrect. According to the Supreme Court's position, which fits in well with the approaches of some states and international experts, there is an intermediate possibility—an independent commission of inquiry. Such a commission, which will be authorized to examine allegations and suspicions directed at acts based on decisions and directives made by senior policy setting echelons in the military and in the political system, can form the infrastructure for opening a criminal investigation, even if it does not necessarily lead to one. This solution embodies, in our opinion, a compromise between the necessity of forming an independent system for examining the need to open a criminal investigation in each case of a military operation that ended in a difficult or exceptional outcome, and the over-deterrence of excessive use of criminal processes in operational events. It seems to us that such a commission can even help to reinforce the legal protection of heads of state and military against prosecution abroad.
116. With regard to the second foundation: Schmitt writes in his article that "As should be clear, a practice that is not technically required by IHL may nonetheless represent a

wise policy decision.”<sup>70</sup> Schmitt also emphasizes the fact that each state possesses a level of commitment derived from its domestic law, from its unique history, and the unique structure of its legal system.

117. The history of the State of Israel shows that in extreme, serious cases of harm to civilians, even when there was no legal basis to open a criminal investigation, independent inquiry commissions were established. These commissions were external to the system (although at times they included representation of former members of the military system). A number of inquiry commissions were established in the State of Israel to examine events in which political and operational echelons were involved. They discussed legal violations and public accountability: The Landau Commission for verification of the investigation practices of the General Security Service; the Cohen Commission for investigating the events in refugee camps in Lebanon; the Inbar Commission mentioned above; the Vinograd Commission for the research of the Second Lebanon War; the current Inquiry Commission.
118. Additionally, Israel’s international status, the frequent criticism directed at it, and its commitment to observe international law obligate it to examine the requirements of international law not only in light of the existing minimum based on treaties and practices of states, but based on evaluating future developments in this area of international law.
119. Therefore, we are of the opinion that it is necessary to establish an external, objective, independent inquiry commission. This inquiry commission can compensate for some of the flaws in the military judicial system discussed above.
120. In our estimation, it does not make sense to establish a new external commission after every serious event. Experience shows that each time such an external examining system was established, it was a result of external pressure and not the initiative of

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<sup>70</sup> Schmitt, *supra* note 16, p. 78.

security authorities themselves (the Cohen Commission was founded as a result of wide-scale public pressure; the Landau Commission was founded following events which clarified that the Israeli Security Agency (Shin Bet) had broken the law and had even lied to the courts and to the various investigative bodies; the Inbar Commission was founded due to the Supreme Court's recommendation). These external pressures are applied in a haphazard manner and dealing with them creates a harsh sensation of threat and crisis within the security forces.

121. Additionally, establishing a new commission for each and every investigation is inefficient. There are considerable costs related to the establishment of a commission, and it is also necessary to re-crystallize work practices, staff, etc.
122. The recommendation presented here is, as stated, the establishment of a permanent external commission for verifying violations of IHL. This commission would be entrusted with the following roles:
  - a. The commission shall serve as a preliminary inquiry commission in any case where the MAG, heads of military or political echelon are involved in making a decision or policy, in which an allegation or suspicion arises that the decision or policy may constitute a serious IHL or human rights violation. In these matters, in any case where reasonable concern arises that the policy itself may constitute criminal concern, the commission shall present the Attorney General with its conclusions in order that the procedure be continued. The commission shall be permitted to criticize a policy even if it did not find it to give rise to criminal liability, and it may recommend, to the military and political echelons, ways of modifying it or compensating those whom it may harm.
  - b. The commission shall appoint from among its members (or receive assistance from external experts) teams which will examine acts of

targeted killings pursuant to the High Court's decision in this matter, and other sensitive military operations in which civilians uninvolved in combat were killed. To this end, the commission may receive assistance from military personnel and civilian investigators as necessary.

- c. It is possible to consider granting the commission the authority to serve as an appeals committee for MAG decisions whether to investigate soldiers and civilians or not, in cases where the authority to make decisions regarding prosecution remains the MAG's (violations of the lower echelon). This commission can respond to the criticism regarding the institutional conflict of interest within which the MAG is situated, to a great extent.
- d. It is also possible to consider vesting the commission with the authority to order a criminal investigation independently at its own initiative as well, in certain cases where the MAG decided not to open an investigation. This authority can exist even when no specific complaint is presented to the committee, but by virtue of the occurrence of serious, exceptional events which the commission believes should merit an investigation. Granting this authority to the commission will ensure more efficient enforcement of IHL and human rights law.
- e. The members of the commission shall be given access to criminal investigations and classified inquiries at all levels.

123. **Composition of the Commission:** It is recommended that the framework of the permanent external evaluation be established in Knesset legislation. A judge or former judge will head the commission. The commission will be appointed by the Government, which will consult with the Attorney General for this purpose. The members of the commission shall include (at the very least) a former member of the security forces by recommendation of the Minister of Defense, a member of the academia who specializes in International or Criminal law, and a representative of the Ministry of Justice.



## J. Conclusion

124. This response document to the MAG's Position Paper accepts most of the fundamental claims expressed in the Position Paper. We have no doubt that the IDF's investigation system is, in general, a fair, credible system.
125. However, there are a number of concrete issues that characterize the system that must be addressed and given thought in light of the challenges that State of Israel has faced in recent years. There is basis for assuming that these challenges will intensify in the coming years.
126. An evaluation of the trends in international law, especially those areas that regulate IHL and human rights law, was performed based on several elements: The written, obligatory norms of international law, court decisions and other decisions made by international organizations, practices of states, general legal principles and the analysis of fundamental trends in international law. These components join together to form the international legal system, which applies in relation to "mixed" conflicts. We will again clarify that focusing on only one component of those listed above will result in only a partial view of international law, and that as a result, the possible ramifications of certain investigative systems is not described correctly.
127. In this context, we commented on three fundamental issues:
- a. The present standard for opening a military criminal investigation is inappropriate. The standard must be based not only on a credible allegation or reasonable suspicion of a war crime, but also on a test: the serious incident, which is unjustified or unexpected.
  - b. The use of operational inquiries should not be part of the criminal investigation process.

c. In our opinion, due to the current situation whereby the MAG wears “a dual hat,” it is necessary to remove from the MAG the authority to decide whether to open a criminal investigation relating to legality of orders and military procedures, which the MAG or his superiors, including the political echelon, have adopted or approved. Additionally, action must be taken to reinforce the external civilian supervision of the investigation system. To this end, a permanent, external, objective commission should be established. This commission will have the ability to clarify a portion of the complaints in a preliminary process, and supervise the military investigation process.

128. In sum, we have suggested a possible mode of action, that of establishing a permanent, independent investigative institution, which, in our opinion, will serve the objectives of the investigation well, and will ameliorate Israel’s position as it faces international demands for independent investigation.