4 Pinsker Street, POB 4702, Jerusalem 9104602, Israel
Tel: +972-2-530-0888 / Fax: +972-2-530-0837

Submission to the United Nations International Commission of Inquiry on the 2014 Gaza Conflict by Prof. Amichai Cohen, Senior Researcher at the Amnon Lipkin Shahak Program on National Security and Democracy

February 11, 2015

Submission to the International Commission of Inquiry

11 February, 2015

by

Amichai Cohen

Dean and Professor of International Law, *Ono Academic College – Faculty of Law*

Researcher, *Israel Democracy Institute*

I. Introduction

The International Commission of Inquiry was formed by the UN Human Rights Council in order:

> "… to investigate all violations of international humanitarian law and international human rights law in the occupied Palestinian territory, including East Jerusalem, particularly in the occupied Gaza Strip, in the context of the military operations conducted since 13 June 2014, whether before, during or after".[1]

This submission details the role of lawyers, especially the Military Advocate General Corps (MAG Corps) within the IDF in implementing and enforcing International Humanitarian Law (IHL) within the Israeli Defense Forces (IDF). It examines the role of the MAG Corps before and during the military operations, as well as in investigating suspicions of violations. It is based on extensive academic studies undertaken by the author of the submission, in recent years, which have led to several academic publications. In the interest of accuracy, these have been updated to reflect the current situation at the time of the submission.

I would like to stress at the outset that I have no knowledge regarding specific events or claims of violations of IHL that supposedly took place during the recent Israeli operation in the Gaza strip.

[1] UN Human Rights Council resolution A/HRC/RES/S-21/1 adopted on 23 July 2014

It may be claimed that since the mandate of the commission is to investigate violations, the question of the role of legal advice, and especially of investigations after the operation is irrelevant to the work of the commission. I think that this claim is incorrect for two reasons:

First, the duty to receive legal advice before and during an operation, as well as the duty to investigate suspicions of violations, are part of the obligations that IHL imposes on the parties to the conflict.

Second, as will be explained below, a state's compliance with the requirements of IHL regarding legal advice and investigation of suspected violations should exercise an impact on the need for international intervention, curtailing its necessity vis-à-vis a party to the conflict that acts in accordance with those obligations. Following the obligations to provide legal advice and to investigate suspicions of violations of IHL creates a greater degree of certainty that the party to the conflict would actually implement its obligations according to IHL.

II. Legal Operational Advice

Israel is obliged by International Law to make legal advisors available to provide advice as to the application of International Humanitarian Law (IHL).[2]

How does Israel perform its International Law Obligations?

1. History

The source of the status of lawyers in Israel's military is the Israeli occupation of the territories since 1967.[3] During the course of the June 1967 Six-Day's War, the IDF conquered territories previously governed by Israel's Arab neighbors. The Israel Supreme Court took upon itself to review the IDF's actions in the territories. However, its willingness to do so carried implications with regard to the internal structure of the military government over the territories. The increased volume of petitions meant that many decisions taken by military commanders were challenged in court. In turn, this development contributed to the realization of commanders that they required legal advice as to the performance of their tasks, lest their decisions be overturned in court.

As a result, many years before "legal operational advice" became a popular term, Israeli officers and commanders were already aware that in their dealings with the civilian population they would do well to receive advice from lawyers, even before taking action in administrative matters appertaining to the military government in the territories. Israeli courts were also quite conversant with the relevant international documents, and perhaps more importantly, they already adopted a tendency to intervene in military decision-making. Israeli politicians were also aware that international law, a set of norms quite beyond their control, in fact governs the actions of the military, via the use of military advisors.[4]

---

[2] This obligation is a rule of Customary International Law. Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law* (2006) rule 141. The rule also appears in article 82 to the *Additional Protocol to the Geneva Conventions of 1949* (1977) (Additional Protocol I), in a little more detail. However, Israel is not party to that protocol, and it is probably not applicable to the Gaza conflict anyway.

[3] Much of the material contained in this section is based on interviews with lawyers that served in the Israeli Military Advocate General's Corps. Some of it was published in: Amichai Cohen, *Legal Operational Advice in the Israeli Defense Forces*, 26 CONNECTICUT J. INT'L L. 367 (2011). There were some instances in the 1980's in which the ILD gave advice on a specific operation, but these were infrequent, and mostly appear to have been the result of a local initiative of a specific commander.

[4] See generally: Cohen *Id.*

The more common interpretation of the "legal operational advice" is a much later development. As recently as the 1990's, Israeli commanders sporadically considered consulting legal advisors regarding the legality of their *military operations*. Mounting international pressure and an extended willingness on the part of the ISC to intervene in military operational matters caused commanders to be aware that they required legal advice in issues such as the need to respond to the charges raised by the Qana incident in 1996. Thereto, the International Law Department (ILD) unit in the MAG had mainly been involved in tendering advice regarding the law of occupation and international peace agreements. The closest its lawyers had come to the front lines was when helping to draft the IDF's rules of engagement. During the 1990's no ILD lawyer gave advice in "real time". Legal advice was sought prior to an operation, when it focused on the legality of *planned* activity. In the field, commanders did not look to lawyers for advice.

A major surge in ILD's lawyers' involvement in operational decisions took place at the beginning of the second *intifada*, in September 2000. The background was the revolution in the perception of the IDF regarding the conflict with the Palestinians.[5] Until 2000, the conflict was seen mainly as a *law enforcement operation*. As such, it concerned restoring public order to occupied territories.[6] In September 2000, however, the IDF began to view the conflict as something similar to war, albeit in a civilian setting.[7] IDF commanders had very little experience as to the IHL limits under this kind of conflict. In order to receive some legal instructions, the IDF commanders turned to the ILD for advice.

Major advancements in the inclusion of lawyers in operations were made in 2006, when the ILD became involved in approving the plans and targets during the second Lebanon war. The change was most specifically apparent at the level of the "theatre", in this case, the IDF's northern command, at which lawyers were present and involved in operational decisions throughout the conflict.

---

[5]Alan Craig, *Lebanon 2006 and the Front of Legitimacy*, 15(4) ISRAEL AFFAIRS 427 (2009).

[6] This was an activity whose legal limitations the IDF had gained considerable experience during the first *intifada* (1987-1993).

[7] For the full explanation of this legal opinion see e.g. the state submissions to the Israeli Supreme Court in the targeted killing case, available at: http://www.law.idf.il/Templates/LOBBY_PREPAREFORER/www.mag.idf.il/398-he/patzar.aspx [Hebrew]. For an explanation of the "war paradigm" and its effect on the policy of targeted killing in Israel see: Gabriella Blum and Phillip Heymann, *Law and Policy of Targeted Killing*, 1 HARV. NATIONAL SECURITY J. 145 (2010) at 155-159.

The involvement of ILD lawyers in the process of approving targeted killing operations was further promoted by the decision of the Israeli Supreme Court in the (*targeted killing case)* (December 2006).[8] In this instance, the court approved the policy of targeted killings under certain specified conditions, which included (1) the observation of strict process both in arriving at the decision to use targeted killing in an individual case, and (2) the conduct of an investigation after every incident involving targeted killing.[9] Reports regarding the execution of the policy show that, subsequent to this decision, ILD lawyers were frequently consulted on matters regarding targeted killing operations.

In Operation "Cast Lead" in the Gaza Strip (December 2008-January 2009) lawyers became much more involved in the command structure. They were attached to divisional commands, and were sometimes involved in operational decision-making.[10] Many plans and operational decisions were approved only after opinions were received from the lawyer in the field or from the central command of the ILD. ILD lawyers regularly sat in during "operations' meetings", where the major decisions regarding planned attacks were taken.[11]

The same structure was preserved in Operation "Protective Edge" in the summer of 2014. To give just one example (in the area of artillery fire): Legal advisors devised a set of thresholds and conditions that had to be satisfied before targets was approved.

---

[8] H.C.J. 769/02 *The Public Committee Against Torture in Israel v. Gov't of Israel*, judgment of 14 Dec. 2006, at para. 21, http://elyon1.court.gov.il/files_eng/02/690/007/a34/02007690.a34.pdf . (Allowing the use of the practice of targeted killing provided the conditions of proportionality are met).

[9] See generally Amichai Cohen & Yuval Shany, *A development of modest proportions: The Application of the Principle of Proportionality in the* Targeted Killing*case,5(2)* J. INT'L CRIMI. J**.** 310 (2007).

[10] Apparently, there is some difference between the levels of involvement of different ILD lawyers in different units. In some units, the lawyer was involved more, and had a voice on many issues. In others, the lawyer was less involved. Different ILD lawyers also understood their role slightly differently in that regard. Some expressly rejected the idea that the lawyer should approve any target, and others were quite sure that this is what they were supposed to do.

[11] Interview with Brig. General Avichai Mandelblit, Chief MAG, HAARETZ September 9, 2009. available at: http://www.haaretz.co.il/hasite/spages/1114791.html. In January 2010, the IDF's Chief of General Staff, Lt. General Gaby Ashkenazi issued specific orders to the effect that the practice used in Operation "Cast Lead" would also be used in all future large scale operations. "CGS Ashkenazi ordered more intensive involvement of legal advisors in managing operations in the IDF", *Haaretz*, January 6, 2010.

2. How They Operate

(i) *Relationship with Operational Units- Independence and Command Structure*

Two major issues lie at the crux of discussion regarding legal operational advice in general. These are (1) the *independence* of the members of the ILD and (2) the *advisory nature of their function*

Independence relates to the level of independence of the legal advisor when giving the advice – how much effect the military commander has on devising the legal opinion. The formal position of all armed forces in liberal democracies is that lawyers should be independent when forming legal opinions. However, this independence is not always supported by the bureaucratic structure of the institution within which the provider of the advice operates. For instance, it is difficult to expect the legal advisor to be totally independent if he is embedded in a combat unit, with whose other members he has close connections. .

Since ILD lawyers fulfil an **advisory function** it is legitimate to ask whether the military commander is obliged to follow the legal opinion he is given. In other words, are members of the ILD legal *advisors* or law *enforcer*s? [12]

With respect to both of these issues – the independence of the ILD lawyers and their advisory function - the Israeli system of legal operational advice has evolved and is still evolving. The lawyers who provide legal operational advice have become more independent institutionally. They have also gained more power as legal enforcers, rather as legal advisors. I will first describe this development, and then briefly discuss its causes.

(ii) Independence

Israeli MAG lawyers are not subordinate to the commander in the area in which they serve. IDF Supreme Command Directives state that "Military Advocate General lawyers are not subordinate to the head of the juridical district in which they serve, but

[12]Testimony of the Chief MAG, to the Winograd commission.

only to the Chief Military Advocate General".[13] The Directives furthermore endow the Chief Military Advocate General with independence, and declare that, "In professional matters the Chief Military Advocate General is subordinate only to the law itself."[14] MAG lawyers are further assured of their independence by their unique nature of the provisions for their appointment and promotion. Although the Chief of General Staff (CGS) appoints MAG lawyers, they must obtain the recommendation of the Chief MAG. The Chief MAG himself is appointed by the Minister of Defense (MOD), upon the recommendation of the CGS[15] (unlike other senior officers who are appointed by the CGS, with the approval of the MOD).

An important difference between the Israeli and American systems is that in Israel operational legal advice is given by" lawyers, whose military occupation is specifically geared towards providing *operational* legal advice. This is different from the US system in which lawyers provide advice in all legal matters. The compact nature of Israeli operations does not usually require the presence of lawyers in specific units. Court martial, general legal assistance, issues of administrative and private law, are all handled by the central command of the Military Attorney General corps. The lawyers deployed in units during conflicts are specifically trained to give operational advice, and this is their only task during the operation. In that sense, the current Israeli deployment of "operational law" is similar to that which Charles Dunlap proposed be adopted in the American context.[16] One drawback of this framework is that it creates some distrust between the ILD lawyers and local commanders, who regard the lawyers as strangers to the unit. On the other hand, however, it does enhance the independence of the lawyers.[17]

In an earlier discussion of the subject that I published several years ago,[18] I identified several institutional impediments to the full realization of the principle of independence. One stemmed from the fact the MAG is appointed by the Minister of Defense. The other resulted from the failure to provide military lawyers with adequate support in their struggles within the military

---

[13]Directive of Supreme Command (DSC) 2.0613 section 10. Heads of military juridical districts are the highest military commander in the district (for the northern district - Commander of Northern Command etc.) DSC 3.0401 article 2.

[14]DSC 2.0613 section 9(a).

[15]Military Justice Law section 177(a).

[16]Charles J. Dunlap,*The Revolution in Legal Military Affairs: Air Force Legal Professionals in 21st century conflicts*, 51 A.F.L. REV. 293 (2001)

[17] Interviews with lawyers.

[18] Cohen *supra* note 3.

Recent years have witnessed significant improvements in both areas. .Especially is this so subsequent to the recommendations tabled in 2013 by an official Israeli commission headed by retired Supreme Court Justice Y. Turkel. In their Report, the Turkel commissioners specifically urged that the MAG be appointed by a public committee headed by the Attorney General, and that his independence vis-à-vis the military chain of command be further enhanced by the declaration of a fixed term for his tenure of office.. [19] Although neither of these recommendations were applied to the current incumbent of the office of MAG, Gen. Danny Efroni, he is conducted himself as though the recommendations were already applied. In the current Israeli climate of opinion, the mere existence of the Turkel report makes it virtually inconceivable that Efroni might be removed from office because of any legal opinion that he might submit.

(iii) Civilian support and independence

There exists a direct link between the institutional independence of the MAG from military pressures and the effectiveness of civilian control over its decisions. To put matters another way: whether or not the MAG is entirely independent (itself not a desirable state of affairs) constitutes a subsidiary question. What really needs to be asked is whether the incumbent of that office is controlled by the legal civilian authorities of the state, to an extent sufficient to preserve the independence of the MAG *vis-à-vis the military authorities.* Absent civilian control over the decision-making process, the military command would find it much easier to exert pressure over decisions in the military. On the other hand, effective external civilian oversight of the decisions of the MAG seriously curtails the ability of the military command to intervene in the MAG's work, and thereby preserves his independence.

Israel's Supreme Court has always provided civilian legal oversight of MAG decisions. Indeed, it has been unique among national courts in its willingness to hear petitions against specific operational aspects of the IDF's military activity. While in most cases the court approves in principle the policy sanctioned by the MAG,[20] since 2000 the Israeli court has been willing to actually intervene in operational decisions.[21] The sum

[19] The full recommendation of the Turkel Commission will be discussed below in detail.

[20] Guy I. Seidman, *Judicial Administrative Review in Times of Discontent: The Israeli Supreme Court and the Second Palestinian Uprising,* 14 ISRAEL AFFAIRS 640 (2008).

[21] Intervention in this sense sometimes means that the ISC forces the IDF to negotiate with the petitioners: For example, in an operation in the Gaza strip in 2004, the then President of the ISC, Justice Aharon Barak forced the IDF to negotiate a settlement with NGOs regarding the advancement of humanitarian assistance to civilians, while the operation was on-going (HCJ 4764/04 Physicians for Human Rights v.

result has been to make commanders and lawyers aware that lawyers' decisions can be petitioned to the ISC, even in real-time, and hence must reflect the law.

Elsewhere I have dealt extensively with the way in which the ISC implements international law, and the reasons for its behavior.[22]

This, of course, does not mean that the court would necessarily involve itself in every military operation. Nevertheless, two clear conclusions emerge from the record. First, that the Court has evinced a willingness to enforce IHL on the IDF *ex ante*, that is, before an action is taken, or even whilst a military operation is in progress.[23] A recent statistical study shows that the Court evinces a greater willingness to intervene in matters of national security than in other topics. [24] Moreover, it seems that these interventions are especially noticeable when they touch upon issues that are of relevance to IHL (such as the separation fence or military operations). Second, and in a more subtle sense, thanks to the record of decisions taken by the Court, the 'shadow' of possible judicial intervention lies over almost every military operation taken, and causes the IDF to take IHL into account. It is therefore fair to say that an illegal policy or directive might be reviewed by the ISC, as has in fact on several occasions been the case, and might even be overturned by the Court were it to be found to be illegal.

However, the level of ISC intervention is necessarily partial and almost arbitrary. The Court can deal only with the issues that are brought before it by petitioners. Moreover,

---

IDF Commander in Gaza). In other cases, the court actually forbade a specific operational technique. A prominent example is the Court's declaration that international law forbade the IDF to continue to use the "early warning (neighbour) practice"',in accordance with which soldiers would force civilians to approach a house in which suspected terrorists were taking shelter and persuade them to give themselves up.. (HCJ 3799/02 *Adalah v. OC Central Command* 2005). In many other cases the IDF had to compromise and provide the Court with specific assurances.

[22] Amichai Cohen and Stuart Cohen ISRAEL'S NATIONAL SECURITY LAW: POLITICAL DYNAMICS AND HISTORICAL DEVELOPMENT (2012); Amichai Cohen and Stuart Cohen, *Israel's dichotomous attitude towards International Humanitarian Law: Causes, Consequences, and Implications* in: Emanuel Adler (ed.), ISRAEL IN THE WORLD: LEGITIMACY AND EXCEPTIONALISM (London: Routledge, 2013), pp. 51-71

[23.] The ISC, sitting as the high court of justice, is perhaps the most flexible court in the world in terms of accepting appeals. It actually has no "standing" limitation, and very rarely resorts to such avoidance doctrines as categorizing a particular subject as a "political question" or related to "foreign affairs". Furthermore, access to the ISC in appeals emanating from the territories is even easier. The unique location of the Palestinian-Israeli conflict, which is taking place very close to Israel's population centers, the large number of NGOs dispersed all over the territories, the flexibility of the ISC, which allows almost direct access to supreme court justices around the clock – all result in a span of opportunities almost unimaginable in other western democracies, to say nothing of non-democratic regimes. See Cohen & Cohen *supra* note 22.

[24] Menachem Hofnung and Keren Wienshall Margel, *Judicial Setbacks, Material Gains: Terror Litigation at the Israeli High Court of Justice*, 7 J. EMPIRICAL L. STUD. 664 (2010).

it does not constitute an appropriate forum for the provision of on-going and continuous oversight of MAG decisions. These drawbacks are supplemented by another, of an essentially epistemic nature. Since knowledge in matters appertaining to IHL in the Israeli government was concentrated at the ILD, there existed no other agency capable of exercising true oversight of MAG decisions.

In this regard, however, a significant change has recently taken place. Recently a special unit at the Attorney General's office was created, headed by Dr. Roy Scheindorff. When Scheindorff was appointed Assistant for International Law to the Attorney General' continuity was ensured by his replacement, Dr Gil-ad Noam. As a result, there now exists a respectable center of knowledge concerning the international law of armed conflict within the Attorney General's office. In yet another of its recommendations, the Turkel commission advocated that the Attorney General's office (an obvious candidate would be the unit discussed above) would review the MAG's decisions regarding investigations. Here too the Commission's recommendations still await implementation. Nevertheless, again, even as matters stand, effective civilian oversight over MAG decisions is increasing, and was certainly evident during Operation "Protective Edge".

(iv) Advisory vs. Compliance officer role

The other issue relating to the role of the lawyer in operational advice is the advisory dimension of legal operational advice. The US doctrine in this regard is that the lawyers' function is entirely advisory. This principle is set out specifically in the DoD directive, which explicitly empowers the commander, in extreme circumstances, to ignore the opinion of the lawyer, if he has crucial military reasons for doing so.[25] The Winograd Commission's final report supports a parallel exception to the US position, according to which the commander may deviate from legal advice in extreme situations, but no such express policy was adopted.[26] In interviews, some past ILD lawyers stressed their view that their role should be advisory. The importance of the designation of legal

[25]DoD directive 57.100

[26]*Winograd commission* final report, January 2008 [Hebrew] at 489-90.

A summary of the report in English is available at:

http://online.wsj.com/public/resources/documents/winogradreport-04302007.pdf

opinion as advice lies in the fact that the military commander retains ultimate responsibility for whatever action is taken.

Despite this view, and as I pointed out as early as 2011, and as has since become much clearer, lawyers involved in legal operational advice in the IDF certainly do not function solely as advisors. Only very rarely would a senior military commander explicitly declare that he is ignoring the legal advice that he has received because of military requirements. MAG lawyers involved in operational advice consistently report that even if a commander decided to ignore their advice, they (or their superiors in the MAG) were always able to prevail upon his superior commander to countermand whatever decisions he might wish to take. MAG lawyers also admit to issuing direct threats to military commanders, warning them that they will be prosecuted after the fact if they take a specific route of action.

The interventionist tendency of the Israeli Supreme Court in operational matters since the year 2000 (to which reference has already been made) further enhances the authority of the MAG. Especially is this so since on only very exceptional occasions has the Court overturned a decision of the MAG to sanction a specific policy. In most cases, the court approves in principle the policy approved by the MAG, although with certain limitations.

Quite apart from now being acutely aware that many of their decisions can be petitioned to the ISC, even in real-time,[27] commanders are also sensitive to the growing possibility that universal jurisdiction may be applied in other courts. IDF officers have been targeted as war criminals in several European courts and certainly look for legal assistance in that direction. As a result, senior commanders many times require at least a tacit approval of their position by the ILD.

This combination of circumstances has clearly exerted an impact. Perhaps against the intentions of the ILD, and certainly in contradiction to its declared policies and self –perception, ILD advice has gained a certain *de facto* veto power, in the sense that politicians and IDF commanders demand legal cover for their actions. They require concrete answers to complex legal questions, and the ILD constitutes the available tool

[27] The ISC has famously been willing to intervene in IDF operations even in real-time. For example, in an operation in the Gaza strip in 2004, the then President of the ISC, Justice Aharon Barak forced the IDF to negotiate a settlement with NGOs regarding the advancement of humanitarian assistance to civilians, while the operation was on going. See HCJ 4764/04 *Physicians for Human Rights v. IDF Commander of Gaza* 58(5) PD 385 (2004) (The judgment is excerpted in English in 35 ISR. YB HUM. RTS. 327 (2005)).(Rafiah Operation case).

for supplying them. Submitting advice without taking responsibility simply does not suffice.[28]This attempt to legalize policies is similar to the US attitude in these matters. As Jack Goldsmith describes it, lawyers took control over much of the decision making in national security agencies, and operatives, especially at mid-level, were unwilling to implement any policy without legal backing *ex ante*.[29]Although the situation in the IDF has not gone that far, events do seem to be moving in that direction.

Another factor affecting the change from pure advice to more concrete decisions is the change of character in legal operational advice. As ILD lawyers became more involved in actual operations, and were required to give answers to specific and real-time questions, their ability to offer a reasoned opinion without a bottom line diminished. A lengthy opinion about a future planned operation might enable the lawyer to include language which is not concrete. When the question posed is: "can we bomb this building?" a yes or no answer is sometimes requested.[30]

Lawyers have thus moved from being legal advisors to what David Luban has termed *compliance officers,*[31] they provide the legal advice, to a standard which satisfies the requirements set by IHL. They also serve as the agents of law.[32]

---

[28] In his testimony in the Winograd Commission AG Mazuz said:
" I basically always thought that we the lawyers have to advise the political and military levels as to the legal standard, and that they should take responsibility for implementing it. In reality it turned out it doesn't work like this. Neither the politicians nor the military are willing to take responsibility for implementing the norms…The politicians and the military come to us and say that they do not know how to translate the principle of proportionality… that they need concrete answers…" Testimony of AG Mazuz[My translation from the Hebrew original, AC]

[29] JACK GOLDSMITH, TH E TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION (2nd Ed. 2009)

[30] As legal operational advice became more embedded in the IDF, so did the tendency of ILD lawyer to confront such questions.

[31] David Luban, *Military Necessity and the Cultures of Military Law,* 26 LEIDEN J. INT'L L. 315-349 (2013).

[32] Most of the enforcement of the MAG is thus not criminal, but rather by providing advice and creating procedures, MAG lawyers are able to exert some "legal" control over military operations.

III. Investigations

The second issue I would like to deal with is investigations of suspected violations of IHL.

1. The Duty to Investigate

Customary IHL requires that states investigate war crimes allegedly committed by their nationals.[33]

In an article I co-authored with Professor Yuval Shany a few years ago, we detailed the contents of the duty to investigate suspected violations of IHL in the following way:

> "Even if states were to agree that investigations are indeed required in a specific instance, the question which then arises pertains to the form of the investigation. What form should an investigation into allegations or suspicions of IHL or IHRL violations take? …. As no IHL treaty directly addresses the issue at hand, we first direct our attention to sources of IHL which indirectly regulate it. We then examine the relevant contents of the duty to investigate as developed under IHRL. Finally, we comment on the practices of some states engaged in the investigation of allegations or suspicions of IHL or IHRL violations. The examination of law and practice may enable us to inject some concrete contents into the somewhat abstract duty to investigate."[34]

In the same article, and based on available sources, we found that the following criteria should apply to investigations of suspected violations of IHL:

A proper investigation should at the minimum satisfy the following criteria: Effectiveness or good faith; promptness; independence; and impartiality.

(i) Effectiveness

In the *Al Skeini* judgment, the European Court of Human Rights detailed the contents

---

[33] *Customary International Humanitarian Law, supra* note 2 , rule 158.

[34] Amichai Cohen and Yuval Shany, *Beyond the Grave Breaches Regimes*, 14 YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW 37-85 (2012).

of effectiveness:

> [T]he investigation must be effective in the sense that it is capable of leading to a determination of whether the force used was or was not justified in the circumstances and to the identification and punishment of those responsible. **This is not an obligation of result, but of means. The authorities must take the reasonable steps available to them to secure the evidence concerning the incident,** including *inter alia* eye-witness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death. Any deficiency in the investigation which undermines its ability to establish the cause of death or the person or persons responsible will risk falling foul of this standard.[35]

(ii) Independence

In addition to effectiveness, the Court emphasized in its case law the need for an independent investigation. This subject, too, was addressed in the *Al Skeini* judgment:

> For an investigation into alleged unlawful killing by State agents to be effective, it is necessary for the persons responsible for and carrying out the investigation to be independent from those implicated in the events. This means not only a lack of hierarchical or institutional connection but also a practical independence.[36]

(iii) Promptness

Promptness is another important component of the duty to investigate under IHRL identified by the ECtHR. Although, the Court recognized in its *Al Skeini* judgment that a prompt investigation may encounter serious difficulties during the armed conflict itself, it emphasized the need to proceed at reasonable speed:

> A requirement of promptness and reasonable expedition is implicit in this context. While there may be obstacles or difficulties which prevent progress in an investigation in a particular situation, a prompt response by the

[35] *Al Skeini v. UK, Grand Chamber, Judgment of 7 July 2011, no.55721/07 ECHR 2011.* para.166.
[36] *Ibid*, at para. 167.

> authorities in investigating a use of lethal force may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts.[37]

(iv) Transparency and Public Confidence

Full transparency in operational investigations is problematic to the extent it suggests that states should publicly divulge the intelligence on which they relied for specific military actions, or even to provide specific operational guidelines (e.g., under what precise circumstances it will resort to targeted killings). Such a position appears to strongly conflict, at times, with the interests of military necessity and is therefore likely to be ignored by many, if not most militaries around the world. Still, as I suggest below, the problem of public scrutiny can be partly addressed in a different way – through independent mechanisms of oversight operating within the state concerned.

These conditions of effectiveness, independence and impartiality, promptness and transparency are also supported by the internal logic of the duty to investigate and legitimacy considerations. As already noted above, a principle objective of the duty to investigate is to prevent future IHL violations by punishing the perpetrators of past violations. It is difficult, if not impossible, to conceive of an effective and legitimate manner in which the duty to investigate can be carried out by bodies that do not meet the requirements of good faith, independence and impartiality and reasonable promptness. An investigation that fails to genuinely strive to ascertain the truth and to hold accountable wrongdoers would not be effective or legitimate. An investigation that is not independent and impartial might not be *bona fide* in nature and is unlikely to be effective and legitimate. Finally, a slow investigative process raises concerns about its genuineness (as suggested in article 17(2)(b) of the ICC Statute), and may be ineffective as a tool for both identifying past violations (due to the loss of evidence and fading memory) and preventing future occurrences of the same sort. It is not surprising in light of inter-connectedness of the various requirements for a proper investigation that some of the most influential military manuals allude explicitly or implicitly to some or all of

[37] *Ibid*, at para. 167.

these requirements.[38]

2. The Israeli system of investigations

In our article,[39] Prof. Shany and myself addressed the problematic nature of the Israeli system of investigations in several distinct areas: first, we noted that the operational debriefing is not a useful or correct way to investigate suspicions of violations. Second, we criticized the lack of independence of the MAG, and third, we emphasized the fact that there exists a lack of strict detachment between the role of the MAG as the chief legal advisor to the military, and its role as the chief prosecutor.

All these question were examined by the Israeli Turkel commission, whose Report must now be examined in some depth.

[38] See e.g. OPERATIONAL LAW HANDBOOK (Brian Bill and Jeremy Marsh (eds) (2010) available at: http://www.loc.gov/rr/frd/Military_Law/pdf/operational-law-handbook_2010.pdf
[39] Supra note 34.

3. The Turkel Commission

(i) Background

On June 14, 2010, the Israeli government adopted a decision to establish the Turkel Commission to investigate two sets of issues: 1) the violent events surrounding the 2010 Gaza Flotilla and 2) the adequacy of Israel's system of investigation. Paragraph 5 of the government decision gave the Commission the authority to:

> "address the question whether the mechanism for examining and investigating complaints and claims of violations of the laws of war, 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."

Initially, membership of the Commission was restricted to Supreme Court Justice (ret.) Jacob Turkel' as chairperson, and to the late Prof. Shabtai Rosenne and General (ret.) Amos Horev as members. In addition, however, two foreign experts were appointed to serve as observers: Lord David Trimble, former First Minister of Northern Ireland and recipient of the Nobel Peace Prize, and Brigadier-General (ret.) Kenneth Watkin, former Judge Advocate General of the Canadian Forces. In July 2010, the Commission was expanded to include two additional members, Ambassador Reuven Merhav and Prof. Miguel Deutch. On September 21, 2010, Prof. Shabtai Rosenne passed away, but the Commission decided not to appoint another member in his stead. Later, on June 23, 2011, Professor Timothy McCormack was appointed as a foreign observer to replace Brigadier-General Watkin. During the Commission's work on the second part of the Report, Professors Gabriella Blum, Michael Schmitt, and Claus Kreb served as special advisers to the Commission.

The Commission received position papers from state officials such as the Military Advocate General (MAG) as well as from NGOs and experts in the field, including the three IDI researchers who have authored this article.

(ii) The Report

The 1,000 page Report includes the Commission's conclusions and recommendations as well as lengthy appendices containing analyses of equivalent mechanisms in the United States, the United Kingdom, Australia, Canada, Germany, and the Netherlands.[4] In its preface, the Report notes that unlike the Commission's first report, which presented a retrospective examination of past events, the second part of the report is prospective and aims to identify the principles and methods required to improve the mechanisms used in Israel, so as to ensure that they conform to the rules of international law and to contemporary trends in other democratic countries.

(iii) Recommendations

The basic finding of the Report is that Israel's mechanisms of examination and investigations of violations of international humanitarian law are generally consistent with Israel's international law obligations. However, the Report also contains the following 18 recommendations for future improvements or reference

1. **"War Crimes" Legislation** – The Ministry of Justice should initiate legislation for all international criminal law offenses that do not have a corresponding domestic offense in Israeli criminal law.
2. **Responsibility of Military Commanders and Civilian Superiors** – Legislation should be enacted to impose direct criminal liability on military commanders and civilian superiors for offenses committed by their subordinates…
3. **Reporting Duties** – The 2005 Reporting Procedure for incidents in which Palestinian civilians were injured…should be incorporated into the Supreme Command Orders and shall apply to every incident involving the IDF or forces for which the IDF is responsible. The Reporting Procedure should be implemented and sanctions should be imposed on commanders who do not comply with its requirements.

   The Reporting Procedure should require documentation of the scene of an incident. This obligation includes seizing all exhibits and documents that may assist the

examination and investigation, and storing the evidence in conditions that will best preserve them for proper examination at a later date.

4. **Grounds Giving Rise to an Obligation to Examine and Investigate** – The Commission found that the IDF's 'investigation policy' following the death of a person during combat operations is consistent with Israel's obligations under international law.

   In order to expedite the assessment of complaints, upon receipt of initial reports the Military Prosecution should classify them according to the legal framework of each incident, namely whether the incident occurred during combat operations and is therefore subject to the rules regulating hostilities, or whether it is any other incident subject to law enforcement norms.
5. **Fact-Finding Assessment** – An operational debriefing is not designed to help decide whether or not to initiate an investigation. A mechanism should therefore be established for carrying out a fact-finding assessment, which should form the basis for the Military Advocate General's (MAG) decision as to whether an investigation is necessary. For this purpose, a special team shall be established in the IDF with expertise in the theatres of military operations, international law and investigations...
6. **The Decision on Whether to Open an Investigation** – [IDF] Procedures should establish a time frame of a few weeks during which the MAG would decide whether or not to initiate an investigation on the basis of the material in his possession.

   The MAG's authority to order an investigation should not be made conditional upon consulting the commanding officer responsible for the unit involved in the incident…Every decision of the MAG not to open an investigation should state the reasons for the decision.
7. **Independence of the MAG** – The fact that the MAG is subordinate to the authority of the Attorney-General in professional matters is consistent with the principle of independence as established in international law. However, legislation and organizational arrangements are required in order to safeguard this subordination: The MAG should be appointed by the Minister of Defense, upon the recommendation of a public professional committee.
8. **The Military Advocate General's "Dual Hat"** – In order to prevent any appearance of partiality due to the duality of the MAG's position—he is both head of the Military

Prosecution and as the chief legal advisor to the military—the status and independence of the Chief Military Prosecutor (CMP) should be strengthened. The CMP should be appointed by the Minister of Defense, upon the recommendation of a committee chaired by the MAG.

9. **The Investigations of the Military Police Criminal Investigation Division** – A Department for Operational Matters should be established in the Military Police Criminal Investigation Division to work with the MAG Corps for Operational Matters with bases in the areas where the incidents under investigation occur. The investigators should include persons fluent in Arabic.
10. **Establishing the Investigation Time Frame** – The MAG, in coordination with the Attorney-General, should set a maximum period of time between the decision to begin an investigation and the decision to adopt legal or disciplinary measures or to close the case.
11. **Transparency of Proceedings** – The MAG Corps should implement a strict documentation procedure for all examination and investigation actions carried out in a file and for all decisions made, especially in cases involving investigations of alleged violations of the laws of armed conflict.
12. **Oversight of the Legal Advice given by the MAG Corps** – In order to strengthen the Attorney-General in exercising his oversight powers over the legal advice given by the MAG, a unit specializing in the laws of armed conflict should be established in the Advice and Legislation Department at the Ministry of Justice.
13. **Individual and Systemic Review of the Military Prosecution System**– Legislation should provide a procedure to appeal decisions of the MAG to the Attorney-General. This legislation should determine the period of time for filing an appeal and for the Attorney-General to make a decision.

    When the Complaints Commission for the Public Prosecution is established, it should be authorized to review all the branches of the Military Prosecution, including monitoring the bodies of the IDF that conduct examinations and investigations, in order to ensure that the MAG's regulations and policy are being implemented *de facto*.
14. **The Handling of Complaints against Police Officers** – The examination and investigation of complaints against police officers operating under IDF command should be carried out by the IDF, rather than by the Israel Police or by the Police Internal Investigation Department at the Ministry of Justice.

15. **The Handling of Complaints against Israel Security Agency Interrogators** – The role of the ISA Interrogatee Complaints Comptroller should be transferred from the ISA to the Police Internal Investigation Department at the Ministry of Justice.

    All ISA interrogations should be fully videotaped, in accordance with rules that will be determined by the Attorney-General in coordination with the head of the ISA.
16. **The Handling of Complaints against Prison Wardens** – The head of the Police Investigations and Intelligence Department should ensure that during the training of the police investigators responsible for investigating prison wardens, proper emphasis is placed on learning the relevant rules of international law.
17. **The Handling of Complaints against the Civilian Echelon** – The Commission found that the system of investigating senior decision makers by commissions of inquiry and examination, which is well established in Israel, satisfies Israel's obligations under international law to investigate acts, decisions or omissions that give rise to a suspicion of serious violations of the laws of armed conflict.
18. **Implementation of the Commission's Recommendations** – The MAG should publish a comprehensive and updated handbook on the examination and investigation mechanisms employed by the IDF. The handbook should lay down guidelines for the examination and investigation mechanisms with regard to the handling of complaints and claims of violations of the laws of armed conflict. The MAG's guidelines should incorporate the guidelines and procedures that will be formulated pursuant to the recommendations of the Report. The handbook should be made available to the public.

    The Commission recommends that the Prime Minister should appoint an independent implementation team that will monitor the implementation of the recommendations in this Report recommendations and report periodically to the Prime Minister.

(iv) Analysis

Although the mandate of the Commission was to examine whether Israel's current examination and investigation mechanisms are in compliance with international standards, the Commission correctly decided not to limit itself to so narrow an inspection and recommended necessary modifications and adjustments.

Especially noteworthy are the following: the rejection of unit debriefings as a preliminary investigative tool; the need to enact War Crimes Legislation; the need to examine all serious incidents entailing exceptional or unforeseen harm; the need to strengthen the independence and impartiality of the MAG; and the desirability of subjecting high-level officials to commissions of inquiry. Likewise notable is the Commission's insistence upon greater speed and transparency in examinations and investigations, including a recommendation that all interrogations by the Security Services be video-recorded.

The author of this submission feels that adoption of the all the recommendation would certainly solve many of the problems raised. The independence of the MAG would be bolstered through the nominating process, the fixed term of service and the fixed rank. The impartiality problem, and the need for transparency would be addressed through the more extensive civilian control through the office of the AG; and the effectiveness issue is to be addressed through the clearer procedures for opening an investigation and the limitation of the use of operational debriefing.

4. The implementation of the Turkel commission and current investigations

To date, the Turkel commission's recommendations have not been fully implemented. That task has been assigned to an internal government working-group. However, some measures have already been adopted

(i) Fact Finding

The major changes which have been implemented are in the area of fact finding. In the past some initial inquiries were made through operational debriefing. As already mentioned, the Turkel commission heavily criticized this procedure, when taking place in parallel or prior to a criminal investigation when such an investigation is required. The change was apparent during Operation "Protective Edge", with the establishment of a "fact finding" unit, headed by General Noam Tibbon, who was not involved in military activity at all. This unit, when directed to do so by the MAG, sent a "fact finding team" to investigate specific occurrences, involving suspicions with regard to the behavior of IDF soldiers. When Tibbon announced in late January 2015 that he was

retiring from active service, Gen. (res.) Yitzchak Eitan was appointed his replacement as commander of the "fact finding team". Such fact-finding teams included a reserve officer, outside the chain of command, and a lawyer from the MAG corps (on either active or reserve duty).

These "fact finding" teams report to the MAG, who based his decisions on whether or not to initiate a criminal investigation on their findings. This reflects an important acceptance of a major recommendation of the Turkel commission, and an abandonment of the operational debriefing system which we opposed. This is an important development in the investigation of suspicions for war crimes, and one which is to be commended.

(ii) Civilian Oversight, Independence and Impartiality

I would like to refer to one other positive development which occurred recently: the development of civilian oversight and control over the decisions of the MAG.

As is clear from my earlier writings, and from the presentation in this document, a major question regarding investigations undertaken by the MAG pertains to his ability to investigate decisions that are based on directives and general orders issued by the Government and the High Command.

There are two issues that need to be addressed: the independence of the MAG, and his ability to review orders based on legal advice.

The problem of independence was discussed earlier concerning legal advice. It seems that the Israeli MAG is independent to open investigations in any matter, and some of the above-mentioned recommendation of the Turkel commission support this independence (especially recommendation 7). It seems that if a system of military investigations is accepted as legitimate, as is the case in most common-law jurisdictions, the MAG is independent enough to conduct these investigations. Naturally, when an investigation of the civilian government is required, the proper institution to conduct this investigation is the AG, and not the MAG, which is part of the army that is subordinate to the civilian government.

A different matter is the question of the ability of the MAG to investigate issues in which legal advice was given. The Chief of the General Staff (CGS), who is the "the supreme command level in the army", issues orders, presumably with the approval of

the MAG, who is his legal advisor but also his subordinate. It seems that MAG cannot review orders given by the CGS, when the MAG himself provided advice as to the legality of these orders (and approved them). There is a similar problem whenever the investigations raises issues concerning the legality of any command given with the approval of the MAG.

Hence, we claimed that investigations of orders given by the high command, or by an officer which received direct advice from the MAG, cannot be reviewed by the MAG.[40]

The response of state to these claims (in various contexts) has basically taken two forms. One is to insist that the review of the Israeli Supreme Court provides sufficient oversight over MAG decisions. Another, adopted after the recent operation "Protective Edge", is to point out that certain civilian agencies provided other kinds of review.

In what follows I shall discuss these two claims separately. I shall begin by evaluating the relevant decisions of the Israeli Supreme Court. Thereafter, I shall evaluate alternative responses offered by the state. *In the area of alternative mechanisms of civilian control, I believe that Israel has made some significant changes, that should be considered as going a long way towards responding to the criticisms raised.*

The Israeli Supreme Court

Extensive judicial review over the formulation and implementation of policies has become perhaps the most notable characteristic of Israel's national security decision-making process. Within that framework, especially relevant is the extent of the involvement of the ISC in the application of International Humanitarian Law.

Earlier in this document, I have already discussed the extent of involvement of the Israeli Supreme Court in matters of National Security. This characteristic of the Israeli Supreme Court has certainly meant that there is some measure of civilian control over application of IHL by the IDF.

Review of Decisions of the MAG

In the context of the current submission, it is especially important to note that in several cases the Court has specifically highlighted its authority to intervene in decisions of the MAG, in matters of decisions whether to prosecute. The most recent decision relevant

[40] It should be noted that these problems are unique to the MAG himself, since other personnel in the MAG corps serve in either its advisory division or its investigative division. The only link between these divisions is the MAG himself (and in rare cases perhaps his immediate deputy).

is *Abu Rahme v. MAG* (2009) e.[41] In this case the Court overturned the MAG's decision to prosecute an officer accused of ordering a subordinate to shoot a detained Palestinian in the leg with the comparatively light charge of "conduct unbecoming". The Court declared the MAG's decision to be unreasonable, ruled that the officer concerned should be charged with a more serious offense (albeit one that the Court left unspecified).

The Court emphasized that:

> 89. …Precisely because of the special status of the military system, extra care is required in enforcing moral-ethical norms in its activities and among its soldiers, particularly in all matters related to the meticulous safeguarding of the rules of restraint and circumspection in the use of force and military authority. In these areas, we must take special care, with serious and light offenses alike, and we must give clear preference to the need to enforce the moral norms of the law even over the institutional interests of the Army and over individual personal considerations pertaining to soldiers who have strayed from the path of acceptable behavior. The level of enforcement in matters pertaining to the prohibited use of military power vis-à-vis local residents who are members of the opposing side, or vis-à-vis interogees, captives and those in military custody, should be as rigorous as it possibly can be, in order to instill the appropriate moral messages not only in the individual sinner, but also in all soldiers throughout the military.
>
> 90. The protection of the rule of law and the defense of individual liberties are characteristics of the democratic conception that underlies the Israeli system of government. It is also an important component of Israel's approach to security (Public Committee, at p. 845). The insistence upon respect for human rights and the safeguarding of human dignity, even vis-à-vis enemy individuals, are inherent in the nature of the state as a democratic, Jewish state. These values must also find their expression in the enforcement of criminal law upon those whose conduct has violated these principles. Law enforcement in this vein is

[41] HCJ 7195/08 *Abu Rahme v. MAG,* (2009) available at: http://elyon1.court.gov.il/files_eng/08/950/071/r09/08071950.r09.htm

> also an important component in Israel's outlook on security, and in the capabilities and standards of the IDF. "The strength of the IDF depends on its spirit no less than on its physical power and on the sophistication of its weapons" (HCJ 585/01 Kelachman v. Chief of Staff, PD 58(1) 694, 719 (2003)). The spirit and moral character of the Army depend, *inter alia*, on maintaining the purity of arms and defending the dignity of the individual, whoever he may be.

The Court then went on to explain that it possesses the authority to intervene in MAG decisions, and also to order that they be changed should the Court deem them to be unreasonable and contrary to the basic principles of legality and morality detailed above.

It should be emphasized, however, that three circumstances prevent the Court from exercising total oversight over the MAG. One is the Court's own insistence that only in extreme cases will it intervene in MAG decisions.[42] A second, already noted above, is that the Court is essentially a reactive body; it can only intervene when petitioned to do so. Finally, it must be born in mind that the ISC sitting as the high court of justice (the procedure according to which most petitions are brought to it), is not the ideal location for the airing of factual disagreements. It rarely hears oral testimony and never conducts cross-examinations.

Alternatives developed after Operation "Protective Edge"

Regarding operation "Protective Edge" there are two developments that are notable in the context of civilian review of MAG decisions.

The first is the involvement of the Attorney General. This became apparent when the current incumbent of that office published an opinion regarding the use of the "Hannibal Directive" during the course of "force protection" operations. The specific contents of the "Hannibal" order are not the subject of this submission. What is important to note that the opinion regarding its legality was authored by the Attorney

[42] Abu Rahme decision *supra.*

General's office, and not by the MAG.[43] This is a positive development, which enunciates a proper division between the roles of the civilian investigative arm, as represented by the Attorney General, and the military investigative unit.

The second development, which is still only at an embryonic stage but should affect this discussion, is the decision taken by the State Comptroller, Justice (ret.) Yoseph Shapira, to investigate aspects of compliance with international law in Operation "Protective Edge".[44] Israeli law empowers the State Controller to investigate actions taken by any agency of the State, to compel persons to testify, and to refer to the Attorney General cases in which there is a suspicion of criminal behavior. The involvement of the State Comptroller is innovative, and could certainly lead to important results. More than anything else, it reflects an opinion that independent civilian agencies need to exercise scrutiny over military actions.

These two important new mechanisms are a welcome addition to the traditional civilian review provided by the Israeli Supreme Court on the decisions of the MAG. Together with the general oversight of the Israeli Supreme Court, these three "civilian" oversight mechanisms, if fully adopted and developed, would create a satisfactory level of civilian control over the MAG's investigations.

In concluding this part of the submission, I would like to refer to the possible charge that, because he is a soldier, the MAG is by definition incapable of investigating any suspicions of violations of IHL. This claim has no basis in IHL or in international law generally. It is clear from existing treaties, and from the practice of states (especially in common-law jurisdictions) that as long as the military follows the basic principles of investigations detailed above, there is no rule or International law obligation that the military cannot investigate suspicion of wrongdoings by soldiers. The question is whether the investigations follows the requirements of international law, without regard to who investigates.

---

[43] Gili Cohen "IDF Prosecutor, Not Senior Commanders, to Decide on Gaza War Probes, AG Rules" *Haaretz Daily Newspaper* January 13, 2015. (Available on the *Haaretz.com* English website http://www.haaretz.com/news/diplomacy-defense/.premium-1.636778)

[44] http://www.mevaker.gov.il/he/publication/Articles/Pages/2015.1.20-Tzuk-EItan.aspx
According to the official statement (published in Hebrew and English), the state comptroller would be aided by Professor Michael Newton of Vanderbilt University, Professor Moshe Halbertal, and Professor Miguel Duetch - a former member of the Turkel Commission.

IV. Policy Considerations

The International Commission of Inquiry has not been designated a "fact finding committee" but rather a commission of inquiry. It should thus consider policy issues that are outside the scope of the specific facts of Operation "Protective Edge". It should also relate to the effects of its findings and recommendations.

In this context, my claim in the present submission is that the commission should conduct itself with extreme care when intervening in the operation of the Israeli investigative mechanisms, that have been itemized above. .

This principle of respect is justified for two reasons: first, the correct division between state sovereignty and respect for the basic principles of international law requires that states receive precedence over international institutions in investigating suspicions of crimes committed by their citizens, provided that they demonstrate their ability to conduct such investigations. Moreover, and secondly, the cause of promoting international law application would be damaged were international institutions to intervene in matters that domestic institutions are capable of coping with.

In order to understand why this second claim is correct, it is important to note that DABLA lawyers in the IDF, as well as the justices of the Israeli Supreme Court and members of the international law unit at the Ministry of Justice, are all agents of the internalization of international law. They contribute to embedding international law into the Israeli domestic legal system and support that development. By employing a variety of claim and mechanisms, they convince the Israeli government and armed services to adopt international standards. Thus, they support the creation of a permanent system of implementation of IHL; they propound the moral and legal reasons for complying with IHL; and they emphasize the extent to which the possibility of international intervention is dependent on Israel's conduct of independent investigations into suspected breaches of IHL. Indeed, every soldier, commander and politician is made aware that unless the advice of the MAG is followed, there exists a potential for the initiation of international judicial proceedings. Similarly, every soldier, commander and politician is made aware that any tampering with the independence of the MAG investigations increases the likelihood that an international tribunal would become part of the process.

These are powerful claims, and they provide the supporters of fuller implementation of IHL with the tools needed to promote that process. International law in general, and

IHL in particular, is thus promoted and becomes a more important part of Israeli law. This process also provides international law with legitimacy, an important part of the fabric of domestic Israeli law.[45]

However, this is a delicate process, the effective development of which is dependent on the existence of a dialogue between international law and domestic law and institutions.[46] It also requires that international institutions respect domestic institutions, when the latter operate. This need for respect is reflected in several legal doctrines. One is the "margin of appreciation" adopted by the ECtHR.[47] Another is embodied in the principle of complementarity, which requires the ICC, and courts applying universal jurisdiction, not to investigate those cases which domestic institutions are willing and able to investigate and prosecute.[48]

I submit that the developments in the area of investigations now taking place in Israel should be recognized, and that deference should be given to the Israeli system of investigation. Any other result would cast aspersions on the legitimacy of IHL norms, and possibly initiate a backlash against all the progress that, as shown above, has been achieved in this area over the past decade. After all, it might be argued, why should Israel support and buttress a domestic system of investigation and legal operational advice if the international system itself does not recognize its efficacy?

---

[45] Amichai Cohen, *Bureaucratic Internalization: Domestic Governmental Agencies and the Legitimization of International Law*. 36 GEORGETOWN J. INT'L L. 1079 (2005);

[46] Beth Simmons MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS (2009)

[47] Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J 273 (1997).

[48] Rome Statute of the International Criminal Court, articles 17; 20.

V. Conclusion

This submission details Israeli practice regarding two of Israel's obligations under IHL: to provide commanders with legal advice and to investigate suspected violations of IHL.

Regarding the issue of legal operational advice, I believe that Israel satisfies all IHL requirements of IHL and, moreover, that she does so at a level that bears favorable comparison with the behavior of even the most advanced of other countries. The Israeli system for investigating suspected violations of IHL has in the past been criticized on several grounds. However, the recommendations contained in the final report of the Turkel Commission (published in 2013) promise to repair those deficiencies, and indeed in large part have already done so.

I recommended, as a matter of policy, that those changes warrant a policy of deference to the judgment of Israeli investigations into the IDF's compliance with IHL.