Operation "Protective Edge"

IDF Activity from the Perspective of International Law, Particularly with Regard to Mechanisms of Examination and Oversight of Civilian and Military Echelons

Public Report

Summary

General Background

1. The modern battlefield presents many operational challenges, some of which are affected by the fact that civilians who do not take a direct part in hostilities[1] (hereinafter - uninvolved civilians) in the combat zones and therefore could be harmed due to IDF combat operations in these sectors.

   International law regulating the use of force consists two sets of laws: *jus ad bellum* ('law of war'), which determine when a state may use force, and *jus in bello,* ('law in war') also referred to as "the Law of Armed Conflict" or "international humanitarian law" which determine the international legal regime governing the use of force during an armed conflict, and regulate the duties, rights and defenses of states and individuals involved in or affected by an armed conflict.

   In addition to international humanitarian law, there are other branches of law that relate to the obligation to examine and investigate violations of international humanitarian law principles (see more below[2]). One of them is international criminal law, which states that the domestic judicial system has precedence over an extraterritorial judicial system in adjudicating international law violations. This is based on two principles: the "principle of complementarity"[3], according to which the authority of an international jurisdiction will be exercised as a last resort when states are unwilling or unable to exercise their duty to investigate and prosecute; and the "principle of subsidiarity", according to which a jurisdiction with territorial or national affiliation has precedence over an international jurisdiction, which has subsidiary responsibility.

   In accordance with the principle of complementarity and the principle of subsidiarity, investigative and judicial systems in the State of Israel which function properly will help prevent the intervention of external courts and tribunals in the sovereign affairs of the State of Israel.

   The State of Israel deals with a difficult and ongoing struggle against terrorism and enemies that rise up against it. However, as a Jewish

1 HCJ 769/02 **Public Committee against Torture in Israel v. Government of Israel** (published in the computerized database, 14 December 2006).

2 The Turkel II Report and the implementation of its recommendations - The normative basis.

3 The principle of complementarity is anchored in Article 17 of the Rome Statute.

and democratic state, it is obligated to preserve the values of democracy, primarily the rule of law and individual rights. This obligation is based first and foremost on the internal fabric of its laws, according to which every government authority is obligated to respect the basic rights protected, *inter alia*, under the Basic Law: Human Dignity and Liberty. This duty is also reflected in those provisions of international law that relate to armed conflict, which obligate the security forces of the State of Israel. Respect for the rule of law and human rights is an essential component of Israel's national security and the shaping of its identity. In this context, the Supreme Court noted:[4] "That is the fate of democracy, in whose eyes not all means are permitted, and to whom not all the methods used by her enemies are open. At times democracy fights with one hand tied behind her back. Despite that, democracy has the upper hand, since preserving the rule of law and recognition of individual liberties constitute an important component of her security stance. At the end of the day, they strengthen her and her spirit, and allow her to overcome her difficulties".

Following the May 2010 "Marmara incident"[5], in June 2010[6] the government of Israel appointed an Independent Public Commission headed by Supreme Court Justice (Ret.) Yaakov Turkel (hereinafter - "the Turkel Commission" or "the Commission") to examine, among other things, "whether the mechanism for examining and investigating complaints and claims raised in relation to violations of the laws of armed conflict, as conducted in Israel generally, and as implemented with regard to the present incident, [the maritime incident of 31 May 2010], conforms with the obligations of the State of Israel under the rules of international law".

In January 2011, the Turkel Commission submitted to the government the first part of its report[7], and in February 2013 it submitted to the

4 HCJ 5100/94 **the Public Committee against Torture in Israel v. the Government of Israel** Supreme Court Rulings 53[4], 817, 845 (1999).

5 A flotilla of six ships that left in May 2010 from the Turkish coast to reach the port of Gaza. Navy fighters took over five ships and encountered resistance, mostly passive. On the sixth ship, the "Mavi Marmara", violent incidents took place, resulting in the injury of nine IDF soldiers, the killing of ten passengers and the injury of 55 of its passengers. One of the ship's passengers died after the event.

6 In Government Resolution No. 1796 dated June 14 2010 it was decided to establish an independent public committee and in accordance with Government Resolution No. 1895 dated July 4, 2010, its powers were extended and certain powers were granted to it under the Commissions of Inquiry Law, 5729 - 1968.

7 The first part of the Turkel Commission Report - The Public Committee for Examining the Maritime Incident, dated May 31 2010, **Report - Part One** (January 2011).

government the second part, titled "Israel's Mechanisms for Examining and Investigating Complaints and Claims of Violations of the Laws of Armed Conflict According to International Law" (hereinafter – "the Turkel Report" or "the Turkel II Report").

On January 5 2014, the government decided to appoint a team headed by Adv. Dr. Joseph Ciechanover to examine and implement the Turkel Report (hereinafter – "the Ciechanover Team" or "the Implementation Team") and instructed it to present its recommendations to the Prime Minister by October 2014. On September 20 2015, approximately one year after the scheduled date, the Ciechanover Team presented its recommendations to the Prime Minister. On July 3 2016, about three years and five months after the Turkel Commission submitted its recommendations (the Turkel II Report), the government discussed the Ciechanover Team's recommendations and approved them in Resolution No. 125/B of the Ministerial Committee on National Security Affairs.

2. On July 7, 2014, following the increase in rocket fire from the Gaza Strip towards the State of Israel, Operation "Protective Edge" ("Tzuk Eitan") began[8]. During the operation, 68 IDF soldiers were killed – including two soldiers, Lieutenant Hadar Goldin and Staff Sergeant Oron Shaul, who have not yet been returned to Israel – as well as five Israeli civilians and a foreign national, and thousands of Israeli civilians and soldiers were injured. According to data published by the Ministry of Foreign Affairs[9], 2,125 Palestinians were killed in the Gaza Strip[10], and according to data compiled by the Coordinator of Government Activities in the Territories (hereinafter – "the Coordinator") according to information received from Palestinian sources and international organizations, approximately 11,000 Palestinians were injured, and approximately 10,300 houses were destroyed and another 5,800 were damaged in a manner that makes them unsuited for habitation[11]. After Operation "Protective Edge", various bodies, including human rights organizations, supplied the Military Attorney General's Office with

8 The decision regarding the offensive phase of Operation "Protective Edge" was made on July 7, 2014, and the air strikes in the Gaza Strip began on July 8, 2014.

9 The Ministry of Foreign Affairs, **The Conflict with the Gaza Strip in 2014** (2015).

10 According to the Ministry of Foreign Affairs report, as of April 2015, at least 44% of all Palestinian fatalities were identified as military operatives of Hamas or other terrorist organizations in the Gaza Strip.

11 The data appear in a document of the Coordinator of Government Activities in the Territories (COGAT) dated December 2014 on the subject of "COGAT Summary" of Operation "Protective Edge".

information on 464 exceptional incidents[12], meaning, incidents in which uninvolved civilians were allegedly harmed and damage to civilian property was caused.

The Audit Actions

From November 2012 to December 2013, the State Comptroller's Office examined, intermittently, the preparations within the political echelon and the IDF for dealing with the issue of reducing the harm to uninvolved civilians and the treatment of civilian population in combat zones (hereinafter - the "Civilian Component of Combat"). A draft of the audit report on the topic of the Civilian Component of Combat (hereinafter – the "Civilian Component Report") was distributed to the relevant authorities[13] in February 2014, and following their comments, some of the data was updated in May 2014. The audit report regarding the Civilian Component was not published due to Operation "Protective Edge", and the current audit on the topic of international law began after the operation, as detailed below.

In September 2014, the State Comptroller informed, *inter alia*, the Prime Minister, the Ministers of the Ministerial Committee for National Security Matters (hereinafter - the "Cabinet"), the Attorney General and the IDF, that he had decided to conduct an audit that would examine IDF activity from the perspective of international law regarding the examination and oversight mechanisms of the civilian and military echelons. The audit was delayed by nearly a year due to a lack of cooperation from the audited bodies. The audit began in May 2015, and from this date until January 2016, the State Comptroller's Office examined the manner in which the political echelon carried out its responsibilities from the perspective of international law in the context of the Cabinet's deliberations during Operation "Protective Edge", the implementation of the recommendations of the Turkel II Report concerning the Ministry of Justice, the Attorney General and the IDF, the work of the mechanism for fact-finding assessment (hereinafter - "the Mechanism" or "FFA Mechanism" or FFA

12 As of January 7th 2016.

13 The audit was conducted at COGAT, which is responsible for the implementation of the government civilian policy in Judea, Samaria and the Gaza Strip; IDF and at the National Security Council (the National Security Council serves as the Prime Minister's and the Government's headquarters in matters of foreign affairs and security as defined in the National Security Council Law, 5768 – 2008). An additional examination was carried out at the Ministry of Foreign Affairs and the National Information Office of the Prime Minister's Office.

teams) and certain IDF orders, including the "Hannibal" Order[14], as they were in effect during Operation "Protective Edge". Supplementary examinations were conducted until January 2017.

On September 2 2015, due to the importance and urgency of the matter, the State Comptroller's Office sent to a number of the audited bodies for their response, a draft report containing findings on "IDF activity with regard to aspects of international law, particularly with respect to the civilian and military echelons' examination and control mechanisms" (hereinafter – "the Interim Draft"). The main points of the Interim Draft, as well as the responses of the audited bodies that were received, are included in this summary report.

The audit was conducted at the Prime Minister's Office; the Ministry of Justice; the IDF, mainly in the Operations Directorate (hereinafter – "the Operations Directorate"); the Military Attorney General's Corps (hereinafter – "MAG Corps"); the Military Police Criminal Investigation Division (hereinafter – "the MPCID"); the FFA Mechanism ; the Southern Command; the Israeli Air Force; the Coordination of Government Activities in the Territories (hereinafter – COGAT); and the National Security Council (hereinafter – "NSC")[15]. As part of the audit, meetings were held with the Prime Minister, cabinet ministers of the 33rd government, the Attorney General and senior officials in the Ministry of Justice, as well as senior IDF officers. In addition, the State Comptroller's Office was assisted by two special consultants[16] for the purpose of this audit.

14 The 'Hannibal" Order was designed to regulate operational orders for preventing abduction of military personnel or civilians and to thwart it after an abduction occurred.

15 See footnote 13.

16 The first is Professor Miguel Deutsch – an expert in civil and commercial law who has published numerous articles and books in these fields, and is a full professor at the Tel Aviv University. Professor Deutsch served as a member of the Turkel Commission. The second is Professor Michael Newton – a world renowned expert on international humanitarian law from Vanderbilt University in the United States, who regularly serves as a special advisor on international law for various organizations and countries. He was a representative of the US government in discussions on the wording of the definition of "war crimes" under the Statute of the International Criminal Court in the Hague and a representative of the US government to the UN Special Court in Sierra Leone. Professor Newton served in this audit as a special expert consultant to the State Comptroller on the subject of international humanitarian law.

Key Findings and Flaws

The IDF's preparations between the years 2012 - 2014 to limit the possibility of harming uninvolved civilians in combat

1. In the audit of the civilian component, gaps were identified regarding the realization of the operational concept[17] of the civilian component in combat.

   Although the IDF conducts training regarding international law, it was found that the directives of the Doctrine and Instruction Division in the Operations Directorate did not stipulate that the training of soldiers and commanders would include the rules of conduct under international humanitarian law applicable to military activity among uninvolved civilian population.

2. The IDF has not yet implemented in its exercises the effects that may result from a high number of civilian casualties during the attack, in relation to its ability to achieve the military and political objectives of the operation.

3. The program for the provision of humanitarian aid to the civilian population in the Gaza Strip (hereinafter – "the Program") doesn't reflect the necessary modifications for the humanitarian treatment of the population during hostilities in Judea and Samaria (hereinafter – "Judea and Samaria") and in the northern arena.

4. The integration of the Operational Law Apparatus[18] in military divisions within the framework of combat, as was the case in Operation "Protective Edge", requires considerable improvement.

5. The NSC did not examine, within the framework of comprehensive staff work, together with all the relevant parties, the international consequences that may result from harm to uninvolved civilians, and the possible effects on the IDF's ability to realize its objectives in combat.

17 The operational concept defines the basic approach of an operational command to the execution of the main operational tasks imposed on it.

18 The operational Law Apparatus is responsible for providing legal counsel to IDF officials on the laws of war and in the areas related to the use of force, during combat and in preparation for it.

The "Hannibal" Orders on the Eve of Operation "Protective Edge" and in the course thereof

1. The "Hannibal" orders were known to be highly sensitive with respect to the life of the abducted person. While the General Staff Order was amended in October 2013, following staff work and the approval of the Attorney General, the order of the Southern Command and the order of the Gaza Division were not compatible with one another, or with the General Staff Order. According to their phrasing at the time, the command and division "Hannibal" orders could have been interpreted in various ways with respect to the terms that describe the value of an abducted person's life. This could have led to different interpretations of the orders by different bodies in the IDF.

1. Although the General Staff's Weapons Engagement Policy Directive [19] requires that the IDF forces act in the field in accordance with the principles of international law, the principles of distinction and proportionality were not expressly mentioned in the "Hannibal" orders.

2. The IDF did not verify that all the orders derived from the General Staff "Hannibal" Order include the amendment approved by the Attorney General and that their wording is identical to the General Staff "Hannibal" Order.

3. The IDF does not routinely carry out an approval and oversight process over the content of its operational orders which are formulated at various levels in the IDF, and there is no work procedure that requires such a process. In this state of affairs, the instructions of the senior command level may not be implemented by the lower command levels. This concern is particularly pertinent with regard to operational orders concerning sensitive situations, such as those relating to human life, which require full coordination at various levels in order to ensure that all IDF forces in the field act in a manner consistent with IDF policy.

19 An order that determines the hierarchy of approvals required for firing according to the type of target, the types of weapons that can be used, and the determination of safety ranges and the definition of sensitive sites.

The Conduct of the Political Echelon during Operation "Protective Edge" in light of International Law

From the minutes of the cabinet discussions which took place between the decision to embark on Operation "Protective Edge" and its conclusion, as well as from the statements made by the cabinet ministers at the time and other senior officials, it was clear that both the political echelon and the senior military echelon explicitly considered the limitations and rules set forth in international law with regard to the conduct of the fighting in Gaza, and the Prime Minister gave explicit instruction to refrain from harming uninvolved civilians. The minutes also indicate that both the political and the senior military echelons took into account, as part of the conduct of the hostilities in Gaza, the issue of humanitarian assistance to the residents of Gaza.

It also emerged that the Attorney General and his staff, as well as the Military Attorney General (hereafter – the "MAG") and his staff provided the political echelon and the military echelon continuously with legal advice on compliance with the rules of international law.

The Turkel II Report and the Implementation of its Recommendations

Recommendations No. 1 and 2 – Legislation concerning "war crimes" and "The responsibility of military commanders and civilian superiors"

Despite the activity of the Ministry of Justice to promote legislation on the subject of "war crimes" and "The responsibility of military commanders and civilian superiors", it has yet to submit bills to amend legislation in this area in order to close the gaps between Israeli criminal legislation and international law, as per the recommendation of the Turkel Commission, which was also adopted by the Ciechanover Team.

Recommendation No. 3 - "Reporting Duties"

During a state of emergency or an armed conflict, a violation of the rules of international law may occur as a result of an operational action, which requires reporting according to the rules of international law. Although the

IDF's new reporting procedure is expanded and detailed, it does not require reporting an incident of unintentional harm to civilians unless it involved extensive harm. This raises a concern that no report will be given regarding incidents that should be examined even when the harm caused to civilians was not deliberate.

Recommendation No. 4 - Grounds giving rise to an obligation to examine and investigate

At the time of the conclusion of the audit, the authority to establish an investigation policy in the IDF had not yet been explicitly defined in the IDF's directives. In order to emphasize the importance of this issue and to ensure that this policy is consistent with international law, it is important that the IDF establishes, in appropriate orders, a policy regarding the handling of complaints concerning events where there is reasonable suspicion that a violation of the rules of international humanitarian law occurred.

Recommendation No. 5 - "Fact-finding assessment" (the work of the FFA Mechanism)

Flaws were found regarding the efficiency and expediency of the Mechanism's work both in collecting the findings and in documentation of the information collected. However, the audit found that the Mechanism did its work in good faith and with a sincere desire to carry out a complete and thorough FFA and to arrive at the truth. In addition, the audit found that the MAG acted to prevent material damage to the factual basis on which he made his enforcement decisions, and as a result, he had sufficient factual basis for making a decision. Following are the key flaws that were discovered:

The regulation of the FFA Mechanism in the same directive regulating the General Staff operational debriefing mechanism and the integration of the FFA Mechanism within the organizational framework of the General Staff operational debriefing mechanism are not fully consistent with the recommendation of the Turkel Commission to establish a "separate mechanism in order to conduct a fact-finding assessment. The separation of the FFA Mechanism from the other operational debriefing mechanisms will contribute to enhancing the effectiveness of the Mechanism and preserving its nature and purpose as a unique and dedicated body directed solely at examining complaints of violations of rules of international law attributed to the IDF. The routine operational debriefing and the General Staff debriefing are intended to draw operational lessons for the future,

while the FFA Mechanism, while operating as an operational debriefing, is intended to examine whether a criminal investigation should be launched. A combination of the two objectives may impair the realization of the purpose of the FFA Mechanism. At the same time, the existence of FFA through the FFA Mechanism in the existing format, subject to the Chief of General Staff and acting separately from the chain of command, together with the integration of experts in various fields, while maintaining the independence of its operations, in conjunction with the independent discretion of the MAG regarding the decision whether to launch a criminal investigation, is consistent with the provisions of international law.

1. The Mechanism was established quickly, ad hoc, only after Operation "Protective Edge" began. Its establishment was carried out without complete and orderly preparation, without an orderly work procedure and without the early appointment of the officials in the Mechanism, which caused difficulties in its work.

1. The work of the FFA teams in the field did not include legal advisors, and only some of the first FFA teams were assigned MPCID investigators, whose involvement in the FFA teams was partial and limited. These functionaries were meant to ensure skillful handling of assessing possible discrepancies between versions and appropriate documentation of the statements of those being questioned, in order to ensure that the fact-finding assessment will facilitate a criminal investigation, if launched, and not harm it.

2. In the examination of 20 files handled by the FFA Mechanism, flaws were found that could damage the thoroughness and efficiency of its work, such as the lack of documentation of the debriefing procedure.

3. In more than 80% of the cases that were transferred to the FFA Mechanism, the length of time required to complete the examination of events exceeded, sometimes significantly, the timetables set forth in the Operations Directorate order 4.8 on the subject of "The debriefing and implementation of the lessons" (hereinafter - Operations Directorate order). The prolongation of the examination may damage evidence and thus hamper a future investigation, if launched.

Recommendation No. 6 - The decision whether to open an investigation

The MAG's Office has yet to publish the instruction of the Chief Military Prosecutor, which includes a time frame within which the MAG must decide whether to launch an investigation.

Recommendation No. 7 - "The Independence of the MAG"

The recommendation of the Turkel Commission regarding the regulation of the MAG's professional subordination to the Attorney General was implemented, but his subordination was not anchored in primary legislation. The recommendation of the Turkel Commission regarding the appointment of the MAG and limiting his tenure was not implemented.

Recommendation No. 10 - "Establishing the investigation timeframe"

The Chief Military Prosecutor's directive regarding the maximum length of time, from the decision to launch an investigation until a decision to initiate legal action, as determined by the Ciechanover Team, has yet to be published. In addition, the MAG Corps and the Manpower Directorate at the General Staff, to which the MPCID is subordinate, have not yet arranged the allocation of resources required for the Military Prosecution and MPCID to be able to meet the timetable set by the Ciechanover Team for making a decision regarding the outcome of an investigation.

Key Recommendations

IDF actions to reduce the possibility of harming uninvolved civilians during combat

1. The IDF should act as soon as possible to complete the processes relating to the operational concept and the preparation of the forces in the context of dealing with civilians in combat zones, in order to be prepared with a full operational concept for a combat situation, once it occurs.

1. The Doctrine and Instruction Division should implement instructions in the IDF to train soldiers and commanders regarding the principles of international law and to ensure that within the framework of the training programs, an appropriate period of time is allocated to the subject of the law of armed conflict.

2. The IDF should take the necessary measures to integrate the topic of the civilian component in combat within the exercises and training it conducts for the combat forces and commands, *inter alia*, coordinated and integrated with COGAT.

3. The IDF should ensure that the plan for dealing with a humanitarian disaster in all possible sectors of action will take into account the

realistic scope of population that will require humanitarian aid in the course of combat and must periodically validate it to ensure its implementation in real time.

4. The Chief of General Staff, in cooperation with the MAG, should examine the ways of regulating the status of the military divisions' legal counsel, and consider placing legal advisers from the MAG Corps as close as possible to the combatant level, during times of combat only. This is in order to ensure, to the extent possible, that combat is conducted in accordance with the rules of international law.

5. The NSC should complete its examination, in appropriate detail, of all the lateral effects involved in the implementation of the IDF's combat scenarios (from both a national and an international aspect), within the framework of overall staff work and in cooperation with all relevant parties, as well as ways to minimize the harm that may be caused to uninvolved civilians, the best course of action of all the bodies responsible of this matter, each in its own field, and the appropriate methods of coordination between them.

The "Hannibal" orders

1. Given that the Chief of General Staff ordered the cancellation of the "Hannibal" Order in June 2016, after the State Comptroller's Office conducted an audit of the matter, the new version of the order as instructed by the Chief of General Staff should give adequate response to the findings arising from this audit. Therefore, the Chief of General Staff should order an examination into the possibility of raising the level of authority necessary to employ firepower during an abduction or fear of abduction, depending on the severity of the incident, in accordance with the possibility that the security situation will escalate, in accordance with the environment in which it is taking place and to the degree of certainty as to the occurrence of the incident. After this examination, the orders should be amended accordingly in conjunction with the MAG. It is also appropriate to incorporate in the order the principles that appear in the IDF's General Staff's Weapons Engagement Policy Directive[20] regarding harm to uninvolved civilians, in order to emphasize to the forces operating in the field the proportionality required when employing firepower to prevent an abduction.

20 See foot note 19.

2. The IDF must determine in an order of the Supreme Command (hereinafter - "Supreme Command Order") the obligation to involve legal counsel in the process of formulating orders at the various levels in the IDF, at least with regard to orders dealing with the employing firepower, that may have consequences for human life, and more importantly with regard to orders that pertain to rules of international law. The IDF must determine that orders derived from the command order issued at the divisional level will undergo said control by the district commands. The Head of the Operations Directorate should determine which orders that undergo such control require also legal accompaniment, and the MAG should anchor this duty in a Supreme Command Order, similar to Supreme Command Order 1.0105[21].

Implementation of the Recommendations of the Turkel II Report

The State of Israel should continue to prepare itself thoroughly, optimally and in a timely fashion, and not wait for a time of crisis, to comply with the requirements of international law and deal with the legal campaign being waged in this arena. This issue is also of significant importance because of the long-term effects, even after the end of hostilities, arising from the military campaign, especially concerning the employment of firepower. Following the publication of the Turkel II Report, which was recognized by the international community, and after the Israeli government decided to adopt the recommendations made by the Ciechanover Team, the Israeli government and the IDF should act without delay to implement these recommendations and take steps to amend the flaws regarding the Mechanism's work noted in this report.

Recommendations No. 1 and 2 – Legislation concerning "war crimes" and "The responsibility of military commanders and civilian superiors"

In light of the importance of anchoring the principles of international law in Israeli law, the Ministry of Justice should expedite the advancement of legislation in these matters in order to improve the compatibility of Israeli

21 Order no. 1.0105 – include *inter alia*, the standing orders of the General Staff divisions in connection with areas related to the designation of their divisions or for a more detailed description of the principles set in the Supreme Command Orders and the orders of the General Staff.

legislation with international law and to ensure that it includes all the offenses relevant to the definition of war crimes.

Recommendation No. 3 - Reporting Obligations

The IDF Operations Directorate, in conjunction with the MAG corps, should determine in the new reporting procedure the obligation to report any event which raises a reasonable suspicion of violations of international law rules, even if the harm to the uninvolved civilians in the incident was unintentional. The procedure should be in clear and understandable language, and not limited to incidents with an extensive scope of casualties. In addition, the MAG should designate an entity in the MAG Corps that will serve as an address for commanders regarding questions and clarifications related to the reporting obligation.

Recommendation No. 4 - Grounds giving rise to an obligation to examine and investigate

The MAG should see to the amendment of the Supreme Command Order and publish the guidelines of the Chief Military Prosecutor without further delay, in order to explicitly anchor the MAG's authority to determine the IDF's investigation policy, as recommended by the Turkel Commission and the Ciechanover Team.

Recommendation No. 5 - Fact-finding assessment (the work of the FFA Mechanism)

1. The State Comptroller's Office believes that conducting a fact-finding assessment by means of the Mechanism for fact-finding assessment is consistent with the provisions of international law. However, in order to improve the work of the Mechanism, the Operations Directorate should publish a separate directive on the Mechanism for fact-finding assessment, clarifying that the FFA Mechanism, whose task is to examine whether a criminal investigation should be opened, is a separate body whose purpose is different from that of the operational debriefing. In addition, the Doctrine and Instruction Division should define in a separate directive the Mechanism for fact-finding assessment as a body that, although it carries out operational debriefing and shall be subject to the rules applying to operational debriefing, including confidentiality – its main purpose is different from that of the ordinary operational debriefings, and that is a fact-finding assessment for the MAG. Specifically, the directive will state that although the Mechanism is subordinate to the Chief of General Staff, its

operation shall be carried out directly by the MAG, in order to achieve its mission of independent fact-finding assessment, which will assist the MAG in ascertaining whether there is suspicion of prohibited conduct on the part of IDF soldiers in the course of the event examined. The publication of a standing operating procedure (hereinafter - SOP) regarding the Mechanism's work is of great importance in anchoring the MAG's special status vis-a-vis the Mechanism, in order to strengthen the Mechanism's compliance with the requirement of independence.

2. The Operations Directorate and the MAG Corps should implement without delay the SOP on the FFA Mechanism's work. The SOP should regulate the work of the Mechanism on the day of action, its training, its composition and its functionaries, including investigators and experts in international law in sufficient numbers, who will be part of the FFA teams in the Mechanism. In addition, the SOP should include detailed work instructions for carrying out the fact-finding assessment by the Mechanism, which shall regulate the manner in which the information should be collected, the ways to prevent compromising the quality of the evidence, the manner of recording the information collected during the fact-finding assessment, and the appropriate way to present the fact-finding assessment findings and the information gathered to the MAG Corps. These instructions are necessary to ensure professional and through work without compromising the possibility of a future criminal investigation, and in order to enable the MAG to decide whether to order the launching of a criminal investigation.

3. The MAG should issue without delay directives and guidelines in which reasonable and feasible time frames shall be set for the work of the FFA Mechanism, and ensure compliance with them. In cases where the examination is overly prolonged, the MAG should provide reasons for the delay. In cases where the commencement of the examination is delayed, the MAG should consider ordering a criminal investigation while waiving the examination stage.

4. The IDF should ensure that all audit comments are implemented in the framework of the SOP regarding the work of the Mechanism, which has entered into effect.

Recommendation No. 6 - The decision on whether to open an investigation

1. The MAG shall publish, without delay, the directive on this matter and establish in procedures a time-bound framework, which will also include a limited period of time for extension, including in the case of an exceptional number of incidents, in which he will have to decide

whether to launch an investigation. In addition, it is appropriate that the MAG consider determining that in significant cases that are liable to arouse broad public criticism or to arouse media or public interest, a military police investigation should be launched immediately without transferring the event to the examination of the FFA Mechanism.

2. In light of the MAG's required freedom of action, it is appropriate that the rules relating to the MAG's consultation with an officer with the rank of Major General should be re-evaluated, as well as the possibility of giving the MAG discretion as to the need for consultation. The rules that will be established should be anchored in military legislation, while preserving the MAG's independence of the MAG's discretion in making his determinations.

Recommendation No. 7 - The independence of the MAG

The Attorney General and the MAG should act to anchor the MAG's professional subordination in primary legislation. The IDF should establish in its orders that the Minister of Defense will appoint the MAG in accordance with the recommendation of the Chief of General Staff and with the consent of the Attorney General. This is in accordance with the recommendations of the Ciechanover Team regarding the appointment of the MAG, limiting his tenure and the determination of his rank, as approved by the Government's Resolution.

Recommendation No. 10 - Establishing a timeframe for a criminal investigation

The MAG should anchor, as soon as possible, in the guidelines of the Chief Military Prosecutor, the recommendations regarding setting a time frame for making a decision on the results of an investigation. In addition, the Deputy Chief of General Staff should discuss the issue of the resources required to meet these recommendations, particularly as preparation for combat incidents such as Operation "Protective Edge".

Conclusion

The State of Israel is a Jewish and democratic state whose army operates in accordance with the principle of the rule of law and the international obligations of the State. Israel's coping with its enemies is done through striking the proper balance between the protection of human rights and

defending the State's security. This is in recognition of the fact that the protection of human rights, even in times of war and crisis, while properly balancing with security needs, is of great significance to the national strength of the state. There is no national security without preserving the values of democracy and human rights.

For years, the enemies of the State of Israel have been attempting to undermine its legitimacy to defend itself by trying to initiate legal proceedings in various countries around the world against senior officials in the Israeli political echelon and against IDF soldiers, with claims that they committed war crimes and violated international humanitarian law. In this context, it is important to note that the terrorist organizations, including the Hamas organization, which operates primarily in the Gaza Strip, attempt to exploit the State of Israel's commitment to the rules of international humanitarian law, including the obligation to avoid intentionally harming uninvolved civilians in the hostilities, so as to harm the State of Israel in military, political and economic areas, and in order to hinder the IDF and to narrow its operational scope of action in combat and during routine times.

The rules of international humanitarian law regulate the duties, rights and protections available to the State and individuals involved in or affected by an armed conflict and the framework for preventing unnecessary human suffering in times of war and armed conflict. The State of Israel is a party to these rules, which establish norms and rules of conduct during the conduct of combat and in the debriefing and investigation activities in cases where there is a suspicion of their violation.

A humanitarian disaster among the civilian population in times of war may, in addition to its moral significance, constitute a breach of the State of Israel's obligations on the international level and cause serious damage to the image of the State and its international standing, and may even have legal implications. Such a disaster may affect the IDF's ability to achieve its operational goals. In light of the sensitivity of the issue and its importance, and in light of the flaws raised in this report, the IDF should ensure that the plan for dealing with a humanitarian disaster takes into account the real scope of the population that will require humanitarian assistance during combat, and validate the plan from time to time to ensure its implementation in real time.

Due to the grave implications of an abduction event, and in light of the differences in the understanding of the instructions of the "Hannibal" orders in the IDF and the possible implications this may have, the "Hannibal" order should have been revoked, as the Chief of General Staff did in the course of the audit in June 2016. The new format of the order should provide adequate response to the findings of this audit, and therefore, the Chief of General Staff should instruct an examination of raising the level of authority

authorized to approve employing firepower during an incident of an abduction or fear of abduction, in accordance with its severity, in accordance with the possibility that it will lead to an escalation of the security situation and in accordance with the environment in which it is taking place and the degree of certainty as to the occurrence of the incident, and to amend the orders accordingly in conjunction with the MAG.

The State Comptroller notes that from the minutes of the Cabinet discussions that took place between the decision to embark on Operation "Protective Edge" and its conclusion, as well as from the statements given in the course of this audit by the cabinet ministers at the time and other senior officials, it is apparent that significant weight was given to the rules of international law in the course of IDF activity in Gaza, that ongoing legal support was given to all Cabinet discussions during the operation, and that there was mobilization to assist the civilian population in Gaza. In providing their instructions at the cabinet meetings, the political echelon and the military echelon were careful to take steps to prevent potential violations of the provisions of international law.

The audit discovered flaws regarding aspects of the efficiency and expediency of the work of the FFA Mechanism during and after Operation "Protective Edge". However, the audit revealed that the Mechanism did its work in good faith and out of a sincere desire to conduct a complete and thorough fact-finding assessment and to arrive at the truth. In addition, it was found that the MAG acted to prevent material damage to the factual basis on which he made his enforcement decisions. The need to observe international humanitarian law is an important factor in fateful political and military decisions. In light of this, the State of Israel should continue to prepare itself in a thorough, optimal and timely manner to meet the requirements of international law and deal with the legal campaign being waged in this arena, and not wait for a time of crisis. This issue is of great importance also because of the long-term effects, even after the end of hostilities, arising from military activity, especially with regard to employing firepower.

The State Comptroller's Office is aware of the complex legal reality facing the State of Israel and the political and military echelons, and notes that the political establishment and the military establishment must ensure that when dealing with terrorist elements, the State of Israel conforms to the accepted principles and rules of international law to which the State of Israel is a party. Acting in compliance with international law may also help deal with the legal, political, and public battle that will probably be inevitable.

The State Comptroller's Office finds that the Ministry of Justice and the IDF took steps to implement the recommendations of the Turkel Commission, even before the conclusion of the work of the Ciechanover Team, which was established for this purpose. However, it was found that at the time of the conclusion of the audit, there were other areas that required resolute action - some of which required proper allocation of resources - in order to quickly implement the recommendations of the Turkel Commission and the Ciechanover Team. The adoption of the Ciechanover Team's recommendations by the Israeli government is an important step in establishing the State of Israel's status as a leading country in strict practical adherence to the principles of international humanitarian law. The Government of Israel and the IDF should act without delay to implement the Ciechanover Team's recommendations and to act to correct the flaws revealed in this audit report regarding the work of the Mechanism.

REPORT

Introduction

The modern battlefield presents many operational challenges, some of which are influenced by the presence of a civilian population in the combat zone, the majority of which is not actively involved in it. Therefore, IDF combat operations in the various arenas may cause, *inter alia*, harm to this population and its property.

International law governing the use of force is composed of two sets of laws: the laws of the use of force, which determine when a state may use force, such as the right of states to self-defense in accordance with Article 51 of the UN Charter; and the Law of Armed Conflict (also referred to as "International Humanitarian Law") which determine the international legal regime governing the use of force during an armed conflict, and regulate the duties, rights and defenses of states and individuals involved in or affected by an armed conflict and the framework for preventing unnecessary human suffering in times of war and armed conflict.

International humanitarian law is based, *inter alia*, on the four Geneva Conventions of 1949[22], which the State of Israel has signed and ratified, and two Protocols from 1977 added to the Geneva Conventions[23], to which the State of Israel is neither a signatory nor a party, but it recognizes the customary effect of some of their provisions.

The rules of international humanitarian law are based primarily on two basic principles: the principle of distinction, which states that only a military objective is a legitimate target for attack, and the principle of proportionality, which requires that the harm to uninvolved civilians be proportionate to the military advantage anticipated from the attack. These principles are also reflected in the provisions of domestic law in Israel, which the provisions of customary international law[24] are recognized as an inseparable part thereof, provided that there is no Israeli legislation that establishes a contradictory

22 The First Geneva Convention deals with the treatment of wounded on the battlefield; the Second Geneva Convention expanded the first to naval warfare; the Third Geneva Convention deals with the treatment of prisoners of war; and the Fourth Geneva Convention deals with the treatment of civilians in wartime.

23 The first protocol deals with international armed conflicts, and the second protocol deals with non-international armed conflicts.

24 Customary law is based on the consistent practice of states and a sense of legal obligation to act according to this practice.

provision[25]. In the HCJ judgment **Physicians for Human Rights**[26], it was noted that "'Israel is not an island. It is a member of an international community'...The military operations of the army are not conducted in a legal vacuum. There are legal norms — some from customary international law, some from international law enshrined in treaties to which Israel is a party, and some from the basic principles of Israeli law — which provide rules as to how military operations should be conducted".

As stated, one of the principles of warfare under international humanitarian law is the principle of distinction, according to which, during a military attack in areas where civilians are present, the military commander in the field must assess the situation regarding the possibility of harming uninvolved civilians or civilian objects as a result of the attack on a military target. As a rule, an attack is not prohibited as long as it is directed at a military target and also meets the principle of proportionality. In order to minimize the damage that may be caused as a result of such an attack, the rules of international humanitarian law have determined that precautions should be taken prior to the attack.

The Geneva Conventions and the Protocols thereto, as well as the rulings of the International Criminal Court, the Statute of the International Criminal Court (Rome Statute), and other relevant tribunals have made a significant contribution to international humanitarian law. War crimes[27] constitute a serious violation of international humanitarian law, and they have been recognized in customary law as a category of offenses establishing personal criminal liability. Consequently, the liability for their execution may be direct liability or liability based on war crimes committed by their subordinates. Direct liability will be imposed on the person who committed the violations themselves, ordered their execution, planned them, or assisted them. The responsibility of superiors for the actions of their subordinates stems from the fact that, according to international law, superiors have a duty to prevent the commission of offenses by subordinates under their effective control or to ensure that proper investigations are conducted and punitive steps are taken if necessary. Therefore, the superiors must prevent potential violations and report violations that have been committed or initiate disciplinary or criminal proceedings in respect thereof. The Rome Statute also refers in detail to the

25 HCJ 785/87 **Al-'Afu v. Commander of the IDF Forces in the West Bank**, Supreme Court Rulings 42(2) 4, 35 (1988).

26 HCJ 4764/04, **Physicians for Human Rights v. Commander of the IDF Forces in Gaza**, Supreme Court Rulings 58(5) 385 (2004) (hereinafter – HCJ Physicians for Human Rights).

27 The full list of concrete offenses included in the category of war crimes, as well as the circumstances and conditions for their application, is controversial and does not enjoy full international agreement.

responsibility of superiors[28]. In the Turkel II report (in this regard, see more below), it was noted with respect to responsibility for the commission of war crimes "Several international tribunals have determined that the commission of a war crime is not limited to commanders, combatants and other members of the armed forces but that even the acts of civilians, committed in the context of, and associated with, an armed conflict may amount to war crimes".

The Rome Statute of July 1998, signed by 123 countries, established the International Criminal Court and defined its powers. The International Criminal Court began to operate in The Hague, Netherlands in 2002. This court was established to give weight to criminal liability in international law through the prosecution in the International Criminal Court of those who had committed or ordered to commit serious crimes. These crimes include genocide, crimes against humanity and war crimes, as well as crimes of aggression. War crimes constitute in fact serious violations of rules of international humanitarian law against civilians or civilian property in armed conflicts. The State of Israel has signed the Rome Statute, but declared, in a manner similar to the United States, that it did not intend to ratify it. Therefore, Israel is not obligated to act in accordance with the Rome Statute. To the extent that the Rome Statute enshrines norms that are part of customary international law, Israel is bound by them.

In addition to international humanitarian law, there are branches of law that determine the obligation to examine and investigate violations of international humanitarian law. These branches are international human rights law, international criminal law and state responsibility law.

Some of the offenses defined as "war crimes" are enshrined in Israeli law as offenses in the Penal Law, 5737 – 1977, and in the Military Justice Law, 5715 – 1955, which include, *inter alia*, murder, manslaughter, rape and more. The rules of international humanitarian law were also enshrined in General Staff Order 33.0133[29], which determines the obligation of IDF soldiers to act in accordance with the four Geneva Conventions.

The State of Israel is coping with a difficult and ongoing battle against terrorism and the enemies that rise up against it. However, as a Jewish and democratic state, it is committed to preserving the values of democracy, primarily the rule of law and individual rights. This duty is based primarily on

28 In this matter see: Michael A. Newton & Casey Kuhlman, "Why Criminal Culpability Should Follow the Critical Path", 40 **Netherlands Yearbook of International Law**, 3-37 (2010)

Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08, Judgment Pursuant to Article 74 of the Statute (21.3.16).

29 General Staff Order 30.0133: "Discipline – Conduct in Accordance with International Treaties to which the State of Israel is a Party", July 1982.

the internal fabric of laws, according to which every government authority is obligated to respect the basic rights that are protected, *inter alia*, in the Basic Law: Human Dignity and Liberty. This duty is also reflected in those parts of international law that deal with armed conflict, which are binding on the security forces of the State of Israel. Respect for the rule of law and human rights is an essential component of Israel's national security and its image. In this context, the Supreme Court noted [30]: "This is the destiny of a democracy—it does not see all means as acceptable, and the ways of its enemies are not always open before it. A democracy must sometimes fight with one hand tied behind its back. Even so, a democracy has the upper hand. The rule of law and the liberty of an individual constitute important components in its understanding of security. At the end of the day, they strengthen its spirit and this strength allows it to overcome its difficulties".

The State of Israel is coping with a difficult and ongoing battle against terrorism and the enemies that rise up against it. However, as a Jewish and democratic state, it is committed to preserving the values of democracy, primarily the rule of law and individual rights

For years, the enemies of the State of Israel have been trying to undermine its legitimacy to defend itself by trying to initiate legal proceedings in various countries around the world against senior officials in the Israeli political echelon and against IDF soldiers, based on claims that they committed war crimes and violated international humanitarian law. In this context, it is important to note that terrorist organizations, including Hamas which operates primarily in the Gaza Strip, try to exploit the State of Israel's commitment to the rules of international humanitarian law, including the obligation not to harm population of uninvolved civilians in hostilities, so as to harm the State of Israel in military, political and economic areas, and in order to hinder the IDF and to reduce its leeway in combat and routine operations.

On July 7 2014, following the increase in rocket fire from the Gaza Strip towards the State of Israel, Operation "Protective Edge" began[31]. The first stage of the operation included attacking targets in the Gaza Strip, mainly through aerial and artillery operations, and on July 17 2014 IDF ground forces entered the Gaza Strip. The operation ended on August 26 2014, following the withdrawal of IDF forces from the Gaza Strip and a ceasefire agreement. During the operation, 68 IDF soldiers were killed – including two soldiers, Lieutenant Hadar Goldin and Staff Sergeant Oron Shaul, who have not yet been returned to Israel – as well as five Israeli civilians and a foreign national, and thousands of Israeli civilians and soldiers were injured. According to data published by the Ministry of Foreign Affairs[32], 2,125 Palestinians were killed in the Gaza Strip[33], and according to data compiled by the Coordinator, based on information received from Palestinian sources and international organizations,

30 HCJ 5100/94 **the Public Committee against Torture in Israel v. the Government of Israel** Supreme Court Rulings 53[4], 817, 845 (1999).

31 See footnote 8.

32 See footnote 9.

33 See footnote 10.

some 11,000 Palestinians were injured, and approximately 10,300 houses were destroyed and another 5,800 were damaged in a manner that makes them unsuited for habitation[34]. After Operation "Protective Edge", various bodies, including human rights organizations, supplied the MAG Corps with information on 464 exceptional incidents[35], meaning, incidents in which uninvolved civilians were allegedly harmed and damage to civilian property was caused.

The Audit actions

From November 2012 to December 2013, the State Comptroller's Office examined, intermittently, the preparations in the political echelon and the IDF for dealing with the civilian population in combat zones (the "Civilian Component of Combat"). A draft report of the audit on the topic of the Civilian Component of Combat was distributed to the relevant authorities[36] in February 2014, and following their comments, some of the data was updated in May 2014. The audit of the Civilian Component was not published due to Operation "Protective Edge", and the current audit on the topic of international law began thereafter, as detailed below.

In September 2014, the State Comptroller informed, *inter alia*, the Prime Minister, the Ministers of the Ministerial Committee for National Security Matters, the Attorney General and the IDF, that he had decided to conduct an audit that would examine IDF activity from the perspective of international law regarding the examination and oversight mechanisms of the civilian and military echelons. The audit was delayed by nearly a year due to a lack of cooperation from the audited bodies. The audit actually began in May 2015, and from this date until January 2016, the State Comptroller's Office examined the fulfillment of the responsibility of the political echelon in the light of international law in the context of the Cabinet's deliberations during Operation "Protective Edge"; the implementation of the recommendations of

34 See footnote 11.

35 See footnote 12.

36 See footnote 13.

the Turkel II Report[37] concerning the Ministry of Justice, the Attorney General and the IDF; the work of the Mechanism for fact-finding assessment; and certain IDF orders, including the "Hannibal" orders as they were in effect during Operation "Protective Edge". Supplementary examinations were conducted until January 2017.

On September 2 2015, due to the importance and urgency of the matter, the State Comptroller's Office sent to some of the audited bodies for their response a draft report containing findings on "IDF activity from the perspective of international law, particularly with respect to the civilian and military echelons' examination and control mechanisms" (hereinafter - the Interim Draft). The main points of the Interim Draft, as well as the responses of the audited bodies that were received, are included in this summary report.

The audit was conducted within the Prime Minister's Office; the Ministry of Justice; the IDF; the Operations Directorate; the MAG Corps; the Military Police Investigations Department; the FFA Teams; the Southern Command, the Israeli Air Force, COGAT and the National Security Council. As part of the audit, meetings were held with the Prime Minister, cabinet ministers of the 33rd government, the Attorney General and senior officials in the Ministry of Justice, as well as senior IDF officers. In addition, the State Comptroller's Office was assisted by two special consultants[38] for the purpose of this audit.

The subcommittee of the Knesset's State Control Committee decided not to table at the Knesset nor to publish some of the data prepared as part of this report in order to protect State security, in accordance with Article 17 of the State Comptroller Law, 5718 – 1958 [Consolidated Version]. The confidentiality of the data does not prevent understanding of the nature of the audit. Following are the key findings:

37 On June 14th 2010, the government decided (Resolution No. 1796) to appoint an independent public committee headed by (retired) Supreme Court Justice Yaakov Turkel to examine aspects relating to actions taken by the State of Israel to prevent the arrival of vessels to the Gaza Strip coast on May 31st 2010, and to examine the question whether the mechanism for the examination and investigation of complaints and allegations of violations of the law of armed conflict, which exists in in Israel in general, and as implemented on that particular event, is consistent with the obligations of the State of Israel in accordance with the rules of international law.

38 See footnote 16.

The IDF's preparations to limit the possibility of harm to uninvolved civilians in times of combat

The IDF's preparations between the years 2012 - 2014 to limit the possibility of harming uninvolved civilians during combat

As stated, one of the principles of warfare under international humanitarian law imposes an obligation to distinguish between military objectives that can be targeted in combat, and civilians and civilian objects, which should not be targeted and that harming them should be avoided, to the extent possible, in the course of combat. In addition, international humanitarian law imposes humanitarian obligations on military forces with respect to the civilian population in the combat zone, which are derived from the degree of control over the relevant area. The degree of responsibility imposed on the military force is influenced by the degree to which its control is established in that given territory. Thus, for example, in a situation where effective control has not yet been established, the military force is required to refrain from interfering with the necessary humanitarian actions of local or international elements, and to enable them, subject to security restrictions and the circumstances of hostilities. When effective control is established, the humanitarian obligations towards the population acquire a more proactive nature, their purpose being to ensure that the basic needs of the civilian population are met.

In the HCJ judgment, **Physicians for Human Rights**, it was stated: "The duty of the military commander according to the basic rule is twofold: First, he must refrain from actions that harm the local residents; this duty is his 'negative' duty. Second, he must carry out acts required to ensure that that the local inhabitants are not harmed. This is his positive obligation ... Both these obligations…should be implemented reasonably and proportionately in accordance with the needs of the time and place". The judgment further states: "According to the humanitarian rules of international law, military activity has the following two requirements: first, that the rules of conduct should be taught to all combat soldiers and internalized by them, from the Chief of General Staff down to the private; second, that institutional arrangements are created to allow the implementation of these rules and putting them into practice during combat."

The IDF's code of ethics is called "The Spirit of the IDF"[39], which states in respect of "purity of arms", among other things, that "the soldier will only use his weapon to carry out the mission, but only to the extent necessary, and will preserve his humanity even in combat. He will not use his weapon and his power to harm noncombatants and captives, and will do everything in his power to prevent harm to their lives, body, dignity and property".

In light of these obligations, it is clear that it is crucial that the forces in the field, and especially the commanders, recognize the binding principles of international law with respect to warfare, especially since, in the context of military operations in recent years, the IDF was forced to fight an enemy operating in an urban civilian environment. Furthermore, in order to minimize to the extent possible harm to the civilian population in areas in which the IDF operates or takes over as part of the operational activity, preparations should be made in advance for dealing with the matters of the civilian population.

In the audit concerning the Civilian Component of Combat, findings emerged regarding the IDF's readiness to reduce the harm to uninvolved civilians during combat in the period preceding Operation "Protective Edge". As stated, the draft audit was forwarded to the audited parties and their response was received, and this audit report was not published due to Operation "Protective Edge". In addition, the State Comptroller's Office examined the lessons learned from Operation "Protective Edge" regarding legal counsel during the fighting. Following are the key findings in these matters:

Approving the operational concept in the IDF of the Civilian Component in Combat

In June 2009, then-Chief of General Staff Lt.-Gen. (Res.), Gabi Ashkenazi, stated in respect of "the humanitarian-civilian issue in combat" that "the matter should be combined in the exercises and training, as well as in the operative orders".

According to the IDF's directives, an operational concept "defines the basic approach of an operational command in regard to the execution of the main operational tasks imposed upon it ... Its purpose is to lay the foundations for building conceptual and physical infrastructures for operations". The procedures and instructions required to implement the IDF's operational

39 The Spirit of the IDF - This are the entirety of the values and basic rules that constitute the IDF's leadership position regarding the spirit of the IDF and the basic values and rules that are supposed to serve as a guiding light and guide it throughout all activity. The Spirit of the IDF includes 11 values: determination, responsibility, reliability, personal example, preservation of human life, purity of arms, professionalism, discipline, loyalty, representation and camaraderie (from the Dictionary of IDF Terminology, page 578).

concept should be derived from it, the interaction between all the units involved, the equipment required within the various units, the training required for the preparation of the various units and preserving their ability to carry out their tasks, and the method for assimilating the operational concept.

In a summary of a working meeting held in March 2010 between the Deputy Chief of General Staff at the time, Major General Benny Gantz, and the Coordinator, the Deputy Chief of General Staff instructed that by June 2010, "COGAT will present the operational concept [the operational concept of the Civilian Component in Combat] and have it approved in an orderly process in the Operations Directorate, and afterwards the concept will be brought for approval by the Deputy Chief of General Staff".

The Head of the Civil Component in Combat Unit of COGAT and the Head of the Operational and Government Section in the Operations Directorate distributed in September 2011 a draft for comments on the "Concept of the civilian component and humanitarian activity in combat in the IDF". According to the decision of the Deputy Chief of General Staff, as stated, this document underwent an orderly process of approvals at the Operations Directorate. Only two years later, in June 2013, the Head of the Operations Directorate at the time, Major General Yoav Har Even, approved the concept.

After its approval by the Operations Directorate, the operational concept was to be approved by the Deputy Chief of General Staff. In October 2013 as a preliminary stage prior to its transfer to the Deputy Chief of General Staff, the Head of the Planning Department at the Operations Directorate led a discussion on the topic of "Realizing the Concept of the Civilian Component in Combat". At the end of the discussion, it was decided that a follow-up discussion should be held in which the IDF Planning Directorate (hereinafter - "the Planning Directorate") would present the existing gaps that should be filled in order to enable the realization of the concept.

In December 2013, at the request of COGAT, the Organization Department of the Planning Directorate, brought to the Operations Directorate and to COGAT, its position regarding support in the establishment of force in the field of Civilian Component in Combat, stating that "The IDF is in the midst of staff work to release resources (reducing the number of forces, manpower, ongoing existence and intensification) to a significant extent, which are intended to enable the execution, planning and implementation of the multi-year plan "Teuza"[40]. In spite of the importance of the Civilian Component in Combat, at this time when the IDF is undergoing an extensive budget-cuts program, and closing operational mission forces, **the task of the Civilian Component in Combat <u>is not seen as a priority</u> by the General Staff**

40 The "Teuza" multi-year plan – The IDF multi-year plan, planned for 2013 – 2017.

in comparison to the other IDF reinforcement tasks (cyber, air defense, submarines, etc. "(emphasis in the original text).

> Until the time of preparing the draft of the Civilian Component Report, at the beginning of 2014, no follow-up discussion was held, in which the IDF Planning Division was supposed to present the existing gaps that should be completed in order to enable the realization of the operational concept of the Civilian Component in Combat, and the Operations Directorate has not presented the concept to the Deputy Chief of General Staff.

Until beginning of 2014, the existing gaps of the operational concept of the Civilian Component in Combat were not presented by the IDF Planning Division for their completion, in order to enable their realization

It should be noted that the approval of the operational concept affects the allocation of the resources needed to advance the matter in the various IDF systems, including affecting the promotion and improvement of military systems designed to prevent harm to the civilian population during wartime. One of these systems is the intelligence system for gathering information on the civilian population, including the location of sensitive sites[41] and the mapping of the local municipal bodies that are essential to the functioning of the town or the area occupied. This area is referred to in the IDF jargon as "Intelligence/Assessment of Civilian Situation ".

In May 2013, the Coordinator told the audit team regarding this matter that "Another area in which the Coordinator identifies a gap is with regard to the study of civilians and intelligence gathering, which requires the investment of many additional resources. It is estimated that today, our capabilities in this area in regard to Judea and Samaria and Gaza stand at about 50% as compared to the actual needs, due to gaps in terms of resources". In this matter, in October 2013, the Head of the Planning Department of the Operations Division at the Operations Directorate, in summing up a discussion on the issue of "Realizing the Concept of the Civilian Component in Combat", concluded that "in the Operations Division there is a gap in formulating a situation report (in real time) with regards to the state of the civilian population in the combat zone (humanitarian crisis, evacuation/ flight, distress, etc.)".

The IDF response from May 2014 to the draft of the Civilian Component Report stated: "In an era when the IDF is required to present a comprehensive [personnel] plan that includes a reduction in permanent personnel positions in a short time... there is no choice but to prioritize the missions... under the 'Teuza' multi-annual plan. The task of the Civilian

41 The IDF's directive from January 2012 defined a "sensitive site" - "a site whose damage may create an operational, intelligence, legal, public or moral problem, and therefore the use of force or fire towards it or close to it requires special attention".

Component in Combat is not being prioritized... Nevertheless… COGAT is given the opportunity to implement the required response within the framework of internal prioritization".

In the years 2012 - 2014, gaps were identified in the areas detailed above regarding the Civilian Component. The State Comptroller's Office points out the importance of raising the forces' awareness of the Civilian Component and preparing them for dealing with this issue, as well as the importance of formulating an operational concept regarding combat in a civilian environment, which were detailed above in connection with the Civilian Component.

In August 2016, the IDF informed the State Comptroller's Office in response to the findings of the draft report as follows:

> "After Operation "Protective Edge", a decision was made to carry out three processes relating to this issue –
>
> a. Updating the concept of the Civilian Population Officers for combat areas and government units – As part of this process, joint staff work by COGAT and the Ground Corps began, so as to update the 'Civilian Component in Combat' directive; to update the Organization Order of the government units; to update the concept of the Civilian Population Officers for combat areas, including the manpower and the means assigned to them. At the end of the staff work, the directive concerning the Civilian Component will be translated into a General Staff Operational Directive, a professional directive of the Ground Corps and an updated Organization Order for the government units.
>
> b. Formulation by the Operations Division of an appraisal of the situation of the civilian population in the combat zone in real time – As part of the desire… to formulate a real-time civilian – humanitarian situation appraisal, permanent COGAT representatives were placed in the war room at the supreme command and the liaison offices. The role of these representatives is to generate updates on the humanitarian situation in the combat zone, including the casualties, the status of the crossings and coordination between the IDF and other bodies operating in the area.
>
> c. Promoting operational orders that regulate the humanitarian response to the population – these include the directive relating to a limited firing time-frame for the conduct of humanitarian activities in combat, which is intended to define, in time of

hostilities, according to a situational assessment, a limited time-frame in order to coordinate humanitarian operations; a directive concerning the warning of the population to mobilize it and defend it during combat...; and the directive relating to humanitarian assistance to the population of the adversary, the purpose of which is to regulate humanitarian assistance to the population, including provision of food, humanitarian equipment and the operation of a temporary hospital for the care of the local population".

The State Comptroller's Office notes that the IDF's response indicates that the IDF has begun to formulate tools and instructions meant to improve its preparations for handling the civilian component in combat. However, in light of the passage of time and the great importance of this subject, it is recommended that the IDF take steps to finalize as soon as possible the processes relating to the operational concept and the preparation of the forces in the context of the treatment of civilians in combat zones, so that it will have a complete operational concept for a combat situation once it occurs.

Training the IDF combat forces in issues arising from international law

The Organization Order of the Doctrine and Instruction Division in the Operations Directorate, determines that this division is responsible for establishing the training processes of the entire IDF command. In another directive of the Doctrine and Instruction Division entitled "Mandatory Subjects in Basic Training and Junior Command Courses", it was determined that commanders in basic training and junior command courses must train the soldiers in "conduct according to the spirit of the IDF and according to the behavioral norms derived from it".

The audit of the Civilian Component revealed that the Doctrine and Instruction Division directives regarding the training of soldiers and commanders do not include reference to training on the rules of international law regarding humanitarian conduct applicable to military activity among the civilian population, even though this is required, *inter alia*, under the HCJ **Physicians for Human Rights** ruling, as stated above.

The IDF response from May 2014 to the draft of the Civilian Component Report states: "The Civilian Component in Combat is studied in the sequence

of command training in the arm [of the Ground Corps]... The role of the Civilian Affairs Officers for combat areas is expressed in the planning process for the exercises at the battalion level... It should be noted that the MAG Corps is involved in the training of IDF commanders and provides commanders with legal training that deals, *inter alia*, with rules relating to minimizing harm to the civilian population in areas of IDF activity and combat... The MAG Corps is also involved in the professional training of COGAT officials (Civilian Affairs Officers for combat areas courses). However, the IDF stated in its response that "it is agreed that additional effort is required as part of the assimilation of the Civilian Component in training and exercises".

In April 2015, the MAG at the time, Major General Danny Efroni, told the audit team that "the extent of awareness of international law and the implications of the legal campaign on the IDF's areas of activity and its conduct in operational activity is still not at the required level among IDF commanders. Therefore, this is a period in which the Advocate General Office's is acting in various ways to bring about a significant change in this matter vis-a-vis the ranks of command in the army.... Training in the IDF on the subject of international law is carried out through the Military Law School and in the framework of military courses, such as the Officers Course at Training Base (BAHD) 1, courses at the Command and Staff College, company commanders' courses and brigade commanders' courses". The MAG added that in his opinion there is a need to expand IDF training in this area. In his opinion, "The scope of time allotted to the subject of international law in the framework of army courses and training **is insufficient and does not provide a solution to the need**. Thus, for example, in the brigade commanders course, the MAG was only given an hour and a quarter for his lecture on international law" (emphasis in the original text). According to the MAG, "This is a gap that the IDF should complete in order to internalize the issue among officers and soldiers and bring it to the required awareness level on the battlefield, as well as assist in the struggle in this field in the international arena". In this context, the MAG proposed "to consider making the advancement in the rank of officers conditional on passing a qualification exam on the rules of international law, similar to the obligation that exists with regard to the examination given on disciplinary law in the IDF... Meeting this condition will raise awareness among officers in the IDF to the subject of international law and the importance of its assimilation into the fabric of the military's operational activities... It is also important to refresh knowledge and qualification on the subject of international law for all those in designated positions in the IDF requiring knowledge of the subject".

In August of 2015, the Commander of the Military Law School told the audit team: "In general, the Law School provides training to commanders on the Law of Armed Conflict, the concept of combat, legal responsibility, the

The directives regarding the training of soldiers and commanders do not include reference to required training on the rules of international law, regarding humanitarian conduct applicable to military activity among the civilian population

exercise of the powers of commanders and disciplinary law... Classes in the subject of Law of Armed Conflict are given at Training Base (BAHD) 1, professional officers' courses, company commanders' courses, at the Tactical Command College, and the Command and Staff course. However, there are courses, such as brigade commanders' courses and battalion commanders' courses, which devote too little time to the subject of the Law of Armed Conflict". In the opinion of the Commander of the Military Law School, "It is very important to train IDF commanders in the field of the Law of Armed Conflict. Moreover, similar to what is happening today with respect to disciplinary laws, for the relevant audiences, a qualification requirement should be made (undergoing training and passing the appropriate exam) in the field of the laws of war; that is, commanders should be required to pass exams on knowledge of international law as a condition for their advancement".

In March 2016, the MAG's Office informed the audit team that, "In the opinion of the MAG, knowledge of the rules of warfare in international law is part of the military profession and should be combined in all relevant military training. However, the MAG recently held a discussion on the subject, in which the progress in the field was presented and instructions were later given". The summary of the hearing, which was mentioned by the MAG's Office, held in December 2015, noted that, among other things, in the training in the field of laws of war "there has been significant progress in recent years". The MAG noted in this discussion that "Dealing with this topic was advanced in an impressive manner in recent years, while implementing a program in many training programs and upgrading knowledge and practice". The MAG further stated that he believes that "There is room for determining a qualification exam in the field of the laws of war as a condition for the promotion of commanders of the rank of Captain to Colonel... As for the promotion of the General Staff's order that will anchor the duty of training in laws of war, the MAG believes that it can be discussed in the future, when the [staff work] is completed and insights are drawn from it".

The State Comptroller's Office comments to the IDF that the Doctrine and Instruction Division should have taken steps to incorporate in the IDF, directives regarding the training of soldiers and commanders in connection with the principles of international law, as this field has become a significant factor affecting the IDF's fighting and the State's coping with possible legal proceedings in the course of combat and thereafter. The MAG Corps should take part in formulating these directives and training programs in the IDF in order to ensure the implementation of the principles of international law in these training programs.

In August 2016, the IDF informed the State Comptroller's Office, in response to the findings of the draft report, that "In 2015, staff work was carried out by the MAG Corps to examine the training of IDF commanders in combat law... Following the staff work, the MAG Corps, together with the Doctrine and Instruction Division, took steps to implement the staff work's recommendations, so that the relevant training in the IDF will also include a legal component that suits the training... A draft for an Operations Directorate - Doctrine and Instruction Division directive was written, which regulates the obligation to integrate content on combat laws within the framework of officers' training, detailing the training courses where the contents will be taught and the topics to be taught in each training session. The directive also states that it is the responsibility of the branches and divisions to prepare internal instructions for their sessions that implement the Operations Directorate - Doctrine and Instruction Division directive... The directive is currently in final stages of work and will be signed soon".

The State Comptroller's Office further notes to the IDF that the Doctrine and Instruction Division should ensure that within the training sessions, an appropriate period of time is allocated to the subject of the Law of Armed Conflict, and that it should consider imposing an obligation to successfully pass an exam in the Law of Armed Conflict as a condition for promotion in rank and in relevant posts.

In August 2016 the IDF noted in this matter, in response to the findings of the draft report, that "The MAG Corps is currently working on the development of interactive courseware on the Law of Armed Conflict, which will constitute a condition for promotion in rank, from Captain to Colonel, in the relevant commands... and will constitute for them an opportunity to acquire the knowledge they require for their posts, as part of their training".

Training the combat forces

According to the instructions of the Ground Forces Command, "Every training session/exercise in an urban area, will have at least one section that includes dilemmas concerning the population in a combat environment... The Ground Corps Command forces is responsible for the combat doctrine[42] and at training exercises, up to the rank of the battalion is required to instruct its units and training bases to integrate the population component in the combat environment as part of the training... In every exercise at brigade level or

42 Combat doctrine - a set of principles and rules that define how military forces plan and conduct combat operations (from the Dictionary of IDF Terminology, page 637).

above, during the combat exercises in urban areas, a scenario will be practiced regarding the population in the combat zone... [the] command exercises... scenarios that combine 'contact' with the population in the combat zone will be implemented".

Despite said Ground Corps Command instruction, COGAT documents and statements made by the Coordinator indicate that at the time of drafting the Civilian Component Report draft, December 2013, the Ground Corps Command and COGAT have not yet determined the combat doctrine of the Civilian Component in Combat and the training content of the IDF forces designated for combat in densely populated areas.

COGAT's response from March 2014 to the draft Civil Components Report states that "COGAT has written the concept of the Civilian Component in Combat, as well as techniques and procedures for the Civilian Component in Combat. The concept, techniques, procedures and professional instructions were forwarded to the Ground Corps and distributed under the "Civilian Component in Combat" Ground Corps Command directive. The training contents for IDF forces designated for combat in densely populated areas is under the responsibility of the Ground Corps".

The IDF's response to the draft Civil Components Report states that "The Civilian Component in Combat is combined in the training of various levels, especially in brigade and division training... The MAG Corps is integrated in the training of commanders in the IDF and provides commanders with legal training that deals with, *inter alia*… rules pertaining to minimizing harm to civilian population in areas of activity and IDF combat". However, the IDF stated in its response that "It is agreed that additional effort is required as part of the assimilation of the Civilian Component in training and exercises".

The response of the Ministry of Foreign Affairs from April 2014 to the draft Civil Components Report states that "**There is great importance to the integration of the Ministry of Foreign Affairs in the formulation processes of military systems and their management, as well as in the execution of exercises in integrated activity**" (emphasis in the original text).

An example of gaps in the training of combat forces on the Civilian Component in Combat emerged from an IDF drill conducted in February 2013. During the exercise, various scenarios were examined in which thousands of casualties and fatalities were expected among uninvolved civilians, revealing flaws in the area of the Civilian Component in Combat.

Following the exercise, in February 2013, the Head of the Operational and Government Section in the Operations Directorate, wrote to the Head of the Operations Division at the Operations Directorate, that "the exercise (which is supposed to present a reality which the IDF is likely to encounter) **did not**

reflect a number of aspects that during combat will constitute a **significant factor affecting** the decision making – such as **the civilian component/ civil crises, legitimization, international pressure and media, public and political pressure** to bring significant achievements in short periods of time... Therefore, when decisions are made based upon a **situational assessment which is 'sterile'** compared to reality, and which does not take into account the significant components mentioned above, **I fear that a mistaken view of reality may can be created, leading to a misunderstanding of what is likely to take place in the future**" (emphasis in the original text).

The Head of the Operations Division also wrote that "COGAT expressed **great willingness** to be active partners in the exercise. However, **no significant civil events have been provided** that may **challenge** the situational assessment and **decision-making** in the combat arena... **[and] to establish a civilian-humanitarian forum** that will deal with the **assessment of the reality and the situation regarding the civilian population in the combat zone**... **Recommend approving the concept of the Civilian Component in Combat** thus defining a general staff entity to handle the issue in the combat arena" (emphasis in the original text).

The IDF should have taken the necessary measures to incorporate the topic of the civilian component in combat in the exercises and training it conducts for the combat forces and the training of the headquarters' staff

The State Comptroller's Office reminds the IDF that the lessons learned from the exercise indicate that during the said period the IDF has not yet internalized in its exercises the implications that may result from so many civilian casualties during an attack on its ability to achieve the military and political objectives of the operation.

The State Comptroller's Office further notes that the IDF should have taken the necessary measures to incorporate the topic of the civilian component in combat in the exercises and training it conducts for the combat forces and the training of the headquarters' staff, *inter alia*, in coordination and in conjunction with COGAT. In addition, given the implications in the international arena, the IDF should include a representative of the Ministry of Foreign Affairs in these exercises.

In August 2016, the IDF informed the State Comptroller's Office in its response to the findings of the draft report that "one of the important components of the training of commanders in international law is the practice of humanitarian issues with legal aspects. This component is carried out during the various exercises in the IDF... In all the exercises where the Legal

Administration is employed [43], many issues are raised regarding the humanitarian aspect, including issues relating to the evacuation of the population prior to the use of force, humanitarian obligations to the population, according to the combat outline, prohibition on looting and abuse, and the nature of the permitted use of civilian property ... In addition, these exercises raise strategic legal issues that can affect the entire combat area and require IDF commanders to consider the strategic environment as part of the battle environment and the decision-making process ... As for the integration of a representative from the Ministry of Foreign Affairs, in practice, the Ministry of Foreign Affairs is integrated in military training and exercises, which deal with information and awareness issues relevant to the ministry".

Civilian Affairs Officers for combat areas

In light of the obligation to minimize the collateral damage to uninvolved civilians in the combat arena, the IDF formulated measures meant to determine how to organize the handling of the affairs of the civilian population in the areas in which it operates and takes over as part of the operational activity. These measures included, *inter alia*, the appointment of Civilian Affairs Officers, publication of provisions regarding the military administration and orders related to fighting in areas where civilians are located, and formulation of a plan for the provision of basic needs to the civilian population.

According to Ground Corps Command instructions regarding the Civilian Component in Combat, it is necessary to place Civilian Affairs Officers amongst the combat forces from the battalion level to the level of the corps. The Civilian Affairs Officers in the IDF units are reserve officers who undergo the qualification for their posts in the COGAT's Coordination and Liaison School, in a five-day course (hereinafter - "the Civilian Affairs Officers course"). The basic file of the Civilian Affairs Officers course (detailing the course's format) notes, among other things, that "The main objective of the Civilian Affairs Officers in combat areas is to outline methods of action in all the processes related to combat regarding the Civilian Component", and that this outline will be expressed in consulting the commander from the fighting procedure stage (the preparation for combat stage) and the combat management stage (the combat stage). Among his other tasks, the Civilian Affairs Officer is required to "participate in the planning of the operations and integrate the handling of the civilian population in a combat environment in the operations... to advise the commander... regarding minimizing harm to

43 The MAG Corps operates a Legal Exercises Administration, which aims to train the IDF commanders, from the General Staff, through the command, the corps, and the division, on legal operational issues they may face in the various battlefields.

the civilian population... To advise the commander on how to relate to the Civilian Component in the vicinity of the fighting... to make sure that the combat forces know the meaning of the Civilian Component in Combat... To integrate and assist the operational activity in the combat zone, while striving to minimize the harm to the population by coordinating... vis-à-vis international organizations... vis-à-vis the population... vis-à-vis civilian authorities, mayors, mukhtars".

The State Comptroller's Office examined in the audit of the Civilian Component the implementation of the decision on the appointment of Civilian Affairs Officers, and following are its findings:

1. COGAT documents indicate that in order to complete the training of a Civilian Affairs Officer, COGAT has formulated, in addition to the Civilian Affairs Officers course, a five-day basic course in the Arabic language. It should be noted that COGAT did not set threshold conditions for acceptance to the Civilian Affairs Officers course, including threshold conditions regarding knowledge of languages such as Arabic and English.

   COGAT's response of March 2014 to the draft of the Civilian Component Report states that "The issue of knowledge of the Arabic language as a prerequisite for training in the Civilian Affairs Officers course was examined in joint staff work conducted by COGAT and the Ground Corps prior to the distribution of the Ground Corps instructions on 'The Civilian Component in Combat'. The staff's work revealed that the potential of Arabic-speaking Civilian Affairs Officers in the Ground Corps is very low, and therefore it is impossible to define knowledge of the Arabic language as a prerequisite for training".

   The IDF response of May 2014 to the draft of the Civilian Component Report states that "The Ground Corps are aware of the gap and are working to close it... The fact that the battalion has combatant interrogators and prisoner interrogators... enables the staffing of non-Arabic speakers as Civilian Affairs Officers. At the same time, the corps is working to have the Civilian Affairs Officers undergo a basic course in Arabic".

   The State Comptroller's Office refers the IDF's attention to the fact that the definition of the Civilian Affairs Officer's function indicates that he should stay in contact with the local population in areas of combat and IDF activity, and therefore knowledge of the Arabic language is important and necessary to fulfill his function. Therefore, waiving the prerequisite for entry into the Civilian Affairs Officers course prior to Operation "Protective Edge" could have impaired their ability to carry out their duties.

The State Comptroller's Office also notes that in view of the importance of the role of the Civilian Affairs Officer, the IDF should examine the possibility of recruiting Arabic speakers from all reserve units to fulfill the duties of Civilian Affairs Officers in the Ground Corps.

In August 2016, the IDF informed the State Comptroller's Office in its response to the findings of the draft report that "The scope of the Arabic-speaking [Civilian Affairs Officers] is limited. A high-level Arabic speaker may not necessarily be suitable/ approved for placement as a Civilian Affairs Officer. In addition, it is appropriate that the Civilian Affairs Officer should come from the resources of the combat unit (familiarity with the fighting procedure, combat management, familiarity with the nature of the fighting, etc.)". The IDF reiterated that "The fact that there are combatant interrogators and prisoner interrogators in the battalion who assist in the dialogue with the locals makes it possible to employ non-Arabic speakers as Civilian Affairs Officers". It added that "The doctrine that was written on this subject is currently being examined. In accordance with the writing of the directive, the contents will be validated by COGAT, and if necessary, the duration of the training will also be examined".

In October 2016 COGAT, in its response to the findings of the draft report, stated, "Knowledge of the Arabic language is now a prerequisite for training in the Civilian Affairs Officers course in light of the role of the Civilian Affairs Officer in the connection with the local population".

2. The Ground Corps and COGAT documents indicate that the training on various subjects given to the cadets in the Civilian Affairs Officers course was insufficient. It was further revealed that although the Ground Corps approved 189 posts for Civilian Affairs Officers, in practice COGAT trained only 107 Civilian Affairs Officers (57%) and only 36 of them (about 34% of the total number of Civilian Affairs Officers that were trained) underwent training in a basic course in Arabic.

   In October 2016, COGAT informed the State Comptroller's Office in response to the findings of the draft report that "The scope of Arabic-speaking Civilian Affairs Officers stands today at 78 reserve officers".

   The head of the Doctrine and Training and Concepts Division in the Ground Corps wrote in January 2013 that " Combat management – the stage of the dilemmas [cases and reactions] [in the Civilian Affairs Officers course] was an important but too short stage, it should be prolonged… the Civilian Affairs Officers should be taught and undergo exercises in staff work in fighting procedure and combat management,

together with the relevant staff officers – the Intelligence Officer, the Operations Officer, etc." The commander of COGAT's Coordination and Liaison School told the audit team in December 2012 that "In his opinion, the Civilian Affairs Officers course does not adequately equip the trainees for their position, since to properly train the Civilian Affairs Officers, longer [training] is required".

COGAT's response of March 2014 to the findings of the Civilian Component Report draft states that "COGAT does not determine the number of training participants and is not responsible for staffing the Civilian Affairs Officers course with the Ground Corps brigades and battalions. The staffing of the Civilian Affairs Officers course as well as the staffing of the follow-up course in Arabic, for Civilian Affairs Officers that underwent the basic training, is determined by the Ground Corps Command... It was made clear in the past to the Ground Corps that three follow-up courses in Arabic are not sufficient for Civilian Affairs Officers in a year, and that five courses annually are required in order to complete the training of the Civilian Affairs Officers who were trained in the basic course so far".

COGAT's response of March 2014 further states that "COGAT has examined in the past with the Ground Corps, the matter of the duration of the training of the Civilian Affairs Officers... The Ground Corps decided on a five-day training period in view of resource constraints, reserve days and training that is in addition to the post of a reserve soldier".

The response of the Ministry of Foreign Affairs of April 2014 to the draft of the Civil Components Report states that "There are political aspects that are operationally relevant to the performance of the Civilian Affairs Officer dealing with the civilian population located in combat zones; **the integration in the IDF exercises of the political aspects in these contexts is also appropriate**" (emphasis in the original text).

The IDF response from May 2014 to the draft of the Civil Component Report states that "The Civilian Affairs Officers course was formulated in light of the needs of the position... The extension of the course was examined but not realized due to resource limitations... In our view, the course provides good response to the subject".

The State Comptroller's Office reminds the IDF that due to the importance of the role of the Civilian Affairs Officer in the IDF combat units, and because there is a significant gap in the staffing of these units, the relevant bodies in the IDF should examine together how this gap can be filled as soon as possible.

The State Comptroller's Office also notes that the IDF should expedite the examination of the doctrine regarding the training of Civilian Affairs Officers and act as soon as possible in accordance with the results of the examination. In addition, COGAT and the Ground Corps, as the professional bodies dealing with the Civilian Component, should cooperate with the Ministry of Foreign Affairs and the MAG Corps in this examination process and act in accordance with the results of the examination and take steps to increase the number of Arabic speakers amongst the Civilian Affairs Officers to be trained, in light of the Civilian Affairs Officer's duties in connection with the local population and with international organizations.

Until December 2013, the model for maintaining the required qualifications for the Civilian Affairs Officers, was not determined

3. The Ground Corps directive determined that the Civilian Component should be integrated into training and exercises, and that "The exercise is part of the process of imparting and preserving the qualifications, knowledge and skill of the individual and the framework". In this matter, in May 2012 the commander of the Ground Command at the time, Maj. Gen. Sami Turgeman, determined in a meeting with the Coordinator, that it is the responsibility of the Commander of the Land Division of the Ground Forces Command to "arrange and summarize" by the beginning of July 2012 "the model of maintaining the qualifications of the Civilian Affairs Officers".

Until the date of formulation of the draft of the Civilian Component Report, December 2013, the model for maintaining the required qualifications for the Civilian Affairs Officers, as instructed by the Ground Corps Commander, was not determined, and the exercise and training program for maintaining their operational fitness was not published.

COGAT's response of March 2014 states that "COGAT has prepared and forwarded to the Ground Corps a qualification model for Civilian Affairs Officers and an exercise and training program to maintain their operational fitness, and the matter has not yet received the approval of the Ground Corps Command".

The IDF response of May 2014 to the draft of the Civilian Component Report states that "Maintaining the qualifications of the Civilian Affairs Officers is carried out as part of their integration in the training of command posts and exercises from the battalion level".

The State Comptroller's Office calls the IDF's attention to the fact that in the absence of a qualification scheme, it is not possible to know whether the manner in which the IDF chose to maintain the qualification of the Civilian Affairs Officers, achieves its goal. Therefore, the IDF should urgently complete the process of approving the fitness model and take steps to integrate it.

The provision of the basic needs of the population

As stated, international law imposes on the military force humanitarian obligations towards the civilian population in the combat zone, derived from the degree of control over the relevant territory. When effective control exists, the humanitarian obligations towards the population are active in nature, and are intended to ensure that the basic needs of the civilian population are fulfilled. These obligations include, *inter alia*, in areas as defined in the rules of international law[44]: the supply of water, food and medicine, and assistance in medical treatment.

In September 2010, the Technology and Logistics Directorate published a plan to provide humanitarian assistance to the civilian population in the Gaza Strip, stating that "As part of the IDF's preparedness for escalation in the Palestinian arena... the IDF should prepare to provide humanitarian assistance to the Palestinian civilian population. In light of the above, coordination has been established between COGAT and the Technology and Logistics Directorate, in which the basic assumptions were formulated according to which the Technology and Logistics Division centers will prepare for the allocation of resources for the provision of humanitarian aid to the Palestinian civilian population... The purpose of the plan ... to serve as a '**contingency plan**', that may be implemented when necessary, according to the Operations Directorate decision, in cooperation with the Technology and Logistics Division and COGAT" (emphasis in the original text). The plan further states that "One of the principles of the civilian humanitarian coordination is to maintain a reasonable fabric of life for the Palestinian population and to prevent a collapse/ humanitarian crisis in times of combat during the stay".

The plan also states that the IDF will provide a response to the basic needs of the civilian population in the combat zone for up to 50,000 residents for six weeks, and that its basic assumptions are aimed only at the Gaza Strip, but

44 The Fourth Geneva Convention (1949) deals with the treatment of civilians during wartime, and at its core is the obligation of the occupying power to the civilian population in the territory that is occupied.

can be implemented in Judea and Samaria as well, with the appropriate adjustments.

In the course of the audit of the Civilian Component, the State Comptroller's Office examined the plan and the plans for its implementation, and following are the findings:

1. The audit revealed that the necessary adjustments to the Judea and Samaria Area were not mentioned in the plan and that the plan does not address the northern arena.

   The IDF response of May 2014 to the draft of the Civilian Component Report states that "The plan was defined as versatile and as adapted both to the southern arena and to the central arena with required adjustments. It is necessary to recognize that the plan was originally formulated only for the Gaza Strip... but can also work in Judea and Samaria... Adjustment in times of combat to another arena (once the response and the degrees have been defined) is reasonable".

2. The COGAT examination revealed that the plan's assumptions regarding the scope of the population that will require humanitarian aid during combat are not consistent with COGAT's assessments. According to the COGAT's recommendation from 2006, a humanitarian response program during combat should handle 300,000 people from the Palestinian civilian population.

   The response of the Ministry of Foreign Affairs to the draft of the Civilian Component Report states that "**The statement regarding the preparation of a relief program cannot focus solely on the IDF; the Ministry of Foreign Affairs should take part in the preparation of the relief program, and also accompany its implementation if necessary... The IDF's plan for the transfer of humanitarian aid to the citizens of Gaza – is not known to the Ministry of Foreign Affairs**. This is an example of the consequences of the **failure to integrate the Ministry of Foreign Affairs in the planning and in the IDF's thinking on the issue being examined**. In addition, **during combat, the Ministry of Foreign Affairs has the opportunity to leverage humanitarian aid to the enemy's citizens for the purpose of preserving and legitimizing operational activity**. However, **without prior familiarity with the action plans** and their operational guiding to achieve a global political and public-political influence, **it is difficult to realize the potential political achievements**" (emphasis in the original text).

The State Comptroller's Office reminds the IDF that the implication of the discrepancy between the existing plan and the size of the population that the plan is supposed to provide for in practice the basic needs required, is a significant increase in the resources required for its implementation in the areas of transportation, food and medical care, and there is no guarantee that the IDF will be able to raise these resources during combat. It is therefore appropriate that the IDF reexamine all the basic assumptions of the plan in accordance with all the possible scenarios in each of the battlefields, and prepare a plan that takes into account the real extent of the population to whom the provision of humanitarian aid may be required.

The discrepancy between the existing plan and the size of the population that the plan is supposed to provide for, requires a significant increase in resources and there is no guarantee that the IDF will be able to raise these resources during combat

3. The Civilian Component Report draft states that most of the forces that were supposed to implement the plan did not practice it. Regarding the practicing of the plan, the Head of the Logistics Department of the Technology and Logistics Division told the audit team in March 2013 that "medical forces practiced their part in the plan several years ago".

4. The plan states that the transfer of goods to the population in the Gaza Strip will be carried out by Palestinian trucks, but if no Palestinian trucks are found for this purpose, military trucks will be allocated for this purpose from a transport center. However, these trucks are not armored and their use in areas of activity and combat may endanger the drivers' lives, and therefore it is possible that IDF commanders will prohibit their movement in the Gaza Strip. Moreover, it is reasonable to assume that in times of war and large-scale military activity, it will be difficult for the IDF to allocate the necessary trucks for the needs of the civilian population in the combat zone.

   Until the date of the Civilian Component Report draft, the Technology and Logistics Division – the Logistics Department, which is responsible for the implementation of the plan, and the Transportation Center, which is responsible for the allocation of the fleet of trucks, have not examined whether alternative plans could be put in place for the delivery of supplies to the civilian population.

   The IDF's May 2014 response to the Civilian Component Report draft states that "The IDF's main task is to provide a continuous response to the maneuvering and firing efforts in all the battlefields until the enemy is overpowered, and therefore the order of priorities is determined by the operational echelon only during the management of the combat. Therefore, there is no decision on the allocation of battle personnel from the stage of the combat procedure".

The IDF has certain obligations relating to the provision of a humanitarian response to the civilian population in the combat zone in which the IDF has effective control. The State Comptroller's Office reminds the IDF that the inability to mobilize supplies for the civilian population is liable to impair the implementation of the aid program in whole or in part, and therefore the IDF should examine with all the relevant parties its logistic preparedness, including its ability to allocate the required resources upon the realization of a possible scenario of a humanitarian crisis and in order to prevent it, and in order to meet its obligations under international law.

5. According to the plan, in the event of the collapse of the Palestinian Authority in Judea and Samaria and the Hamas regime in the Gaza Strip, the local health mechanisms are likely to collapse. In such a state of affairs, if the assistance provided by the international organizations active in the Gaza Strip and Judea and Samaria Area is insufficient, the IDF will establish a "Front-Line Humanitarian Medical Center", whose goal is to provide a medical solution for the local population in the area held by the IDF. The plan stated that it was "preliminary only" and that the issue of establishing a "Front-Line Humanitarian Medical Center" had not yet been presented to the Chief Medical Officer Command.

   It was found that the Technology and Logistics Division has not presented to the Chief Medical Officer Command the matter of setting up a "Front-Line Humanitarian Medical Center" as of the formulation of the Civilian Component Report draft.

   The IDF response from May 2014 to the Civilian Component Report draft states that "The matter was evaluated in depth by the Chief Medical Officer Command as part of the response to the IDF's [operational] plan, and this will be embodied in the General Staff logistics plan that is scheduled to be published in June 2014". In another response from September 2014, the IDF noted that "The implementation of a "Front-Line Humanitarian Medical Center" in the General Staff logistics plan will take place in 2015".

The State Comptroller's Office reminds the IDF that a humanitarian disaster among the civilian population in times of war may violate Israel's obligations on the international level and significantly harm its image and international standing and may have legal implications. In addition, such a disaster could affect the IDF's ability to achieve the objectives of the operation campaign. In light of the sensitivity and importance of the issue, the IDF **should** reconsider the basic assumptions of the plan and its applicability, and the State Comptroller's Office notes that the plan does not provide a solution for the humanitarian care for the population during combat in Judea and Samaria and in the northern arena.

In August 2016, the IDF stated in its response to the findings of the draft report that "The last time the plan was re-validated in the IDF was in 2010. During the third quarter of 2016, a combat procedure is being carried out to update and validate this plan… Under the arrangement of the plan, the systems that comprise the logistic response in the Logistics Division were instructed that for the first level of assistance to 5,000 [people] immediate preparations should be made and almost without dependence on a source external to the IDF. It is possible to say today... that the scope of response to the needs set in the plan is about 90%... At the end of the combat procedure, a demand will be formulated vis-à-vis the Ministry of Defense with the aim of creating an infrastructure and a response to all the other levels [based on] contracts entered into by the Ministry with its suppliers, assuming the plan will be implemented… We will emphasize that because the period of time of the other levels [to the scope of those receiving assistance] is from 7 days of combat onwards, this time period allows for organization and assessments. Of course, this is based on existing and predetermined agreements".

In October 2016, COGAT submitted to the State Comptroller's Office in response to the findings of the draft report that "The plan was jointly updated with the Technology and Logistics Division and is currently awaiting circulation [for responses]".

The State Comptroller's Office reminds the IDF that, in light of the sensitivity and importance of the issue, it should act in coordination with the Ministry of Defense to ensure that the plan includes the preparation of an infrastructure for rapid communication with suppliers. The IDF should also ensure that the plan for coping with a humanitarian crisis on all possible action fronts takes into account the real scope of the population that will require humanitarian aid during combat, and validates it from time to time to ensure its implementation in real time.

The activity of the Operational Law Apparatus in Operation "Protective Edge"

During the Second Lebanon War, officers of the MAG Corps accompanied the IDF's operational activities in a variety of bodies, including: the General Staff Forum, the General Staff Divisions, the Northern Command, the Home Front Command, and the Air Force and Navy. The lessons learned by the MAG Corps from this war indicated the need to deepen the legal support even during the preparations for combat and exercises, and the need to institutionalize legal counsel during combat. Following these lessons, the MAG Corps has established, on the basis of its resources, an Operational Law Apparatus (hereinafter - the Operational legal advisory system), whose purpose is to provide legal counsel to IDF personnel on the Law of Armed Conflict and in the areas that accompany the use of force, in the course of combat and in preparation for it. This is in order to achieve the IDF objectives in combat in accordance with the law. The apparatus is designed to strengthen and expand the legal counsel that is provided regularly to all of the units exercising force in the General Staff and the commands, and consists of legal advisors in active service (with most of them carrying out this role as a secondary appointment alongside their regular role), and reserve officers. The Operational System provides, *inter alia*, legal advice up to the level of military divisions.

The HCJ **Physicians for Human Rights** ruling stated, "The mere fact that operations are necessary from a military viewpoint does not mean that they are lawful from a legal viewpoint. Indeed, we do not replace the discretion of the military commander in so far as military considerations are concerned. That is his expertise. We examine their consequences from the viewpoint of humanitarian law, this is our expertise. "

The Deputy Attorney General (Criminal), Adv. Raz Nazri, noted at the Cabinet meeting on August 1st 2014, regarding the discretion of the military

commanders, that "There is the question of what is the collateral damage that has been caused and there is the question of what is your target... Insofar as the target is more valuable from a military standpoint, of course it is possible to talk about higher collateral damage. In a principled decision, it is not the jurists who determine the collateral damage, but the commanders determine it... The commanders know how to asses this and they also know how to make a judgment call... This is in respect of the question of what is proportionality".

After Operation "Protective Edge", the Head of the International Law Department at the MAG Corps instructed that a debriefing be carried out to learn and draw conclusions, *inter alia*, regarding the employment of the Operational System in the operation. The debriefing conducted by the MAG Corps indicates that there is room for a significant improvement in the integration of the operational legal advisory system in combat military divisions. Following are the details:

The debriefing found that the effectiveness of the legal counsel for the military divisions in combat is significantly lower than expected, and relies mainly on the internal resources of the MAG Corps (personnel and material resources), the degree of assertiveness and personal connections of the advisors, and the desire of those receiving the counsel to internalize it and integrate it into commands.

The debriefing also revealed that in the absence of an orderly combat doctrine, in practice the legal counsel is not an integral part of the division's staff, and is not known to the division officers, and the division officers have no real information on the function that the legal counsel is supposed to fulfill. In addition, there is a gap in the staffing of the Operational System, with an emphasis on legal counsel to the military divisions. In light of this, the legal counsel personnel in the military divisions during Operation "Protective Edge" was reinforced by officers in active service and reserve officers from the Northern Command, the General Staff, and the Northern military divisions.

The debriefing also revealed that many of the legal advisors in active service do not feel that they have received sufficient training to perform their duties well, and that there are reserve legal advisors who felt that in the absence of practice, the theoretical knowledge acquired in the operative course is not retained with the required freshness.

In August 2016, the IDF informed the State Comptroller's Office in response to the findings of the draft report that "In view of the conclusions of the debriefing, various ways are constantly being examined to strengthen and improve the activity of the operational advisory system. At the same time, staff work was carried out at the Ground Corps to regulate the combat

The effectiveness of the legal counsel for the military divisions in combat is significantly lower than expected

doctrine of the division commands, in which the status of the legal advisor in the division was better defined".

In January 2017, the IDF stated, "The legal counsel regarding the attacking of targets is one of the main areas of activity of the MAG Corps in times of emergency, and a large part of the targets that were attacked in Operation "Protective Edge" – including the targets that were planned in advance prior to the campaign, the 'strategic' targets and the vast majority of the targets which were brought before the political echelon – were examined by the legal advisors of the MAG Corps… **the legal advisors of the MAG Corps accompanied the commanders with regard to the implementation of the principle of proportionality**, in principle (the considerations that can be weighed, how to assess expected collateral damage, etc.), as well as with respect to the implementation of the principle in concrete attacks... **The role of the legal advisor was to assist the commander in making decisions that are consistent with international law, including the principle of proportionality, and not to take a decision in his place on the matter**" (emphasis in the original text).

The State Comptroller's Office emphasizes that operational legal advisory has great importance and a significant influence on the considerations regarding the manner in which the IDF opens fire in aspects relating to the rules of International Humanitarian Law. Former Minister of Defense, Moshe Ya'alon, told the State Comptroller's Office that "It is desirable that there be legal counsel in the field of international law as well as Israeli law regarding the use of force... It is important that there be legal accompaniment to military maneuvers".

The State Comptroller's Office notes that although there is great importance in maintaining the discretion of commanders on the ground, on matters such as the choice of military targets, the consideration of proportionality, and the choice of precautions required in the attack, these processes should be carried out in accordance with professional standards, that will be determined with the assistance of the legal counsel. In cases where questions arise regarding the implementation of the rules of International Humanitarian Law, provided that this is possible from the operational point of view, the IDF should act so that the commanders receive assistance from the legal advisers, who are near the commanders in times of emergency, up to the division level.

Therefore, since the commanders are the ones conducting the combat in the field, the MAG Corps should ensure that commanders at all levels, especially those in the field, receive legal training on the principles of combat management according to the rules of international law, such as the principle of proportionality and the principle of distinction.

In August 2016, the IDF informed the State Comptroller's Office in this regard: "Our position is that there is no room to extend the legal counsel below the division level." and that "In times of routine, close legal counsel is provided to the commanders up to the command level, and in times of emergency, legal counsel is provided down to the level of the [military] division... The relationship between the legal advisors and the commanders on these matters, on the General Staff and the Command level, is very good, while at the [military] division level improvement is required on this subject".

The State Comptroller's Office notes that in light of the importance of international law and its growing influence on the management of military campaigns and the intervention of the international community during and after the campaign, the Chief of General Staff should examine with the cooperation of the MAG the ways to regulate the status of legal counsel in military divisions, and consider placing legal advisors from the MAG Corps as close as possible to the level of the combatant, during combat only. This is in order to ensure that combat management is conducted in accordance with the rules of international law. In addition, they should examine the resources required for this purpose, including the writing of an operating doctrine and a training program for an operational legal advisory system, as stated.

The activity of the National Security Council – examining the expected implications of harming uninvolved civilians

The National Security Council Law, 5768 – 2008 (hereafter - the National Security Council Law) stipulates that the National Security Council should "(1) Coordinate the Government staff work, the staff work of the Ministerial Committee for National Security Affairs and any other ministerial committee, on matters of foreign affairs and security… (5) Be responsible on behalf of the Prime Minister for the inter-organizational and inter-ministerial staff work on matters of foreign affairs and security... [and] present…its recommendation to the Prime Minister on policy on these matters". With regard to the National

Security Council's staff work on Israel's foreign affairs and security affairs, the State Comptroller's report on the implementation of the National Security Council Law[45] states: "Throughout the State of Israel's years of existence, various parties have pointed to the vital need for permanent external counsel to the prime minister and the government in areas of national security, through a strong capable head office that will enable decisions on the basis of staff work and the presentation of alternatives to choose from".

The audit revealed that, as of the date of the formulation of the Civilian Component Report draft, the National Security Council, as a staff body of the Prime Minister and the government on matters of foreign affairs and security of the State of Israel, has not examined as part of overall staff work in collaboration with all relevant parties, the international consequences that may arise from significant harm to uninvolved civilians, and the possible effects on the IDF's ability to realize its objectives in combat.

The National Security Council has not examined the international consequences that may arise from significant harm to uninvolved civilians, and the possible effects on the IDF's ability to realize its objectives in combat

In the Prime Minister's response from April 2014 to the Civilian Component Report draft it was stated, "According to the National Security Council's approach, which constitutes a professional echelon in this regard, the staff work required for the examination of the Civilian Component in Combat should be done only as part of staff work performed for a concrete operational plan, and as part of it. This is a topic that does not stand in itself, and that cannot stand in itself, as reference to it requires a different adaptation from one specific case to another. Therefore, the discussion of this issue constitutes part of the staff work required for a specific operational plan and therefore is examined only within the framework of this staff work". In another response from the Prime Minister's Office from August 2014, it was stated: "It shall be noted that despite the National Security Council's position… the National Security Council took upon itself to hold a lateral discussion on the Civilian Component in Combat".

The response of the Ministry of Foreign Affairs from April 2014 to the Civilian Component Report draft states that "The Ministry of Foreign Affairs plays a significant role in building the international legitimacy for military campaigns – especially in the context of exposing the use of the civilian population by the opponents Israel faces. Also, during combat, and thereafter, the Ministry of Foreign Affairs' activity in preserving the international legitimacy in cases where there is an ongoing need to use force vis-à-vis the different opponents, while facing legal and political arguments that reject the use of force or the modes of use of the force, is very important, and therefore **there is great importance in involving the Ministry of Foreign Affairs in the**

45 State Comptroller, Report on the Implementation of the National Security Council Law and the Handling of the Turkish Flotilla (2012), in the chapter on the implementation of the National Security Council Law, page 65.

processes of building and managing military campaigns, and in carrying out exercises in integrated operations". The Ministry of Foreign Affairs also noted in its response that "**The extent of the political advice regarding IDF operations is unclear. The political policy bodies should insist that the professional inputs of the Ministry of Foreign Affairs be incorporated in all decision-making processes related to the planning and management of military campaigns**, *inter alia*, due to the aspect of the involvement of the opponent's civilian population in war zones" (emphasis in the original text).

Despite the aforementioned response, in August 2016 the Prime Minister's Office informed the State Comptroller's Office that "The necessary staff work on the Civilian Component in Combat should be done as part of the staff work that is being carried out with regard to a specific operational plan, and this is the National Security Council's practice. In the discussions held by the National Security Council with the relevant officials regarding specific operational plans, the aspects of the Civilian Component are also examined in the fighting" (emphasis in the original text).

The State Comptroller's Office reminds the National Security Council, that according to the IDF's combat scenarios, it may be necessary to fight in more than one arena at a time, and that significant damage to uninvolved civilians in IDF combat incidents on all possible fronts of conflict can have effects on the international law level, on the State of Israel's international relations, on its image around the world, and the IDF's ability to realize its objectives in combat. Therefore, it is appropriate that in view of the roles imposed on the National Security Council in the National Security Council Law, the National Security Council should complete its examination with the appropriate detail of all of the lateral effects involved in the implementation of IDF combat scenarios (the national and international aspects) in overall staff work. As part of this work, the National Security Council should examine the ways to reduce the potential harm to civilians and the treatment of the uninvolved civilian population in the various IDF combat zones, with regard to the unique characteristics of each sector of activity. The National Security Council should also examine the potential damage to the image and legitimacy of the State of Israel as a result, and the information programs relevant to each sector of activity.

The "Hannibal" Orders

The State of Israel and the IDF have an obligation to ensure the safety of their citizens and soldiers and to protect their lives, including the duty to prevent their abduction. The abduction of a soldier or a citizen, such as the abduction of Gilad Shalit in June 2006 and the abduction of Ehud Goldwasser and Eldad Regev of blessed memory in July 2006, is considered an event which provides the enemy with a significant strategic and morale achievement, especially in view of the cost exacted in the past for the release of live soldiers or the return of bodies of soldiers killed during or after an abduction. As a result, abduction is considered a serious threat in all areas of IDF action, and the IDF must prepare in advance to prevent the abduction and to respond swiftly to thwart it after it has occurred.

The abduction of a soldier or a citizen is considered an event which provides the enemy with a significant strategic and morale achievement

An opinion written by Professor Newton[46] to the State Comptroller on this subject indicates that according to the Law of Armed Conflict, the military commander has a basic obligation to protect his soldiers and to do everything in his power to prevent the abduction of a soldier. The military commanders must act in accordance with the Laws of Armed Conflict, while adhering to the principle of proportionality, when examining their options for action, including in connection with the prevention of an abduction of a soldier. In his opinion, Professor Newton also noted that there is no comprehensive permit to attack all those who are in a particular area where an abducted soldier is found (including civilians), if there is no information indicating that the civilians are directly participating in the hostilities. On the other hand, there is also no comprehensive prohibition to operate in such an area only because of the presence of civilians.

The "Hannibal" Order is a General Staff Order issued by the Operations Directorate, intended to regulate the operational orders for preventing the abduction of a soldier or a civilian and to thwart it after it occurred (hereinafter - the "Hannibal" Order). The Order expresses the General Staff policy on the manner of handling by the IDF of an abduction of a soldier or a citizen, from the stage of preparation, in its course and up to the point at which the abduction was prevented or the contact with the abductors was cut off, on the basis of a chain of command required to employ firepower. The Order includes explicit reference to the rules of engagement against the abductors because of the danger that employing firepower against the abductors will also harm the kidnapped soldier's life. The main purpose of the Order is to determine the order of actions to be performed immediately upon learning of the abduction or in the event of a fear of abduction. The General Staff "Hannibal" Order states that "**The commands and branches are required to adjust the scenario and actions to their regions**"

46 See footnote 16.

(emphasis added), which means that the publication of a relevant order for the region is under their responsibility.

Due to the weighty implications that could result from an abduction, including those that followed the use of the "Hannibal" Order during Operation "Protective Edge", the State Comptroller's Office examined on the basis of the principles of international law, the three "Hannibal" Orders - the General Staff "Hannibal" Order, the Southern Command "Hannibal" Order and the Gaza Division "Hannibal" Order (hereinafter – the "Hannibal" Orders) – which were in effect during Operation "Protective Edge" and applied to the Gaza Strip area.

The phrasing of the "Hannibal" Orders on the eve of Operation "Protective Edge"

As part of the State of Israel's obligation to act in accordance with the principles of Israeli law and international law, including the Law of Armed Conflict, and in order to balance the need to attack military objectives with the need to avoid harming uninvolved civilians, the IDF defined a policy for firing weapons, in an operational standing order entitled "The General Staff Policy for Weapons Engagement and Civilian Safety Range" (hereafter - the General Staff's Weapons Engagement Policy Directive). The Directive determines the hierarchy of approvals required to employ firepower according to the type of target, the types of weapons that can be used and the determination of safety ranges and the definition of sensitive sites.

In 2011, the IDF began extensive staff work by the Operations Directorate and the MAG Corps for the update of the General Staff "Hannibal" Order, in cooperation with the Attorney General, who gave his comments on it. In the course of the staff work, the rules of engagement regarding the immediate response to an abduction event were also examined, according to which in the thwarting of the abduction, harming the abducted person must be avoided to the extent possible.

In 2012, the Deputy Attorney General (Special Affairs) (hereinafter - the Deputy Attorney General) wrote a letter to the Attorney General and the State Attorney, detailing his position on the rules of engagement in the General Staff "Hannibal" Order. The Deputy Attorney General referred in his letter to the General Staff "Hannibal" Order from October 2010, which included provisions according to which action can be taken to stop the abduction, including firing towards the abductors, even if there is danger of harming the abducted person. In his letter, the Deputy Attorney General noted that in his opinion "The Order is **'problematic'**, and perhaps even **'very problematic'**", (emphasis in the original text) due to the circumstances

under which, in the Order, it is permitted to shoot at the abductors, despite the fear of harming the abducted person.

In April 2013, the MAG wrote to the Attorney General that the provisions of the General Staff "Hannibal" Order created a lack of clarity regarding the circumstances in which it is permitted to shoot at the abductors, despite the fear of harming the abducted person. In June 2013, the Deputy Attorney General wrote to the Attorney General, explaining that "The fear was that this wording would be interpreted as permitting shooting at the abducted person in almost every situation".

In October 2013, the IDF Operations Directorate amended the General Staff "Hannibal" Order according to the remarks of the Attorney General's Office (hereinafter – the revised order). The revised order stated that it specifies "principles and actions to be taken in the event of the abduction of a soldier or citizen, at an overt level[47], within the international border of the State of Israel, within the security lines separating the territory of the State of Israel and the Judea and Samaria Area or the Gaza Strip, from areas under the responsibility of the IDF in respect of internal security or from areas in which the IDF operates". The revised order included directives relating to an abduction event or fear of the abduction of a soldier or a civilian on the following subjects: hierarchy of the powers to declare the activation of the Order, the employment of firepower and pursuit detailing various levels of employing firepower according to the hierarchy of command.

The revised order did indeed assume that the actions that might be taken to prevent abductions are usually accompanied by a certain risk to the abducted soldier's life, but it determined that the use of weapons to prevent the abduction would be carried out while avoiding harm to the abducted person, to the maximum extent possible.

In October 2013, the MAG sent the revised order to the Attorney General for his response; in November 2013 the Deputy Attorney General wrote to the MAG that the Attorney General had approved the order in the new version. The revised order was in effect during Operation "Protective Edge".

The command and division "Hannibal" Orders might have been ambiguous in respect of the terms that describe the value of the abducted soldier's life

47 According to the General Staff Order, an overt level abduction is an abduction carried out in an overt action.

The audit found that the General Staff "Hannibal" Order was amended in October 2013, as stated above, but the "Hannibal" Order of the Southern Command (hereinafter – the Command Order), which was also amended, is in part incompatible with the General Staff revised Order. It was further found that the "Hannibal" Order of the Gaza Division (hereafter – the Divisional Order) was not amended at all, and is mostly incompatible with the revised General Staff Order and the amended Command Order.

The FFA Mechanism examined "Hannibal" Orders that were in effect during Operation "Protective Edge" and found that there were gaps in understanding the orders that might be understood as ambiguous regarding the possibility of deliberate harm to the abducted person and might even create a lack of clarity among the forces operating in the field regarding the employment of firepower to prevent abduction.

In a document issued by the Chief of General Staff's Office in December 2014 on the subject of "Continuation of the preparations for the General Staff's concluding seminar for Operation "Protective Edge" – the Chief of General Staff's key remarks", it emerged that in a discussion held on the matter in November 2014, the Chief of General Staff at the time, Lieutenant General Benny Gantz, commented on the debriefing stating that action should be taken to prevent the abduction even if there is a risk to the abducted soldier's life, and to take steps to have the forces in the field understand the orders.

In his letter from October 2014 the Head of the FFA Mechanism wrote to the Head of the Operations Directorate, on the topic of "Orders to be updated following the "Protective Edge" Operation debriefings", *inter alia*, that "The Hannibal Order is an order for times of routine. **I recommend revoking the Hannibal Order – including changing the name**, writing orders to prevent the abduction of soldiers that would be relevant to all the situations [routine, emergency and war] - with an emphasis on do's and don'ts. We should provide information on the moral aspect, to all the forces, that an IDF soldier is not to be killed in order to stop an abduction" (emphasis in the original text).

In this context, it should be noted that the Head of the Operations Directorate at the time, Major General Yoav Har Even, referred in a meeting with the audit team held on March 2015 to the principle of proportionality in the implementation of the Hannibal Orders, and stated, "The Hannibal procedure [Hannibal Order] does not allow shooting without restraint or disproportionate shooting".

In August 2016, the IDF informed the State Comptroller's Office in response to the findings of the draft report that "It was found that said comments in

the draft audit report did indeed reflect certain contradictions between the Divisional Order and the General Staff Order. However, since the "Protective Edge" campaign, several changes were made in the matter".

In his article "Camaraderie at All Costs"[48], referring to the "Hannibal" Order, Prof. Asa Kasher noted: "As I discussed the significance of this order with many soldiers and commanders, both during the First Lebanon War and in the last decade (and even during Operation "Protective Edge"), and often I was surprised by the enthusiastic defense given by some of the soldiers and the young commanders to the idea of deliberately killing the soldier in order to thwart his abduction alive. As soldiers know in advance that in order to protect the country and its citizens they risk contact with the enemy, I was told more than once that soldiers should know that their friends may kill them so as to protect the state and its citizens from the worst situation where a live soldier is in the hands of the enemy. These allegations are clearly erroneous, both in terms of military orders and in terms of military ethics, which binds the value of 'camaraderie' with the values of 'adherence to the mission', 'human life' and more... The value of 'camaraderie' requires soldiers to help each other as part of the joint effort to carry out military tasks intended to protect the state and its people. The value of 'camaraderie' and the value of 'human life' lead to the absolute conclusion that the use of soldiers against one of them in a manner that brings about his death is out of the question, even if in the future, in order to bring the soldier home safely, the state will have to release terrorists in return for him".

In August 2016, the IDF informed the State Comptroller's Office in response to the findings of the draft report that "**Even before receiving the draft of the report, the Chief of General Staff instructed the cancellation of the Hannibal Order in its current format and the writing of a new order in its stead**… An understanding has formed, that better regulation of the issue was required, both in terms of the uniformity of the orders and in the aspect of adapting the orders to the various situations (routine, emergency, war)" (emphasis in the original text). The IDF further stated that in June 2016, the Chief of General Staff instructed that the Hannibal procedure is to be immediately rescinded and not to make use of this name in the future.

48 Asa Kasher, "Camaraderie at All Costs", **Makor Rishon**, Supplement for Shabbat (September 12th 2014).

The State Comptroller's Office reminds the IDF that the "Hannibal" Order is highly sensitive with respect to the life of the abducted soldier, and in their previous version, the command and division "Hannibal" Orders might have been ambiguous in respect of the terms that describe the value of the abducted soldier's life. This could have led to different interpretations of the orders by different entities in the IDF. Therefore, the IDF had to ensure that the amendment approved by the Attorney General was anchored in all of the orders derived from the General Staff Hannibal Order, so that they would be identical in their phrasing to the General Staff "Hannibal" Order, which was amended, as stated.

The State Comptroller's Office also notes that although the General Staff's Weapons Engagement Policy Directive requires, as stated, action according to the principles of international law, the principles of distinction and proportionality are not explicitly mentioned in the "Hannibal" Orders. Therefore, it is appropriate to incorporate into this new order the principles that appear in the IDF General Staff's Weapons Engagement Policy Directive regarding harm to uninvolved civilians, in order to emphasize for the forces operating in the field the proportionality required when employing firepower to prevent an abduction.

In view of the differences in the understanding of the provisions in the "Hannibal" Orders in the IDF and the possible ramifications this may have, the "Hannibal" Order should have been revoked, as was done ultimately by the Chief of General Staff during the course of the audit only in June 2016. It should also be noted that the nature of the Order indicates that it is more suited to ongoing security actions and not to combat, and therefore it is possible that in an abduction incident it would be more appropriate to act according to other relevant orders regarding combat, while instilling the principle of proportionality in the employment of firepower in the event of abduction.

In view of the differences in the understanding of the provisions in the "Hannibal" Orders in the IDF and the possible ramifications this may have, the "Hannibal" Order should have been revoked, as was done ultimately by the Chief of General Staff during the course of the audit only in June 2016

As the Chief of General Staff ordered the cancellation of the "Hannibal" Order, after the State Comptroller's Office conducted an audit of the matter, the new version of the order as instructed by the Chief of General Staff should provide an answer to the findings of this audit, and therefore, the Chief of General Staff should instruct that an examination be undertaken as to raising the level in the hierarchy of command required to employ firepower during an abduction or suspected abduction, depending on the severity of the incident, in accordance with the possibility that the event will cause an escalation in the security situation, in accordance with the environment in which it is taking place and the degree of certainty as to the occurrence of the incident, and accordingly amend the orders in collaboration with the MAG.

The State Comptroller's Office also notes to the IDF that the conveyance and the assimilation of the new order among the forces should increase, including with regard to the moral aspects pertaining to this order, while ensuring that the orders derived from it at the various levels are uniform at all levels of command.

The IDF further informed the State Comptroller's Office, in August 2016, in response to the findings of the draft report, that "Extensive staff work has recently been carried out to update and consolidate the orders dealing with coping and responding to abductions, in order to improve the forces' familiarity with them, to clarify the differences in the responses given in the various areas, and to simplify their implementation".

In January 2017, the IDF informed the State Comptroller's Office that "**The extensive staff work to update all of the orders dealing with coping with and responding to abductions in routine and emergency situations was recently completed**. In the framework of the amendment of the various orders, a section was added, dealing with employing firepower in such events. This section clarifies that strikes employing firepower will be carried out in accordance with the Weapons Engagement policy in force and the principles of employing firepower set forth in the General Staff's Weapons Engagement Policy Directive. It was further stipulated that notice should be given that attacks be directed only against enemies or military targets, and that attacks comply with the principle of proportionality. The new orders were presented before the various units in the military, and afterwards the orders of the various bodies, which were derived from the General Staff orders, were presented for approval by the Operations Directorate. In the end, it was decided that a briefing should be given on the new orders to all the soldiers operating under the commands" (emphasis in the original text).

The IDF also stated that according to the new order, in the event of an abduction and falling into captivity in a state of emergency and war, "every soldier is required to do **everything in his power** to thwart the abduction and capture of another soldier, **while protecting the life of the abducted soldier**… including opening fire on the abductors, while refraining to the extent possible from injuring the abductee or the prisoner, in accordance with the rules of engagement set forth in the standing orders" (emphasis in the original text).

The process of approval of orders in the IDF

In the Supreme Command Order on "The process of updating orders that bind the entire military"[49], it was determined, *inter alia*, that any proposal to update another general order[50] would be sent by the initiating entity of the orders[51] to Military Intelligence – the Information Security Department for its input, to the MAG Corps – Counsel and Legislation, and to the Financial Adviser to the Chief of General Staff, as well as to the coordinating bodies[52] concerned with the matter, at the discretion of the initiating entity of the orders. The Supreme Command Order further stipulates that the initiating entity of the orders should provide a reasoned response to any comments made during the round of comments that it does not intend to accept.

The audit revealed that the definitions in the Supreme Command Order indicate that operational orders are not included under "other general orders", and therefore the provisions of this Supreme Command Order do not apply to operational orders.

In view of the differences in phrasing between the various Hannibal Orders, as noted above, the State Comptroller's Office examined the principles of the procedure for approving orders in the IDF at the various levels in general and in the context of the Hannibal Orders in particular. Following are the details:

According to the provisions of the Supreme Command Order, the Operations Directorate does not constitute a certifying body or auditing body for the wording of the orders of the regional commands or military divisions, which are supposed to publish detailed orders that are adapted to their area of

49 Supreme Command Order no. 1.0102 dated July 9th 2002.

50 Other general orders – as defined in Supreme Command Order no. 1.0105 – see foot note 21.

51 Initiating entity of the orders – An entity in the division or branch whose function is to update the army orders and other general orders under the responsibility of the division or branch.

52 The coordinating bodies include, *inter alia*, the command bodies and the heads of the planning and organization branches in the field commands.

operations, as a derivative of the General Staff Order. Furthermore, in accordance with the Supreme Command Order, as stated above, the MAG Corps does not accompany the drafting of these orders at the various levels as a routine matter, and there is also no provision requiring the accompaniment of legal counsel or consultation in this process.

In October 2015, the Head of the Northern Arena in the Operations Division of the Operations Directorate stated to the audit team that "When a General Staff order is changed, the Operations Directorate allocates to the various commands a period of preparation before the order comes into effect, during which they should prepare with orders suited for their sector, that must comply with the requirements and provisions of the General Staff order. Until the entry into effect of the order (according to the date specified therein) – the old order remains in effect. For the purpose of clarifying matters relating to the manner in which the various orders are formulated in the command, division or brigade, the appropriate entities in the command, division or brigade should be addressed".

In October 2015, the Head of the Operational Branch of the International Law Department at the MAG Corps informed the audit team: "As for formulating IDF orders, it is emphasized that every level in the IDF phrases its own orders, unless the supervisory echelon demand to approve the order. Meaning, the command is not required in every case to receive the Operations Directorate's approval for its orders, but the command order should be formulated in accordance with the Operations Directorate directive (while adapting it to the needs of the sector) and it cannot contradict it (naturally every commander can add restrictions to the provisions of the supervisory echelon, and restrict the use of force that he permits his soldiers as opposed to what the supervisory echelon permits.) This is done respectively on all the various levels of the IDF. To the Head of the Operational Branch's best knowledge, the IDF does not have a provision requiring control on the part of the Operations Directorate over command or divisional orders. In addition, the phrasing process for the command orders does not require accompaniment or consultation with the legal advisor in the command".

The Head of the Operational Branch of the International Law Department stressed on this issue that the MAG Corps is not a control body. In response to the question of the audit team, it was clarified that there is not necessarily supervision by the MAG Corps on the manner in which the orders are formulated at lower levels.

In September 2016, the IDF informed the State Comptroller's Office in response to the findings of the draft report that "There is currently no regulation that requires legal reference to the directives at the different levels. This also stems from the understanding that there are matters that require unequivocal legal regulation, but there are also matters whose regulation is

There is no procedure for approving and controlling the content of the operational orders as a matter of routine. That no procedure is required for such a process, may lead to a different implementation of these commands

under the purview of commanders, subject to ethical values and professional principles. The exception to this is the rules of engagement, for which there is a procedure that determines the process of their approval... [and] the obligation to consult with the legal counsel... The orders at the various levels should be derived from the orders above them, comply with them and certainly not expand on them. Therefore, the legal accompaniment of the operational orders at the General Staff level (and often at the command level) is sufficient, since it ensures that the basic principles, from which the other orders are derived at the lower levels, comply with the rules of international law". The IDF further informed the State Comptroller's Office that, "Naturally, a significant portion of the operational orders, certainly the commands at the combat level (division and below), have implications for human life. This is a very large number of orders... Of course, the legal counsel can be consulted in the event the commanders believe in a certain case that it is also necessary at the divisional and brigade levels... However, there is no need and no practical way to involve legal advisors in the formulation of **each and every** order... In the integration process [of the new orders regarding the abduction of soldiers], creating an obligation to receive the General Command's approval and control over directives on the subject, at the command and division level, will be considered" (emphasis in the original text).

The State Comptroller's Office reminds the IDF that the fact that there is no procedure for approving and controlling the content of the operational orders formulated at various levels in the IDF as a matter of routine, and that no procedure is required for such a process, may lead to a substantive difference between the orders at the various levels, which may even lead to a different implementation of these commands. In such a situation, the implementation instructions as intended by the supervising echelon may not be implemented by the lower echelons. This concern, which is true as stated in regard to each and every order, arises most strongly with respect to operational orders concerning particularly sensitive situations, such as those relating to human life. With regard to such orders, the full coordination between the various levels is even more essential in order to ensure the forces in the field act in a manner consistent with the IDF's policy. In view of the above, the IDF should stipulate in a Supreme Command Order the obligation to receive legal accompaniment in the process of formulation of orders, and at the very least in respect of orders dealing with employing firepower, which may have implications for human life, and even more so in orders that are relevant to the rules of international law.

The State Comptroller's Office also reminds the IDF that in order to ensure that a General Staff order that includes sections relating to the use of force and firepower and which has an impact on human life is unequivocal, supervision of the senior levels is required. Therefore, the IDF should determine who is responsible for overseeing the formulation of these orders. The IDF should also determine that this control will be carried out by the regional commands for orders derived from the command order published at the divisional level. The Head of the Operations Directorate should determine what orders require legal support as well as said control. The MAG should anchor this obligation in a Supreme Command Order, similar to Supreme Command Order 1.0105.

The Conduct of the Political Echelon during Operation "Protective Edge" from the Perspective of International Law

The Basic Law: Human Dignity and Liberty states that "Fundamental human rights in Israel are founded upon recognition of the value of the human being, the sanctity of human life, and the principle that all persons are free ", and that "All governmental authorities are bound to respect the rights under this Basic Law ". It should also be noted that according to the Basic Law: The Military, the army is subject to the authority of the government[53].

Not only the military echelon, but also the political echelon is obligated to ensure that the army's activities comply with the provisions of international law relating to armed conflicts; therefore, the directives given by the political echelon to the military echelon in connection with carrying out military activity should include reference to international law and should comply with international law.

As part of the general obligation of the political echelon to ensure that the IDF acts in accordance with the Law of Armed Conflict, it should ensure that efforts are made to prevent potential violations of the law and that there are independent and effective mechanisms that enable reporting of alleged violations of the Law of Armed Conflict; proper examinations and investigations of allegations on violations of the Law of Armed Conflict; and initiating disciplinary or criminal proceedings in respect thereof, if necessary.

53 In this regard, see Mordechai Kremnitzer and Ariel Bendor, **Interpretation of the Basic Law: The Military** (2000).

The audit examined the fulfillment of the responsibility of the political echelon in connection with international law in the framework of the cabinet's deliberations, and revealed that of the 18 cabinet discussions that took place from the date of the decision to launch Operation "Protective Edge" on July 7 2014 until its end on August 26 2014, in the majority of discussions issues relating to the duty to act in accordance with the binding rules pursuant to international law in the context of IDF activity in Gaza, were explicitly mentioned. In addition, the audit revealed that all the discussions were attended by the Attorney General and his senior staff. The following are examples of issues that were raised before the political echelon:

Measures for reducing harm to uninvolved civilians

At the Cabinet meeting dated July 7th 2014, on the subject of "Protective Edge", in which representatives of the defense sector presented the intelligence situational assessment and recommendations for the continued policy and action, the Chief of General Staff at the time, Lieutenant General Benny Gantz, when describing the IDF's actions, said that before attacking targets "we observe and see that there are no women, we see that there are no children and that there is no hospital and there is no mosque, and we do our job". As for attacking Hamas government targets, the Chief of General Staff at the time said: "When I talk about targets of the Hamas administration, these are only targets on which we have already completed the entire legal debate, and they are legitimate [and] only legal".

At the Cabinet meeting from July 8th 2014, on the subject of "Protective Edge", in which the defense system representatives reviewed the situation and the cabinet discussed the guidelines for continuing of the military operation, the Chief of General Staff noted that the population is warned before an attack on buildings.

In a meeting concerning the situation on July 11th 2014, headed by the Prime Minister, which included, among others, the Minister of Defense and the Chief of General Staff, the Prime Minister noted that "Every attack should take into account the damage to the uninvolved civilian population alongside the operational need, while understanding the importance of minimizing the damage".

At the cabinet meeting held on July 15th 2014, which dealt with the review of the situation and the IDF's proposed plans, the Chief of General Staff stated: "We continue and reinforce our efforts to mobilize the population [in Gaza] in order to protect it in a way that will enable us first of all to open fire more effectively and prevent harm to civilians... This issue of harming uninvolved civilians is dramatic in its long-term effects on us and we need, with all the difficulty it entails, to be very, very careful. I take upon myself these decisions in a manner where I try to do as much as possible in order to advance the determination and remain as reasonable as possible under these very very complicated conditions".

In the meeting on "Presentation of a 'front-line defense' plan to the Prime Minister" on July 17th 2014, the Prime Minister noted that "Attempts should be made to minimize the harm to the uninvolved civilian population as much as possible, while evacuating the area from civilians".

In a situation assessment meeting headed by the Prime Minister on July 20th 2014, it was noted: "The Prime Minister stresses that efforts and call should continue to be made to evacuate civilians from combat areas".

At the Cabinet meeting on July 23rd 2014, the Coordinator described the efforts and difficulties stemming from the evacuation of wounded and dead from combat zones.

At the Cabinet meeting on July 26th 2014, the Minister of Defense at the time, Moshe Ya'alon, informed the cabinet ministers that "Everything we attacked was a target approved by both the MAG and the Attorney General".

Later, at the cabinet meeting on July 27th 2014, the Minister of Defense made clear with respect to attacks on targets in Gaza that "All the targets are legitimate, everything is done with legal backing, [and] nothing is done illegally". He also stressed that before attacks the population is given warning. A senior Air Force official described the procedure prior to an air attack in a certain neighborhood when it was not clear whether the building was evacuated of population: "Before the attack, when we call on the phone every house, we tell them to leave, we make sure they leave and we attack... There are very difficult dilemmas here – were the people evacuated, did the people not evacuate?"

In this regard, the Minister of Defense emphasized the operational dilemmas that arise as a result of the desire to avoid harming uninvolved civilians. He said: "There is one statement here [of a senior Air Force official] that I suggest to pay attention to, and I also emphasized it to the UN Secretary General when I explained what we are doing in order not to harm civilians: the moment you ask civilians to evacuate a neighborhood,

you lose the element of surprise, and if you succeed in evacuating them, the terrorists are ready for you".

The Chief of General Staff clarified that before action in a certain neighborhood, the IDF informed the neighborhood residents of the fact, warned them, fired smoke bombs as warning, and surveyed the area to see who remained. The Chief of General Staff also said: "We saw that there was no movement. We moved away everything that could be removed... After people left, the terrorists roam the area and booby-trap the houses. We eventually encounter a phenomenon where until two days ago, an area that was a civilian neighborhood, has become in practice a military complex, booby-trapped on the ground, underground... It is not easy for any of us to approve targets as we approve them, to conduct very difficult discussions on the level of collateral damage. You do not sit with us in these rooms, but we did it". The Chief of General Staff added: "During this campaign, we are employing FFA teams on all exceptional incidents".

The Deputy Chief of General Staff at the time, Major General Gadi Eizenkot, noted in the same discussion: "I think that the limit of modern warfare is civilians. The need to evacuate civilians for their protection... I spread leaflets, I call on the population to evacuate in order to protect it, because its space is being used to fire weapons to kill civilians, and even then, I do not let loose and do not fire artillery, but rather fire with precision, precision guided munitions that can hit targets".

At the cabinet meeting held on July 30th 2014, the Coordinator, Major General Yoav (Polly) Mordechai, noted that in order to avoid harming the population of the Gaza Strip, entire neighborhoods had been evacuated, and according to international organizations, 400,000 people had evacuated. The Coordinator further added that every school in the entire Gaza Strip was marked as a sensitive site according to the Chief of General Staff's instructions.

At the cabinet meeting held on August 1st 2014, the Chief of General Staff explained that the IDF is aware of the possibility of civilians being near the military target, and therefore, where possible, it uses the "knock on the roof" method[54] to distance the civilians and reduce the damage caused by the attack. The IDF does its utmost and examines every target before attacking it in order to distance civilians from it.

54 "Knock on the roof "- an IDF procedure in which civilians are warned that they may be harmed by a military attack and therefore must evacuate. Within the framework of the procedure, many actions are carried out with the aim of bringing about the evacuation of the place, including non-lethal firing of weapons towards it.

Regarding the procedure for approving the targets, a senior legal official noted in this hearing that "The army is working together with the International Law Department at the MAG Corps with respect to the 'incrimination' of targets. In the legal world, there is a military target [or] a civilian object, this is the basic distinction… With regard to civilian objects, under law they cannot be targeted. To my understanding, up to now, even the political echelon has not come and said that it nevertheless wants to, because at the end of the day we as a state want to operate according to international law, and we also want you and the Chief of General Staff and the General of the Command and everyone sitting around this table not to be exposed to any danger or to any international proceeding".

In the cabinet meeting held on August 5th 2014, the Chief of General Staff said, "I am very proud that, wherever possible, attacks where we believed uninvolved civilians might be harmed were stopped". The Attorney General replied, "Chief of General Staff, I wish to tell you that we were on a visit with the Commander of the Air Force... We saw with our own eyes the caution taken by the Air Force when bombing. We saw how much effort was invested in respect of each and every house, how many phone calls were made to the house. We, at least, were very impressed".

At the Cabinet meeting held on August 20th 2014, on the subject of "Protective Edge", the Chief of General Staff explained that the decision to attack a military target takes into account considerations of proportionality and injury to the uninvolved civilians.

Comments by Cabinet Ministers on the measures to reduce the harm to uninvolved civilians in Operation "Protective Edge"

Within the framework of the audit, the audit team met, *inter alia*, with all those who served as cabinet ministers during Operation "Protective Edge", as well as with the Chief of General Staff and his deputy and relevant generals; in order to clarify issues relating to, *inter alia*, the manner in which the issue of international law was referred to in the cabinet meetings held in the course of the operation. These officials informed the audit team that during Operation "Protective Edge", the subject of international law was raised in the cabinet deliberations and was an integral part of the planning of military activity. Following are examples:

The Minister of Strategic Affairs and Intelligence Affairs at the time, MK Yuval Steinitz, told the audit team in February 2015 that "Both the considerations of the IDF and the considerations of the cabinet ministers involved preventing harm to uninvolved civilians in Gaza. There was concern over a possible humanitarian crisis in Gaza and therefore steps were taken to ensure to constantly bring in food to Gaza and carry out actions to prevent harm such as warning the population. Operation "Protective Edge" had higher awareness of international law than previous operations. There is no army that under similar circumstances behaved like the IDF in terms of international law. For example, the "knock on the roof" procedure is carried out only in the IDF".

Former Minister of Finance, MK Yair Lapid, told the audit team in February 2015 that "The issue of harm to the uninvolved civilians in Gaza was raised in a series of discussions between the Attorney General's Office and the IDF". The former minister raised the fact that the issue was dealt with mainly in a technical - legal manner and less as a moral - ethical issue, adding "the Chief of General Staff also raised this issue as a moral - ethical issue, and there was more than one discussion in the cabinet on this topic".

The Minister of the Economy at the time, MK Naftali Bennett, told the audit team in February 2015 that "The issue of collateral damage was brought up a number of times, mainly as a report of the Chief of General Staff who was very focused on the matter. The Attorney General was also involved and even blocked actions due to considerations of possible harm to uninvolved civilians".

The Minister of Public Security at the time, Mr. Yitzhak Aharonovitch, stated in January 2015, in response to the audit's questions, that as a rule, he believes that "The subject of international law in the framework of the operation was covered thoroughly and in depth, with professional support in determining the policy for employing firepower and in the decision-making process. Every cabinet meeting included legal officials, including the Attorney General, to ensure that the military activity would not deviate from what is permitted under international law. In addition, the Cabinet was updated from time to time by the Chief of General Staff on the status of the selection of military targets, the use of firepower and their legal validity, as approved by the MAG". The Minister of Public Security at the time also told the audit team that "The entire operation was conducted within the limitations of international law, with the Chief of General Staff leading the effort in this matter within the IDF, and the Attorney General with regard to its civil aspects. The Chief of General Staff said several times that there were opportunities for targeting a terrorist operative but that he ruled them out for fear of harming

It is evident that both the political echelon and the senior military echelon explicitly considered the limitations and rules set forth in international law regarding the conduct of the fighting in Gaza, and the Prime Minister instructed against harming uninvolved civilians

uninvolved civilians. The IDF stated that there were legal work teams accompanying the forces. Without the consent of the Attorney General, targets were not attacked". The Minister was of the opinion that "the issue was sufficiently raised in cabinet discussions during Operation "Protective Edge"

The Minister of the Interior at the time, MK Gilad Erdan, told the audit team in February 2015 that "The subject of international law was discussed extensively by the cabinet... The Chief of General Staff also raised this issue during the cabinet discussions. In fact, a minister in the cabinet is powerless when the Attorney General forbids the execution of a particular action. Thus, in effect, leaving the cabinet with a very limited possibility of approving actions".

The Minister of Justice at the time, Tzipi Livni, responded to the audit team in March 2015: "The subject of international law was discussed before Operation "Protective Edge". During the operation, aspects of international law were raised as a consideration in the cabinet and discussions were held at the Ministry of Justice before approving the attack of targets. It is known [to the former minister] that even the MAG ruled out targets... Throughout the operation, members of the legal system examined each and every target".

The Minister of Foreign Affairs at the time, MK Avigdor Lieberman, told the audit team in March 2015 that "No decision was made in the cabinet without the MAG and the Attorney General. No other country employs such a mechanism".

Former Minister of Defense, Moshe Ya'alon, told the audit team in March 2015 that "A military action should be planned both in terms of ethics and in terms of legal defense. Therefore, it is advisable to have legal counsel in the field of international law and Israeli law regarding the use of force. In some cases, there may be disagreement as to whether a target is a legitimate target for attack. Therefore, it is important that there be legal accompaniment to military moves. It is therefore important that military campaigns are accompanied by legal counsel. Legal support is embedded in the IDF in the process for approving targets. During Operation "Protective Edge" this usually worked fine, although there were some disagreements with the Attorney General regarding the legitimacy of certain targets".

Regarding the Cabinet's preoccupation with international law and the planning of the IDF's activities, while taking into account the binding rules of international law, the Deputy Attorney General (Criminal), Adv. Raz Nazri, informed the audit team in July 2015 that the comments of the Attorney General and his team were usually not necessary in the

cabinet discussions "since in practice, in the cabinet meetings themselves during times of combat there is not much direct reference to legal subjects, as the cabinet is not a legal forum that deals with the question of what is right or wrong from a legal point of view, and many topics are discussed beforehand... The legal work begins at the MAG Corps even before the fighting and unconnected to it, for example in regard to the construction of a bank of targets. There are issues on which the IDF consults with the Ministry of Justice and there are issues that are discussed and decisions are made in respect thereof at the Ministry of Justice together with military officials. In the course of the "Protective Edge" campaign, the IDF brought certain topics before the Attorney General... Sometimes the legal advice given by the Ministry of Justice to the IDF is such that it allows military activity, from the legal perspective, but requires presenting the various risks to the political echelon before making a decision... There are times when the commanders choose, for their own reasons, to be stricter than what the legal restrictions require, as presented by the legal counsel, and this is absolutely legitimate, as the command or political viewpoint includes broader considerations than just the legal one".

The Southern Command commander at the time, Major General Sami Turjeman, told the audit team in May 2015 that "In March - April 2014, the Southern Command held training for battalion commanders on underground warfare, in which a briefing was also given on international law, in light of which use of force is to be carried out in the Gaza Strip".

The State Comptroller's Office notes that from the minutes of the cabinet discussions that took place between the decision to embark on Operation "Protective Edge" and until its conclusion, as well as from the statements given to the audit team by the members of the cabinet at that time and other senior officials, as stated above, it is evident that both the political echelon and the senior military echelon explicitly considered the limitations and rules set forth in international law regarding the conduct of the fighting in Gaza, and even the Prime Minister instructed against harming uninvolved civilians.

It is further evident that the Attorney General and his team, as well as the MAG and his team, provided ongoing legal advice to the political echelon and the senior military echelon regarding compliance with the rules of international law.

In addition, the Minister of Defense and the military echelon emphasized in the cabinet meetings the legality of the targets that were attacked and the actions taken to reduce collateral harm to uninvolved civilians. The military echelon also described to the political echelon the efforts it was making to reduce the harm to uninvolved civilians and to prevent it where possible.

Humanitarian aid to the population in Gaza

One of the principles of the Law of Armed Conflict is the principle of preventing unnecessary suffering[55], which states that harm which causes unnecessary suffering to someone who is not part of the cycle of hostilities, does not serve a military need, and is therefore prohibited. This principle is anchored in several provisions of international humanitarian law, such as Article 23(e) of the Hague Regulations of 1907. In addition, a fundamental and central principle of international humanitarian law is that persons outside of hostilities should not be targeted. For example, the Fourth Geneva Convention, and in particular its third part, deals with the protection of civilians in wartime, including in non-international conflicts[56]. Article 27 of this convention establishes the principle of humane treatment, according to which protected persons[57] must be respected and harming their person, dignity, family life, religion and customs should be refrained from. These principles have also been recognized in Israeli case law, such as the HCJ **Physicians for Human Rights** ruling.

At the cabinet meeting held on July 23rd 2014, regarding "Protective Edge", reviews were given of the state of affairs and of military operations, and there was a discussion of the UN Human Rights Council resolution on the establishment of a commission of inquiry into violations of international

55 Which is in addition to three other principles underlying many unique provisions in the various conventions, namely: the principle of military necessity, which states that combat forces are permitted to harm humanitarian interests only if the harm serves a military need (for example, Article 53 of the Fourth Geneva Convention); the principle of proportionality; and the principle of distinction.

56 Article 3, common to the four Geneva Conventions.

57 Article 43 of the Hague Regulations of 1907 establishes the need to care for the local population in an occupied territory, such as maintaining public order and public life. The Fourth Geneva Convention requires the occupier, *inter alia*, to ensure the regular supply of food and medicine to the population.

humanitarian law in the Palestinian territories[58]. In this meeting, the Coordinator, Major General Yoav (Polly) Mordechai, described the humanitarian situation in Gaza and the IDF's assistance in improving the situation: "There is a serious shortage of medical equipment. Today I coordinated with the Ministry of Health and the Medical Corps, after we brought in quite a few trucks, to try and help ... The great difficulty is to evacuate the wounded and casualties from the areas... We are making great effort to try and do the best we can. There was a humanitarian window. In Shejaiya twice, an extension of the ceasefire was granted in light of the request of the Red Cross. A hospital was opened by the Medical Corps at the Erez Border Crossing. We've allowed the setting up of a Jordanian hospital… We are bringing in medical equipment... We set up a joint war room with the international organizations that sit with us and try to coordinate everything. In my opinion, the most impressive development is that for the first time... every combat battalion has a Civilian Affairs Officer together with the battalion. He tries to coordinate the arrival of an ambulance, he handles the infrastructure; this is unprecedented anywhere in the world".

In response to the Coordinator's remarks, the Minister of Defense told the cabinet: "I have agreed that if there is no political humanitarian ceasefire, there should be a break of twelve hours". The Prime Minister noted that "If there is no organized break, there should be a tactical break".

The Chief of General Staff noted in the same discussion: "The civilian effort that "Polly" [the Coordinator Major General Yoav Mordechai] described is very important to me, let us not take it lightly... and I think it is worthwhile, if not tomorrow then the day after tomorrow, to take a significant humanitarian step to allow them to organize. We need it for them, we need it for us and it seems to me that it is the right thing to do no later than this date. The Minister of Defense concluded and we are going, at least from our point of view, on the path that will be this path, unless there is another political development".

In the cabinet meeting held on July 25th 2014, regarding "Protective Edge", the Prime Minister said: "We are aware that we have a humanitarian problem in Gaza that is developing and we need to call a humanitarian ceasefire there. The intention was to do it today, a humanitarian twelve-hour ceasefire… We should implement a temporary humanitarian ceasefire in any event".

The minutes of the cabinet discussions held during Operation "Protective Edge" indicate that both the political echelon and the senior military echelon took into account, as part of the conduct of the combat in Gaza, the issue of humanitarian aid to the residents of Gaza

58 On July 23rd 2014, the UN Human Rights Council, in its resolution S-21/1, decided that an independent international commission of inquiry should be urgently established to investigate all violations of international humanitarian law and human rights law in the Occupied Palestinian Territories (as defined in the resolution) in the context of the military operations that have been taking place since June 13th 2014. The resolution also referred to the Gaza Strip. The committee submitted its findings on June 22nd 2015.

In the Cabinet meeting held on July 30th 2014, regarding "Protective Edge", the Prime Minister asked the IDF to give a review of the humanitarian situation in Gaza. The Coordinator, Major General Yoav (Polly) Mordechai, reviewed the situation in Gaza and updated that "The entire emergency mechanism is working on generators from day to day from diesel fuel that we bring in through Kerem Shalom. The biggest danger is that for all the emergency capabilities, they too will not have energy, and then the problem will get much worse". The Prime Minister replied that "This can be a very difficult problem and we need to [give] it consideration".

The Coordinator further updated: "We have been conferring for a number of days with all of the international bodies. We have asked them to bring chemical toilets as well as equipment, generators and everything possible to try and push into the Gaza Strip. We also approached the Palestinian Authority in Ramallah and asked them to organize as many things as possible. We know how to create platforms. As per our responsibility, the State of Israel should also bring in generators. I have already turned to IEC and checked their capabilities to bring in generators into the Gaza Strip. If the next stage is that the international arena will not provide solutions, we will have a legal obligation to provide solutions to what is happening in the Gaza Strip. In my eyes, this would be the worst development, leaving us with more responsibility, even though it is external, but still a responsibility. Therefore, today the window of time is not a window of negotiations and not of messages; it is a window of humanitarian needs only. From three o'clock to seven o'clock in the evening, excluding combat zones, we allowed the people something basic, people who will maybe go to buy equipment, food, go to the hospital and return. We allowed a four hour break that is really minor, but also important, except for the combat zones".

Regarding the State of Israel's obligation to deal with the humanitarian situation in Gaza, the Attorney General at the time, Adv. Yehuda Weinstein, explained that "This is not necessarily a legal problem, but it is a humanitarian problem. We are committed to solving humanitarian problems" and the Prime Minister stressed: "I am making a distinction between the legal issue and the practical issue in the field... If I had to explain the main thing that is required of this table, it is to deal with several dimensions at the same time! Not only one dimension, not only the military aspect but also the political aspect and the public relations aspect and the humanitarian aspect". Later on in the meeting, the Attorney General said: "Minister of Defense, the humanitarian story, I think, is still missing. It is something that is imposed on us and not on others. If there were alternatives and we could bring things in there from other places, so be it, but there are no alternatives, this is imposed on us alone. I am putting aside for a moment the legal duty and I will soon address it, but even if this does not exist, morally, conscientiously, as a person, as a

state, as an army, to do it - I think these things are among the basic principles. Besides, we also have a legal obligation".

The Minister of Defense replied: "First of all, we have an open field hospital... Two - electrical repairs. We are dealing with this, repairing the electricity system... Three, Kerem Shalom is open even now... If organizations want to help, this convoy or another convoy, we will certainly allow their entry within a short time. Therefore, it is forefront on our mind, but as you see it is a very high friction event, the terrorists are within the civilian population and these are the results".

At the cabinet meeting held on August 1st 2014, in the matter of "Protective Edge", the Prime Minister instructed the government ministries to mobilize the government ministries to deal with the humanitarian situation in Gaza.

At the cabinet meeting held on August 5th 2014, the Head of the Operations Directorate at the time, Major General Yoav Har Even, reviewed the IDF's activity and noted: "In the course [of the Operation] we conducted a humanitarian effort, reviewing it every day. You can see the numbers here – close to one thousand nine hundred trucks with food, medicine and humanitarian equipment, and in the coming days this will increase".

The minutes of the cabinet discussions held during Operation "Protective Edge" indicate that both the political echelon and the senior military echelon took into account, as part of the conduct of the combat in Gaza, the issue of humanitarian aid to the residents of Gaza. The Prime Minister instructed the IDF several times that the improvement of the humanitarian situation in Gaza due to the combat is important. The military echelon made sure to emphasize to the political echelon the great importance it attributes to improving the humanitarian situation of the residents of Gaza as a result of the combat and detailed its efforts to assist in this area.

The State Comptroller notes that the information described above regarding the significant weight given to the rules of international law in the IDF's activity in Gaza, regarding the legal advice that accompanied all of the cabinet discussions during the operation, and the efforts to improve the humanitarian situation in Gaza, indicate that in giving said instructions, both the civilian supervisors and the military commanders ensured that steps were taken to prevent potential violations of the provisions of international law.

The Turkel II Report and the implementation of its recommendations

Background

in June 2010, following the "Mavi Marmara incident" of May 2010[59], the Israeli government appointed[60] an independent public commission - the Turkel Commission (or 'the Commission') - to examine aspects relating to the actions taken by the State of Israel to prevent the arrival of vessels to the Gaza Strip coast on May 31st 2010, and to examine "whether the mechanism for examining and investigating complaints and claims raised in relation to violations of the laws of armed conflict, as conducted in Israel generally, and as implemented with regard to the present incident, [the maritime incident of 31 May 2010], conforms with the obligations of the State of Israel under the rules of international law". Along with Israeli experts in various fields, renowned international experts in the field of international law were added to the commission as observers.

In addition to the Law of Armed Conflict, there are three legal branches from which the duty to examine and investigate violations of international humanitarian law is learned - international human rights law, international criminal law and the laws of state responsibility. These laws impose on parties to an armed conflict the obligation to investigate alleged violations of international humanitarian law.

In October 2010, following the appointment of the Turkel Commission and prior to the publication of its recommendations, Judge Mary McGowan-Davis was appointed to chair the Davis Commission[61]. In March 2011, the Davis Commission submitted its conclusions noting, *inter alia*, that Israel had dedicated significant resources to investigate allegations of operational misconducts in the course of operation "Cast Lead"[62], and has made progress

59 See footnote 4.

60 See footnote 5.

61 The Davis Commission - an examination committee set up by the Human Rights Council to examine the investigation conducted by the parties - Israel and the Palestinians - regarding the legality of the fighting in Gaza during Operation "Cast Lead" (Oferet Yetzuka).

62 Human Rights Council, Report of the Committee of independent experts in international humanitarian and human rights law established pursuant to Council resolution 13/9, para 78 U.N Doc. A/HRC/16/24 (March 18, 2011).

in investigating the concrete cases mentioned in the Goldstone Report[63]. It should be noted that the Davis Commission noted positively the work of the Turkel Commission, and concluded that "a public commission of inquiry like the Turkel Commission is an example of a mechanism that Israel can use".[64]

In February 2013, the Turkel Commission submitted to the government the second report on "Israel's Mechanisms for Examining and Investigating Complaints and Claims of Violations of the Laws of Armed Conflict According to International Law". The Turkel report stated that the Commission was asked to examine this issue, *inter alia*, "in view of the criticisms leveled in Israel and internationally with regard to the manner in which Israel investigates complaints and claims of violations of international humanitarian law".

On January 5th 2014, the Government decided, in accordance with recommendation 18 of the Turkel Report (Resolution No. 1143) on "The appointment of a team to review and implement the Second Report of the Public Commission to Examine the Maritime Incident of May 31st 2010 (regarding the examination and investigation in Israel of complaints and claims of violations of the Law of Armed Conflict under international law)" ('the Ciechanover Team'). The resolution states, *inter alia*, that the Ciechanover Team "should study the report, examine the need for various adjustments and improvements, and propose concrete ways for its implementation", and that "the team will submit its recommendations to the Prime Minister within nine months of its appointment", meaning – by October 2014. On September 20th 2015, about a year after the scheduled date, the Ciechanover Team submitted its recommendations to the Prime Minister.

On September 2nd 2015, about three weeks before the Ciechanover Team submitted its recommendations, the State Comptroller's Office issued a draft report containing findings on "IDF activity from the perspective of international law, particularly with respect to the civilian and military echelons' examination and control mechanisms" (the Interim Draft).

As noted, after Operation "Protective Edge", the MAG Corps received information on 464 exceptional incidents in which uninvolved civilians were allegedly harmed or damage was caused to their property. In the course of the operation, the Chief of General Staff at the time, Lieutenant General (res.)

63 The Goldstone Commission was established on April 3rd 2009 by the UN Human Rights Council. The commission examined all violations of international human rights and humanitarian law that may have been committed in the course of the hostilities in Gaza during Operation "Cast Lead".

64 Human Rights Council, Report of the Committee of independent experts in international humanitarian and human rights law established pursuant to Council resolution 13/9, para 80 U.N Doc. A/HRC/16/24 (March 18, 2011).

Benny Gantz, appointed Brigadier General Noam Tibon as "Head of the Investigating Team - Operation "Protective Edge"" (the Mechanism commander). Shortly after the appointment, the team began examining exceptional operational events that occurred during Operation "Protective Edge", at first, according to a directive of the Chief of the General Staff, upon the recommendation of the MAG, and later on as a fact-finding assessment of the exceptional incidents described above. According to the letter of appointment, the Head of the FAA Team should "examine, among other things, the manner of planning an operation, the process of identifying the target as a legitimate military target for attack (the 'incrimination') if any, the attack procedure, and the interfaces between the relevant forces, relating, *inter alia*, to the relevant operational directives. In addition, in respect of any event, you [the team leader] should receive guidance from the MAG regarding the relevant facts that require clarification".

The audit revealed that of the 464 exceptional incidents that had reached the MAG Corps, a criminal investigation was launched by the MPCID in 25 cases; 68 incident cases were closed by the MAG's decision not to order an MPCID investigation; and 330 incidents were transferred for the FFA Mechanism's examination[65]. Amongst the cases forwarded for the Mechanism's examination, the Mechanism completed handling 167 cases and transferred them to the MAG Corps to decide whether to open an investigation, while in 163 cases, the examination is still pending. 85 of the cases forwarded to the MAG Corps are being examined by it[66] and 82 were closed without ordering the launching of an MPCID investigation.

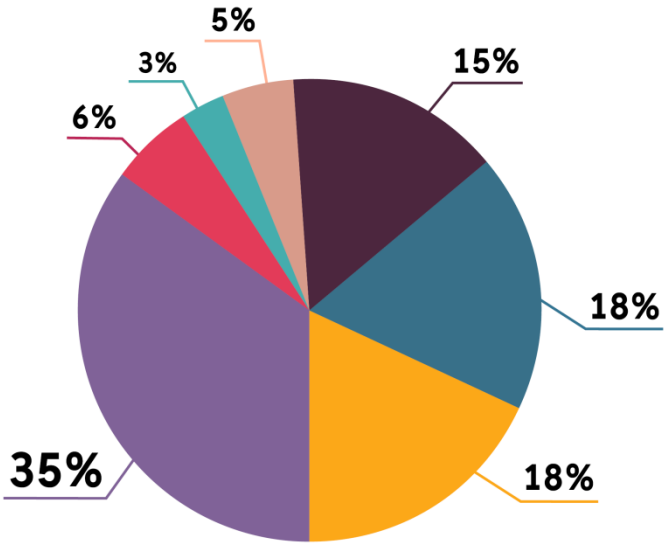
After Operation "Protective Edge", the MAG Corps received information on 464 exceptional incidents in which uninvolved civilians were allegedly harmed or damage was caused to their property

65 The status of the remaining 41 cases is "cases without status" or "cases not to be forwarded for investigation" and "events frozen due to an investigation".

66 For a decision as to whether there is reason to launch a criminal investigation.

Illustration 1: **464 exceptional incident files that reached the MAG Corps according to their status**

Status of handling of exceptional incidents from Operation "Protective Edge" as of January 7th 2016



Event handled by the MAG's Corps

Event closed after the FFA Mechanism's examination

Closed by the MAG without the FFA Mechanism's examination

MPCID investigations

Events without a status

Events that will not be transferred to the FFA Mechanism and events frozen due to an investigation

Events handled by the FFA Mechanism

The Normative Basis

International law and the grounds for launching an investigation

As stated, in addition to international humanitarian law, there are legal branches that determine the obligation to examine and investigate violations of international humanitarian law. This obligation developed mainly within the framework of international human rights law. However, the Turkel II Report states that the wording of the principles in human rights law is general, and therefore can be adapted to the frameworks of armed conflict and humanitarian law. The Turkel II Report states: "The duty to conduct an investigation whenever there is a reasonable suspicion of the commission of a war crime is well established in international law. In the absence of a reasonable suspicion of a war crime there is still a duty to conduct a fact–finding assessment when the information is only partial or circumstantial, particularly where there has been an exceptional event or incident such as unanticipated civilian casualties".

According to international criminal law, in the adjudication of violations of international law, the domestic judicial system has precedence over an extra-state judicial system, based on two principles: the "principle of complementarity" - the authority of an international jurisdiction will be exercised as a last resort when states are unwilling or unable to exercise themselves their duty to investigate and prosecute; and the "principle of subsidiarity" – giving precedence to a jurisdiction with territorial or national nexus over an international authority, which has subsidiary responsibility.

According to the principle of complementarity and the principle of subsidiarity, the proper functioning of the investigative and judicial systems of the State of Israel and their ability to comply with the rules of international law should therefore serve to obviate any intervention of external courts in the sovereign affairs of the State.

The Turkel II Report states that "The Commission is satisfied that a legal obligation to undertake an **investigation** applies to those acts that constitute serious violations of international humanitarian law otherwise known as 'war crimes'. Furthermore, in order to ensure future compliance, there is an obligation to conduct some form of **examination** into violations of all other provisions of international humanitarian law" (emphasis in the original text). The Commission further noted that "the threshold required for an investigation is where a credible accusation is made or a reasonable suspicion arises that a war crime has been committed." The Commission added: "Not every case of death or injury of a person in an armed conflict amounts to a breach of the rules of international humanitarian law. The death or injury of

combatants, civilians directly participating in hostilities, and collateral civilian casualties that are proportionate are permissible under international humanitarian law… it will be the context in which the incidental death or injury occurred that will determine whether there is a reasonable suspicion of the perpetration of a war crime. Any such reasonable suspicion will immediately trigger an investigation".

In addition to the obligation to carry out an examination and investigation, international human rights law establishes four general principles (hereinafter - the General Principles) that are material requirements that an investigation should comply with in order to be considered effective, i.e., an investigation capable of reaching the truth, and one that will enable, *inter alia*, a determination in the matter of liability for the act, and in appropriate cases, to bring to justice the perpetrator of the violation. The four general principles are: independence, impartiality, effectiveness and thoroughness, and promptness. According to the Turkel II Report, international human rights law extends and defines the requirement of transparency as a fifth principle. The Turkel II Report states that, "When an investigation during armed conflict is required, it must be conducted in accordance with the general principles for an 'effective investigation' … The precise content of the general principles may vary according to the specific context and the prevailing conditions".

The Turkel II Report further states that "in the context of an armed conflict, there are instances in which a fact–finding assessment is required to determine whether an investigation should ensue. The main purpose of this assessment is to collect sufficient information about the incident. In addition, it must facilitate a potential investigation, and not hinder it.... The fact–finding assessment must be carried out in a way that fulfils its overall purpose, in other words, it must be carried out with professionalism, expertise, and promptness so that it facilitates a potential investigation and does not hinder it." The Report also states that "there are different types of effective investigations. Criminal investigations are one, but other types may also suffice, as long as they conform to the general principles, thereby constituting an 'effective investigation'....Thus, for example, when facing situations that may not be properly addressed by a criminal investigation, due to their nature, complexity, or scope, it is appropriate to use additional or complementary tools".

In October and November 2016, Prof. Newton wrote to the State Comptroller an opinion in which he stressed the importance of the fact that the examination of every event by the FFA includes explicit reference to the identity of any examinee who may bear criminal liability for the event being examined.

Israeli law – the grounds for carrying out investigations and the mode of their execution

Suspicions of acts that amount to "war crimes" - except for offenses under the Nazis and Nazi Collaborators Punishment Law, 5710–1950 - are investigated based on offenses specified in the Penal Law, 5737–1977, which include, *inter alia*, offenses of murder, manslaughter and rape.

With respect to this matter, the Supreme Court has ruled[67] that "In cases where the laws of war have been violated, indictments will be filed under Israeli law and in respect of an appropriate criminal offense, which generally conforms to the principles of international criminal law. In such cases, the prosecutor should establish the elements of the specific offense as in any other criminal trial". It should be emphasized that according to the Penal Law, there is no offense and no punishment for it unless it is prescribed by statute or pursuant thereto[68]. In other words, in order for criminal proceedings, including a criminal investigation, to be instituted for offenses under international law, they should be determined as offenses under Israeli law.

The obligation to investigate allegations of violations of international humanitarian law is also enshrined in Israeli law by virtue of the constitutional recognition of the right to life, as determined in the Supreme Court's ruling[69]: "This right is a fundamental right protected under Israeli law, and it the right of any person under international law as well. The right to life is enshrined in international human rights conventions and is held by the protected persons according to the laws of war and occupation... Even when a violent clash occurs, rules apply that require the combat forces to respect human life and, to the extent possible, respect the basic rights of civilians not involved in combat". The ruling also states in this regard that "The investigation itself has implications for the protection of the right to life – the investigation allows first and foremost prosecution in suitable cases and the imposition of responsibility on those who violate the law. Moreover, a criminal investigation works to preserve the forward-looking element of the duty to protect life by deterring future injury, preventing contempt for the right to life and contributing to the atmosphere of the rule of law".

In addition to the offenses set out in the Penal Law that enable, as stated, the prosecution of violations of international humanitarian law, the Military Justice

The obligation to investigate allegations of violations of international humanitarian law is also enshrined in Israeli law by virtue of the constitutional recognition of the right to life

67 HCJ 3292/07 **Adalah - The Legal Center for Arab Minority Rights v. the Attorney General** (published in computerized database, December 8th 2011).

68 Article 1 of the Penal Law, 5737 – 1977.

69 HCJ 9594/03 **B'Tselem - The Israeli Information Center for Human Rights in the Occupied Territories and the Association for Civil Rights in Israel v. The MAG** (published in computerized database, August 21st 2011).

Law applies to IDF soldiers, *inter alia*, certain provisions stipulated in the Penal Law, and also includes special punitive provisions for "military offenses", including the crime of looting, which is a war crime under international law. In addition, General Staff Order 33.0133[70] establishes the obligation of IDF soldiers to act in accordance with the four Geneva Conventions. Failure to fulfill these obligations constitutes grounds for prosecuting soldiers in the regular army or in reserve, and of military-related civilians[71].

According to the Military Justice Law, a commander who knows or has reason to believe that one of his subordinates has committed an offense that can be tried in a military court, including a violation of international law, shall file a complaint or order the preparing of a complaint for the offense and bring it before a judicial officer.

The grounds for holding an investigation in the IDF following complaints and allegations of violations of international humanitarian law are set forth in General Staff Order 33.0304, entitled "Examination and Investigation of the Military Police Criminal Investigations Division" (hereinafter - the Order), and in the MAG's directives. According to Section 63 of the Order, an investigation of the MPCID should be opened in cases where there is reason to suspect that the offenses specified in the Order, including: abuse, looting, rape and illegal use of a weapon (use of weapons without authority or without proper precautions, resulting, *inter alia*, in the injury of a person, or the creation of a deliberate risk to a person or unlawful discharge of a weapon). The Order further states that an investigation of the MPCID will be opened in cases where there is reason to suspect that an offense under the Penal Law, that has no military equivalent in the Military Justice Law, had been committed.

Information on violations of international humanitarian law can be brought to the MAG Corps by means of reporting of the commanders, a complaint filed by the victims themselves or by human rights organizations representing them, media reports or Israeli or other reports regarding a certain incident. The information is examined by the MAG Corps, and if it does not raise suspicion of criminal activity, the decision to open an investigation is suspended until the operational debriefing is received.

Apart from the criminal investigation and unconnected to it, the IDF conducts an "operational debriefing" or "military debriefing", which is an examination conducted by the army for the purpose of drawing lessons, rather than a criminal investigation into an incident that occurred during training or operational activity or in connection thereof. Article 539a of the Military

70 See footnote 29.

71 Volunteers in reserve forces or working in the army and any person who is lawfully in the custody of the army or who has been given weapons by the army.

Justice Law, Supreme Command Order 2.0702[72] and the instruction of the Operations Directorate on the subject of "Drawing Lessons, their Implementation and Assimilation" determine the operational guidelines for the operational debriefing. According to these directives, the operational debriefing is usually carried out within the framework of the relevant unit, and the debriefing material is classified. Article 935a of the Military Justice Law determines that "Statements made in the debriefing, the minutes of the debriefing, any other material prepared in its course, as well as the summaries, findings and conclusions [hereinafter - the Debriefing Material] will not be accepted as evidence in a trial, except in the trial for providing false information or for concealing an important detail in the debriefing".

It is further stated in this article that "In the event the MAG or his deputy finds that the Debriefing Material reveals suspicions of a commission of an offense that justifies an examination or investigation by an investigating body, he may, after consulting an officer with the rank of Major General at least, instruct the investigating body in writing to launch an investigation… In the event that the MAG or his deputy order an examination or investigation, he shall describe in his instruction the circumstances of the incident following which the debriefing was conducted and the reasons for which suspicion arose of the commission of the offense; however, no Debriefing Material will be attached to the instruction, nor will it indicate a suspicion against a person involved in the incident".

The rules relating to the legal status of the operational debriefing, and especially the confidentiality of the information gathered during the debriefing, are intended to ensure the reliability of the data gathered in the framework of the debriefing. The person conducting the debriefing is not subject to the rules of evidence, and he is entitled to collect testimony from any soldier who was involved in the incident or whose testimony is necessary for the debriefing, and to receive any relevant document. As opposed to a criminal investigation, the soldiers being questioned are not entitled to legal representation, to the right to remain silent or to the right against self-incrimination. Following the completion of the operational debriefing, its findings are presented to the senior echelons of the IDF (the Corps Commander or Directorate Commander), and in some cases even to the Chief of General Staff's approval. In cases where the MAG requests this, the findings of the debriefing are forwarded for his examination, for the purpose of a preliminary examination to determine whether the findings raise suspicion of an offense that would justify opening an MPCID investigation. The High Court of Justice[73] addressed the MAG's reliance on the operational debriefing for the purpose of gathering the information that underlies the

72 Supreme Command Order on "Debriefing classified as privileged" dated September 21st 2003.

73 The **B'Tselem** ruling, see footnote 64.

decision to open an investigation, stating: "We did not see fit to interfere with the policy of the respondent [the MAG]... It is indeed possible that there are drawbacks to the operational debriefing, as a tool on which the MAG's decision is based, and consideration should be given to biases of the kind noted by the petitioners [B'Tselem and the Association for Civil Rights in Israel] when examining the operational debriefings in order to reach a decision on the need to open a criminal investigation. However, there is no escaping using this tool, being the only tool for an immediate examination of the conduct of the military unit". The Turkel II Report also dealt with this topic and recommended not relying on the operational debriefing in order to reach a decision on opening an investigation, as will be detailed below.

The implementation of the Turkel Commission recommendations

General

In February 2013, the State of Israel published the Turkel II report[74], and it was widely publicized, including in foreign languages. This publication created a representation, both internally and vis-à-vis the international community, that this report represents the principles that will guide the State and the military, and that they intend to act in accordance with what is stated therein. The Turkel II report states, *inter alia*, that "it may be determined that the examination and investigation mechanisms in Israel for complaints and claims of violations of international humanitarian law and the methods they practice, generally comply with the obligations of the State of Israel under the rules of international law. However, the Commission is of the opinion that in several of the areas examined there are grounds for amending the examination and investigation mechanisms and that in several areas there are grounds for changing the accepted policy... It should be emphasized that where the Commission saw a need for amendments or changes to the mechanisms and operating methods, it does not necessarily indicate essential flaws, but rather it is a blueprint for optimal improvement."

The recommendations of the Turkel Commission, as a public commission appointed by the government, such as the recommendations of a state commission of inquiry, do not obligate the government as long as it does not adopt them. However, with regard to the recommendations of a state

74 An English version was published on the internet at http://www.pmo.gov.il/SiteCollectionDocuments/turkel_eng_b1-474.pdf

commission of inquiry, the accepted approach is that these recommendations should be given considerable weight. In this matter, it was held in HCJ 935/89[75]: "The governmental body that makes a decision following the recommendations of a commission of inquiry is not required to obey them... However, it is not entitled to ignore them. It should examine the recommendations on their merits, while giving them the appropriate weight... This weight is derived from the objective, professional and official nature of the commission of inquiry, from the depth of its investigations, the fairness of its deliberations and its impartiality, from its wide horizons and the seriousness of its recommendations, and the public's expectations that its recommendations will be implemented". The practice is that the government of Israel adopts the recommendations of state commissions of inquiry, unless there are momentous circumstances that justify them not being adopted. Although these statements were written with regard to a state commission of inquiry, it should be noted that the Turkel Commission discussed a professional-legal question, with the assistance of international observers, consultants and experts who accompanied its work. The Commission's work received international attention, and the report that was of a legal-professional nature is highly regarded in the international community, hence the significant weight of the recommendations of the Commission.

The fact that the Turkel Commission's work received international attention, and that the report was of a legal-professional nature highly regarded in the international community, hence the significant weight to its recommendations

On January 5th 2014, the government decided to appoint the Ciechanover Team "for the examination and implementation of the Turkel II report", in order to examine the need for various adjustments and improvements and to propose concrete ways to implement it. In September 2015, the Ciechanover Team submitted its recommendations to the Prime Minister and only on July 3rd 2016 the Political - Security Cabinet decided to adopt the Team's recommendations in Resolution No. 125/B and to set up a team to monitor the implementation of its recommendations and to report on the matter to the Prime Minister and the relevant bodies every six months. The team will be headed by the Head of the National Security Council and will include, *inter alia*, a representative of the Attorney General, a representative of the Ministry of Justice and a representative of the Ministry of Defense or the IDF, including representatives of the MAG.

75 HCJ 935/89 **Ganor v. the Attorney General**, Supreme Court Rulings 54(2) 485, 520 (1990). See also HCJ 4585/06 **the Committee of the Families of the Victims of October 2000 v. the Minister of Public Security** (published in computerized database, October 24th 2006).

The audit found that only in July 2016, three years and five months after the Turkel Commission submitted the Turkel II report, and only after the State Comptroller's Office distributed the draft of the current audit report to the audited bodies, did the Security Cabinet discuss the recommendations of the Ciechanover Team for the implementation of the Turkel II report recommendations, and decided to adopt them.

The State Comptroller's Office notes that the impact of the Turkel II report on the international community, *inter alia*, in view of the extensive publicity given by the State to the report and its recommendations, including its full publication in English and the publication of parts of it in other languages on an official State website, created a representation, both domestically and internationally, according to which the report indeed represents the principles guiding the state and the military, and that they intend to act in accordance with what is stated therein.

The State Comptroller's Office believes that in this situation, and even after the government decided to adopt the Ciechanover Team's report to implement the recommendations of the Turkel II report, as stated, any significant deviation from the recommendations of the Turkel Commission is liable to be perceived by the international community as a deviation on the part of the State of Israel from the recommendations of a professional committee appointed by it, with all the implications thereof.

Despite the above, once the government made a decision on this issue, the Ministry of Justice, the IDF and all other relevant bodies should act as soon as possible to implement the Ciechanover Team's report, in order to improve the state and army's compliance with their commitments to optimal conduct in times of combat and defense, including in accordance with the rules of international humanitarian law.

In July 2016, the Head of the Ciechanover Team, in his response to the findings of the draft report, stated, "The Turkel Commission has done a thorough and professional job, and we made sure not to deviate from the Commission's recommendations except in cases where we realized that the implementation of the recommendation as written, would harm the effectiveness of the implementation... There were several instances where the Commission's recommendations were given without the consent of the bodies that were supposed to carry them out, or without consultation with them, and in other cases it became clear to the bodies once they had again examined the Commission's recommendations, that they could not implement them. In cases where we believed that these reservations were justified, we strived to

reach a solution that would express the difficulties the bodies encountered, while ensuring that the Team's recommendations would not deviate materially from the report's intention and from the purpose underlying its recommendations... The provisions of international law, particularly international humanitarian law, give the states latitude in choosing the manner in which they examine and investigate allegations of violation of the laws of armed conflict".

In August 2016, the Prime Minister's Office stated in its response to the findings of the draft report that "The publication of the reports of public commissions in itself does not constitute a commitment on the part of the government or its head in respect of their findings... Instruction no. 1.1502 of the Attorney General... explicitly states that 'The conclusions and recommendation of an advisory committee have no binding legal standing'. The reports of public commissions are published, *inter alia*, for reasons of transparency and sometimes for the purpose of receiving comments from the public, and this does not increase the level of the government's commitment to their conclusions".

The Prime Minister's Office also noted in its response to the findings of the draft report that "The Cabinet held a thorough and exhaustive discussion before adopting the recommendations of the Ciechanover Team after it was presented with all the relevant materials, including the Ciechanover Team report, a summary of the report, as well as **a table detailing the differences between the recommendations of the Turkel II report and the recommendations of the Ciechanover Team**... The Cabinet's decision was duly made, in accordance with all the necessary administrative standards, while emphasizing the differences between the recommendations of the Turkel II Report and the recommendations of the Ciechanover Team" (emphasis in the original text).

In September 2016, the IDF informed the State Comptroller's Office in its response to the findings of the draft report that "**From the time the Ciechanover report was approved by the Cabinet, the IDF is obligated to implement fully the recommendations of the Ciechanover report, as adopted by the Cabinet. The adoption of the Ciechanover report in the Cabinet resolution is the binding standard that guides the IDF**... The IDF has already begun implementing the recommendations of the Ciechanover Team in the course of the Team's work [and] continues to work forcefully to complete the implementation of the recommendations of the Ciechanover report... in the coming months until the full implementation of the report in its entirety" (emphasis in the original text).

In January 2017, the Attorney General informed the State Comptroller's Office in his response to the draft report that "Once the Security Cabinet has dealt

with this matter, the criterion that binds state bodies, including the Ministry of Justice and the IDF, is the Cabinet's decision... The Ministry of Justice is committed to completing the implementation of the recommendations... [and] is acting vigorously to do so as soon as possible".

The State Comptroller's Office examined the implementation of the recommendations of the Turkel II report concerning the Ministry of Justice, the Attorney General and the IDF, including the recommendations of the Ciechanover Team, which adopted the Turkel Commission recommendations. In addition, the State Comptroller's Office examined the differences between the recommendations of the Ciechanover Team and the recommendations of the Turkel II report concerning the Ministry of Justice, the Attorney General and the IDF, which the Ciechanover Team did not fully adopt. Following is a detailing of the findings:

Recommendation No. 1 - "war crimes" Legislation

The Turkel II report states that according to various bodies and individuals, "the list of crimes in Israeli law is only partial and does not include all acts defined as war crimes under international humanitarian law" and that they "do not reflect the severity of the violations under international humanitarian law". The report also cited the response of the Attorney General dated September 27th 2011 regarding the same arguments, according to which "in practice, Israel's criminal law is to a great extent commensurate with the offenses stipulated by international law", and "the Ministry of Justice has, over the years, monitored developments in international law', and 'assessed these developments against Israel's obligations' and the practices of various States 'in incorporating international crimes into their domestic legal system".

The report notes that the Attorney General's letter of response indicates that "there is not a full commensuration between the norms of Israeli criminal law and those of international law". According to the Turkel Commission, in order to comply with international law, which requires "to enact any legislation necessary to provide effective penal sanctions… it is satisfactory to 'translate' the behavior amounting to a war crime into an existing offense in the domestic legislation, provided that it reflects the severity of the violation under international law". Accordingly, the first recommendation in the Turkel II report is: "The Ministry of Justice should initiate legislation wherever there is a deficiency regarding international prohibitions that do not have a 'regular' equivalent in the Israeli Penal Law, and rectify that deficiency through Israeli criminal legislation"

The Ciechanover Team recommended that "the Ministry of Justice act soon to continue promoting legislation to anchor the offense of torture in the Penal

Law and legislation pertaining to crimes against humanity... [and] the continued consideration of the need for further legislative amendments with respect to war crimes".

At the time of the conclusion of the audit, January 2016, the recommendation regarding the "enactment of war crimes" legislation has not yet been implemented: despite the activity of the Ministry of Justice in this matter, it has not yet submitted bills to amend Israeli legislation to supplement legislative gaps in international law, in accordance with the recommendation of the Turkel Commission, which was adopted by the Ciechanover Team.

Despite the activity of the Ministry to amend Israeli legislation to supplement legislative gaps in international law the recommendation regarding the "enactment of war crimes" legislation has not yet been implemented

In September 2016, the Attorney General informed the State Comptroller's Office in his response to the draft report that "The draft memoranda concerning the offense of torture and the Crimes against Humanity Law were presented to me at a meeting chaired by me on August 8th 2016 and were approved by me, subject to further work being done on them on a number of points. The draft memorandum on the offense of torture will be presented to the Minister of Justice in the near future, and if her approval is given, the memorandum will be distributed. The memorandum of the Crimes against Humanity Law is in final stages of completion and will be distributed as well".

The State Comptroller's Office reminds the Ministry of Justice that in view of the importance of including the principles of international law in Israeli law, it should expedite the promotion of legislation in this matter, in order to improve the compatibility between Israeli legislation and international law and to ensure that it includes all the offenses relevant to the definition of war crimes.

Recommendation No. 2 - The responsibility of military commanders and civilian superiors

The Turkel II report states that "The Commission recommends enacting provisions that impose direct criminal liability on military commanders and civilian superiors for offenses committed by their subordinates, where the former did not take all reasonable measures to prevent the commission of offenses or did not act to bring the matter to the competent authorities when they became aware of the offenses ex post facto". The Commission further recommended that "Orders by commanders may in themselves (as distinct from omissions by commanders) also constitute violations of international humanitarian law".

The Turkel Commission noted that Israeli criminal law does not explicitly address the responsibility of commanders and superiors and their obligation to prevent offenses, but "IDF commanders are required 'to strictly maintain discipline and compliance with the law and the orders', and to take disciplinary action against any offender". The Commission further noted in this matter, that according to the MAG, "it is the obligation of each commander to prevent and suppress violations of the laws of war by his subordinates, insofar as these are incorporated in military orders" ", and that "The question of the criminal liability imposed on commanders for the failure to prevent offenses of their subordinates was dealt with in rulings of the courts martial".

The Ciechanover Team also recommended that, "Whereas until the completion of the Implementation Team's work the examination of the matter has not yet been completed, we recommend the continued handling of this matter, as instructed by the Attorney General, led by the Ministry of Justice in cooperation with the Military Advocate General's Corps and the other relevant bodies, so as to determine as soon as possible the principles that will express in the legislation the responsibility of military commanders and civilian superiors".

The audit revealed that, although more than three years had elapsed since the submission of the Turkel II report, the Ministry of Justice has not completed the legislative amendment in accordance with recommendation no. 2 therein and in accordance with the Ciechanover Team's recommendation on this matter.

In August 2016, the IDF informed the State Comptroller's Office that in May of that year the MAG Corps had forwarded to the Ministry of Justice a draft bill intended to implement the said recommendation by establishing the criminal liability of military commanders and civilian superiors for offenses committed by their subordinates.

In September 2016, the Attorney General submitted to the State Comptroller's Office in his response to the draft report that "The responsibility of military commanders and civilian superiors... contains several additional complex points requiring elucidation, and therefore additional work is required with respect to it. Therefore, I instructed... to promote further work on the subject".

In November 2016, the IDF informed the State Comptroller's Office: "It should be emphasized that commanders who allegedly gave orders to violate the Law of Armed Conflict are expected... to be interrogated, and were indeed interrogated as part of the investigation proceedings conducted and still being conducted in respect of the "Protective Edge" campaign, on suspicion of

carrying out various criminal offenses, defined in the Penal Law and in the Military Justice Law".

The State Comptroller's Office reminds the Ministry of Justice that the commanders' responsibility also applies where they have not taken reasonable measures to prevent the commission of offenses by their subordinates. Therefore, the Ministry of Justice should complete the required legislative amendments as soon as possible, in view of the great importance of these sensitive issues and their impact on IDF activity in future combat events and on the State of Israel in the political and international arena.

Recommendation No. 3 - Reporting Duties

According to the rules of international humanitarian law, commanders have the duty to report violations of international humanitarian law. According to the recommendation of the Turkel Commission, "the Reporting Procedure should be incorporated into the Supreme Command Orders. Moreover, it should be assimilated by all IDF units and sanctions should be imposed on commanders who do not comply with the Procedure". The Commission also emphasized the obligation to document the scene of the incident soon after its occurrence, which includes the seizing of each exhibit and any possible evidence that may assist in the examination and investigation, including the preservation of items such as clothing and ammunition, to the extent possible, which will enable their subsequent examination.

The obligation to report: On July 28th 2014, prior to the release of the Ciechanover Team report, the Operations Division of the Operations Directorate issued a standing order regarding "The provision of an initial report and debriefing to the MAG Corps" (hereinafter – the New Reporting Order), the aim of which is to determine "the manner of providing operational reports and debriefings to the examination bodies"[76]. The New Reporting Order notes that "This reporting has great significance with regard to the legitimacy of IDF's operations and its ability to manage the legal and media campaigns that accompany its military operations... A reliable and prompt report on exceptional incidents will enable real-time response and allow informed decision-making based on the reports of the commanders, thereby helping to preserve the IDF's freedom of action". The order includes, *inter*

76 The order details what must be presented to the Chief of General Staff and the manner of presentation upon the occurrence of an event belonging to one of the seven types of events detailed in the order (e.g. an incident involving casualties among our forces or an incident in which uninvolved civilians were killed).

alia, a description of the events that are required to be reported to the examination bodies in the IDF and the components of the reports to those bodies, including details regarding the documentation of the scene. The New Reporting Order prescribes, *inter alia*, the cases where intentional damage took place, which require reporting, as well as a number of incidents in which the reporting obligation is not contingent on intention, such as: an incident in which civilians were killed on a large scale, or there was harm to UN personnel, media teams and sensitive sites. Provisions concerning documentation are regulated in the Operations Directorate – the Doctrine and Training Order No. 4.7 "Operational documentation – creation, collection and preservation of information generated in operational activity". The order states that "This order should be viewed as a supplementary provision to the provisions of the Operations Directorate – the Doctrine and Training Order No. 1.6, "Reporting procedures and the presentation of event debriefings to the Chief of General Staff".

The Ciechanover Team determined in connection with the new reporting procedure that it "determines the events to which the reporting requirement applies, the method of providing the report and the relevant timeframes.", and that "the Order of the Operations Division on Reporting expands the previous Reporting Procedure[77]". The State Comptroller's Office examined how the New Reporting Order fulfills the reporting obligation in cases of suspicion of violation of the rules of international humanitarian law.

The audit revealed that the New Reporting Order requires reporting of exceptional incidents during routine times and on a list of events during an emergency and during war when there is reasonable suspicion of a serious violation of Israeli or international law by IDF soldiers. However, the order does not require the reporting of any event in which unintentional harm occurred to uninvolved civilians, and limits the obligation to events in which the scope of civilian casualties is extensive and to a number of additional unique incidents.

The State Comptroller's Office reminds the IDF that in times of emergency or war, events may occur that should be examined due to the fact that there is a reasonable suspicion of violations of international law as a result of an operational action, even though the injury to civilians was not intentional; however, the reporting order does not require them to be reported.

The reporting order should be rephrased and stipulate the obligation to report with respect to any event in which there is a reasonable suspicion of a violation of the rules of international law, even if the harm to uninvolved civilians therein was unintentional

77 According to the Turkel II report: "The reporting procedure for incidents in which Palestinian civilians were injured", 2005.

The State Comptroller's Office further notes that the reporting order is of great importance as it enables the IDF to initiate examination and investigation processes, regardless of the filing of complaints or the receipt of information regarding exceptional incidents from human rights organizations or the media. Therefore, the IDF Operations Directorate, in cooperation with the MAG Corps, should rephrase the reporting order and stipulate the obligation to report with respect to any event in which there is a reasonable suspicion of a violation of the rules of international law, even if the harm to uninvolved civilians therein was unintentional, in clear and understandable language and without limiting it to an extensive scope of casualties. In addition, the MAG should determine an official in the MAG Corps that will serve as an address for commanders regarding questions and clarifications related to the reporting duties.

Moreover, the audit revealed that most of the events in Operation "Protective Edge", in respect of which the FFA Mechanism opened an examination, were reported by outside sources rather than by IDF commanders. There is therefore great importance that the Operations Directorate, in conjunction with the MAG Corps take steps to implement the New Reporting Order amongst IDF commanders, while emphasizing the reporting duties.

In August 2016, the IDF informed the State Comptroller's Office in its response to the draft report that it "accepts the recommendation regarding the appointment of an official in the MAG Corps, who can advise the various military echelons regarding the applicability of the order [the New Reporting Order]... as soon as possible".

The documentation obligation: As stated, the Turkel Commission emphasized the obligation to document the scene of the incident shortly after its occurrence, including the seizure of any exhibit and any possible evidence that may assist in the examination and investigation.

The New Reporting Order states that steps should be taken for the most extensive documentation possible of operational material relevant to the exceptional incident and the preservation of this material, in accordance with the provisions of Operations Directorate – the Doctrine and Training Order No. 4.7.

The Ciechanover Team stated, "In light of the importance the Turkel Commission ascribed to the subject of documentation of the scene for the purpose of conducting an effective examination and investigation, we recommend that the relevant provisions in the IDF be updated as soon as possible to ensure effective documentation of the scene, except in cases where, due to operational reasons to be recorded, the scene cannot be

documented immediately after the event. In particular, we recommend that the amended order clearly define the parties responsible in the IDF for documenting the scene... The Team [Ciechanover] recommends that with respect to a violation of this provision the Military Advocate General exercise a strict and effective enforcement policy". In addition, the Ciechanover Team stated, "the Military Police Criminal Investigation Division Commander Order no.22 "Visiting the scene of a crime"… dealing with the investigative documentation of the scene, should be amended so that emphasis is also placed on the scene of an incident that raises suspicion of a breach of the rules of international humanitarian law… the revised order anchor the duty to document the scene by the Military Police Criminal Investigation Division… this order come into force within three months from the date of approval of this report's recommendations by the government".

The audit revealed that at the time of the completion of the audit, an amended order regarding effective documentation of the scene of the incident in combat had not yet been published. In addition, the audit did not find support for the updating of said Military Police Investigations Department order no. 22 ("Visiting the scene of a crime").

In August 2016, the IDF informed the State Comptroller's Office in its response to the draft report that, "at this time, the Operations Directorate is carrying out staff work in order to regulate the matter and internalize it amongst the army ranks. The MAG Corps is involved in this process, which is in its early stages, and is working to promote it, in accordance with the recommendations of the Turkel Commission and the Ciechanover Team… In addition, the MPCID, together with the MAG Corps, is working to amend the MPCID order which deals with documentation of the operational scene, in accordance with the recommendations of the Ciechanover Team... Regarding the assimilation and integration of operational documentation among the forces, it should be noted that a system for operation documentation and information and knowledge management has been developed. The system, which is not yet operational, should include documentation of the war rooms during routine times and during combat, Operational Debriefings, communications recordings, etc."

The State Comptroller's Office reminds the IDF that the Operations Directorate, in conjunction with the MAG Corps, should complete the amendment of the operational documentation order regarding effective documentation of the scene, as recommended by the Ciechanover Team, to take steps to integrate its provisions in suitable training in IDF units and afterwards take steps to enforce it. This is in light of the fact that the Ciechanover Team adopted the recommendations of the Turkel Commission on this issue and even added to them. In addition, the MPCID Commander should take steps to update the MPCID order, which deals with investigative documentation of the crime scene.

Recommendation No. 4 - Grounds giving rise to an obligation to examine and investigate

The Turkel II report states that the investigation policy customary in the IDF generally complies with Israel's obligations under international law. However, the Commission recommended that "the authority to determine such a policy should be defined explicitly in the appropriate rules", and that "upon receiving the Preliminary Report Form, the MAG Corps should immediately classify the legal context of the incident, i.e., whether is it an incident involving 'actual combat', and therefore subject to the rules regulating the conduct of hostilities, or any other incident subject to law enforcement norms. This will aid in directing, as quickly as possible, the assessment of a complaint to the correct channel".

The audit found that, at the time of the conclusion of the audit, it had not been clearly delineated in the IDF's procedures who is authorized to establish an investigation policy in the IDF.. Following are the details:

In the letter of the MAG of March 2014 to the Head of the Ciechanover Team regarding the position of the MAG Corps on the implementation of the Turkel Commission recommendations, it was noted that "The authority to determine the investigation policy stems from the Military Justice Law. However, in accordance with the Commission's recommendation, it will also be expressly enshrined in the Supreme Command's orders. The investigation policy itself will be anchored in the guidelines of the Chief Military Prosecutor".

In the letter of the MAG to the Head of the Ciechanover Team from January 2015, it was noted that "Despite the anchoring in Article 178 of the Military Justice Law, which... encompasses the authority of the MAG to establish an investigation policy, the MAG Corps took steps to anchor this authority in the

MAG' Corps Supreme Command Order, as proposed by the Turkel Commission".

The MPCID Commander told the audit team in June 2015 that "The MPCID unit has the authority to open a criminal investigation according to the decision of the m MPCID commander. This includes an investigation with respect to any violation of international law. The Military Police Investigations Department unit has the authority to carry out an investigation at the end of combat. Usually, the decision is made in cooperation with the Military Advocate for Operational Affairsin the MAG Corps, after examining the complaint... The soldiers must act on the battlefield without fear... However, this does not permit harming innocent people. When an event occurs above which raises a 'black flag' [of illegality], it is necessary to launch an immediate investigation... something that indeed took place during Operation 'Protective Edge'".

The Ciechanover Team noted with regard to the recommendation of the Turkel Commission on this issue that it had reviewed the draft amendment to Supreme Command Order no. 2.0613 in "The MAG Corps", initiated by the IDF, and that "an explicit article enshrining the authority of the MAG to set such an investigation and prosecution policy was included in the draft. This proposal regulates the authority to determine the investigation policy in appropriate directives, and we can only recommend that it be approved and come into effect as written within 30 days from the date of approval of this report's recommendations by the government. Furthermore, it is recommended that after such amendment enters into effect, the investigation policy – as will be determined at that time – shall be included in the guidelines of the Chief Military Prosecutor". The Ciechanover Team further recommended that "the obligation to classify the incident[78] will be anchored in a Chief Military Prosecutor's guideline, and that this guideline determines that the classification shall be made within seven days from the time the MAG Corps learned of the incident, should such classification be necessary"

The audit revealed that at the date of completion of the audit, Supreme Command Order no. 2.0613 has not yet been updated, and that the Chief Military Prosecutor's guidelines have not yet been published, despite the undertakings made in the matter, as stated.

78 Classification in the legal context - is this an event that is subject to norms of law enforcement, or is it an "actual combat" incident to which the laws of armed conflict apply.

In February 2016, the legal assistant to the MAG stated in this matter that the Chief Military Prosecutor's guidelines are merely a draft, and the staff work in their respect had not yet been completed: "After the adoption of the recommendations of the Ciechanover Team by the government, their preparation shall be completed". Regarding the update of Supreme Command Order no. 2.0613, the assistant said that "After approval of the Ciechanover Team's recommendations by the government and subject to them, the draft will be transferred to the MAG's approval and its preparation will be completed".

In August 2016, the IDF informed the State Comptroller's Office in its response to the draft report that "The draft of the Chief Military Prosecutor's directive has been ready for some time... The publication of the directive was awaiting approval of the recommendations of the Ciechanover Team by the political echelon and the allocation of appropriate resources for its implementation. Now that the recommendations of the Ciechanover Team were adopted by the government, the Chief Military Prosecutor's guidelines will be published as soon as possible and will come into effect upon the allocation of the required resources".

The State Comptroller's Office notes that it is important for the IDF to anchor in appropriate directives the policy of handling complaints about events that raise reasonable suspicion of violations of international humanitarian law, in order to emphasize the importance of the matter and to ensure that this policy complies with international law. Now that the government has adopted the Ciechanover Team report, the MAG should see to the amendment of the Supreme Command Order and publish the Chief Military Prosecutor's guidelines without further delay. This should be done in order to anchor explicitly the authority of the MAG to determine the policy of investigations in the IDF, as recommended by the Turkel Commission and the Ciechanover Team.

Recommendation No. 5 - Fact-finding assessment (the workings of the FFA Mechanism)

The Turkel II report states that sometimes, in order to determine whether an investigation should be opened, a fact-finding assessment is required, the main purpose of which is to gather sufficient information about the incident in order to decide whether to launch a criminal investigation. (With regard to Recommendation No. 5, see more in the separate chapter on the workings of the FFA Mechanism).

Recommendation No. 6 - The decision on whether to open an investigation

1. **The time frame for deciding whether to launch an investigation**: The Turkel II report states that "[the Commission recommends] the establishment in procedures of a timeframe of a few weeks during which the MAG shall decide whether to open an investigation based on the material in his possession". The report further stated, "in some of the countries… there are rules providing that, as a matter of policy, an investigation must be opened concerning incidents liable to arouse widespread public criticism, or to raise a public or media outcry (without first conducting a fact–finding assessment)...The Commission views these approaches favorably, and it recommends that the MAG consider ordering the opening of a MPCID investigation, as a matter of policy, with respect to such incidents even in the context of hostilities, especially when the damage was not foreseen".

   The Ciechanover Team recommended in respect of this recommendation, following the draft of the Chief Military Prosecutor's guidelines that was presented to it, that "As a general rule, a final decision on how to handle a complaint will be made by the Military Advocate General's Corps within a period of **up to fourteen weeks from the date of receipt of the complaint**" (emphasis in the original text). The Ciechanover Team further recommended, that "with respect to the examination of events that occurred during times of emergency and in combat, and concluded that in such cases, the above time period for making a final decision on how to handle the complaint shall be counted from the time of the cessation of combat" and that "in combat events, followed by an unusually large number of complaints, the Military Advocate General will be able to extend, for reasons to be recorded, the dates mentioned above, for periods of up to 90 days each" It should be noted that, contrary to the recommendation of the Turkel Commission, according to the recommendation of the Ciechanover Team, the MAG can extend the period of time for a decision on whether to open an investigation without limitation, if following combat incidents an unusual number of complaints were filed.

   In an opinion on the FFA Mechanism's work prepared by Prof. Newton for the State Comptroller in October and November 2016, he stated that it would be necessary to ensure that the amount of time that passed from the conclusion of the FFA Mechanism until the decision of the MAG Corps, does not lead to the conclusion that there was an "unjustified delay in proceedings in which the circumstances do not conform with an intention to bring the person concerned to justice". According to his expert opinion, there should be an established standard to provide some clarity to the

processes; in circumstances where the established timeline is either infeasible or inappropriate, the MAG should be required to specify the reasons for the delay.

The MPCID Commander told the audit team in June 2015 that "The element of time has an impact on the quality of the investigation. An investigation that begins months after the incident occurs is problematic and affects the quality of the investigation". The MPCID Commander emphasized that "when an event occurs above which a 'black flag' is raised, it is necessary to launch an immediate investigation (for example, in cases of looting), something that indeed took place during Operation "Protective Edge"".

The audit revealed that, at the time of the completion of the audit, the Chief Military Prosecutor's guideline regarding this recommendation had not yet been published, including a time frame within which the MAG would have to decide whether to open an investigation.

In July 2016, the Head of the Ciechanover Team stated in his response to the draft report that "In balancing the requirement of thoroughness with the requirement for promptness, it would be appropriate to allow, in appropriate cases, relatively short extensions of 45 days each, granted by the most senior IDF officers, accompanied by written reasons".

In August 2016, the IDF informed the State Comptroller's Office in its response to the draft report that "The draft of the Chief Military Prosecutor's directive has been ready for some time, regulating, *inter alia*, the time frame for making a decision regarding the opening of an investigation, and stipulating an obligation for justification on a decision to refrain from opening an investigation... Now that the cabinet has adopted the recommendations of the Ciechanover Team, the Chief Military Prosecutor's guideline will be published shortly and will come into effect upon the allocation of the required resources".

The guideline for the MAG whether to open an investigation and a time frame for making a decision have not yet been published

The State Comptroller's Office reminds the IDF that the principle of promptness is one of the five principles that are designed to ensure that the examination of exceptional incidents is effective (see more below). Furthermore, the time component influences the quality of the investigation, if one is to be launched, and therefore once the Turkel Commission allotted a certain period of time for making the decision with respect to the need for an investigation, and the Ciechanover Team also adopted its determination with regard to circumstances other than combat incidents, the MAG should publish the guideline without delay, and set a defined time-frame during which the MAG should decide whether to open an investigation, including an extension if necessary, *inter alia*, in the case of an unusual number of incidents. The IDF should allocate to the MAG Corps the resources required to comply with this procedure.

In addition, the State Comptroller's Office notes that the MAG should consider determining that in significant cases that are liable to arouse broad public criticism or to generate media or public interest, an MPID investigation be opened immediately, without transferring the incident to the examination of the FFA Mechanism.

2. **The obligation to consult with a Major General**: The Turkel II report further stated, "the MAG should not be obliged to consult with the Major–General responsible for the unit involved in the incident, but rather he shall be allowed to consult with any commander as he sees fit".

   The audit found that the Operations Directorate order determines that the MAG is to examine the findings of the examination of the FFA Mechanism as to whether it is appropriate to order a criminal investigation. The chapter dealing with the FFA Mechanism does not stipulate the MAG's authority to decide to launch an investigation on a consultation with any party. However, Article 3c of Appendix B of the order, which deals with the confidentiality of the information, states that "If the MAG or his deputy find in the debriefing material suspicions of the commission of an offense which may justify an investigation, they may, after consulting with an officer of the rank of Major General, at least, instruct in writing the investigating body to open an investigation". Furthermore, Article 539a(b)(4)(b) of the Military Justice Law determines that if the MAG finds that "The debriefing material raises suspicions of the commission of an offense that justify an examination or investigation by an investigating body, he may, after consulting an officer with the rank of major-general, at least, instruct in writing an investigating body to launch an examination or an investigation".

In the MAG's letter of March 2014 to the Ciechanover Team regarding the position of the MAG Corps on the implementation of the Turkel Commission's recommendations, it was stated, "The consultation is only conducted in cases where a MPCID investigation is opened following a debriefing. In these cases, the relevant officer for consultation **is the Major General**, due to his overall responsibility over the incident and the debriefing proceedings. Due to concerns over delays, addressed by the Commission, a maximum period of 30 days for the consultation will be anchored in the law" (emphasis in the original text).

The Ciechanover Team commented on this recommendation: "We believe that indeed the existing consultation mechanisms can contribute to a fruitful professional dialogue between the command entities and the military legal officers, and that its annulment could harm this discourse. However, and in light of the concern expressed by the Turkel Commission that the obligation to consult may cause a delay in the decision regarding the opening of an investigation, we recommend that Article 539a... be amended so as to limit the time for the conclusion of the consultation to 15 days from the MAG's approach to the General".

In August 2016, the IDF informed the State Comptroller's Office in its response to the draft report that "The recommendation of the Turkel Commission on this issue stemmed from the desire to promote expediency in decision-making. In our view, limiting the duration of the consultation period with the general to 15 days, as recommended by the Ciechanover Team, provides an appropriate response... to the rationale underlying the Turkel Report recommendation... The IDF will take steps to anchor this recommendation in law vis-à-vis the legislative bodies".

The State Comptroller's Office reminds the IDF, that in light of the discretion afforded to the MAG, the rules relating to the MAG's consultation with the Major General should be reexamined, including the possibility of leaving the very need for consultation to the MAG's discretion, and that the rules that will be determined be anchored in military legislation, while preserving the MAG's independent discretion in making his decisions.

3. **The reasoning of the MAG's decision regarding the opening of an investigation**: The Turkel II report states that every decision of the MAG not to open an investigation should state the reasons for the decision.

   The Administrative Procedure Amendment (Statement of Reasons) Law, 5719 – 1958, imposes a duty on public officials to justify their decisions,

except in special cases, including when state security or its foreign relations require that the reasons for the decision not be disclosed. However, the demand for reasons is important due to the following: the need to understand the decision and to remove concern of arbitrary decisions; the need to grant the ability to examine the decision by administrative or judicial review; and the need to establish public trust in government institutions. The High Court of Justice[79] expressed its opinion in this matter, stating: "We believe that the Respondent should give reasons for any decision based on discretion, which can harm a citizen. He must show how and on what basis he has reached a decision, and not only when he is required to show a reason in this court... The decision, if it is not arbitrary, should be based on certain facts, findings and considerations, and if so, why not have all of these be recorded and disclosed to the person the matter pertains to, so that it can be put to a review and a test?"

The MAG justifies his decisions not to open an investigation but this is not anchored in IDF orders or directives

The Ciechanover Team recommended in this matter that "any decision made by the authorized entities in the MAG Corps with respect to a **complaint** in which allegations were raised regarding operational activity of IDF soldiers be reasoned in real-time in detail and be documented in the prosecution's files." (emphasis not in the original text).

The audit revealed that the MAG does indeed justify his decisions not to open an investigation into the incidents that were debriefed, as recommended by the Turkel Commission, but this is not anchored in IDF orders or directives.

The former MAG, Major General Dan Efroni, wrote to the State Comptroller's Office in October 2015, "A draft of the directives has already been written, which... establish the duty to provided reasoning for decisions to refrain from opening an investigation".

In November 2015, the IDF stated in its response to the findings of the draft interim report, "The State Comptroller's recommendation that the MAG provide reasoning for his decisions whenever he decides not to launch an investigation is already accepted and implemented in practice".

79 HCJ 143/56, **Khaled Abd al-Hajij v. the Traffic Controller**, Supreme Court Rulings 11 370 (published in computerized database, May 10th 1990).

The State Comptroller's Office notes that the recommendation of the Ciechanover Team according to which the obligation to provide reasoning for the MAG's decisions not to open a criminal investigation shall apply only to the investigation of complaints, is limiting and is inconsistent with the obligation to provide reasoning required in respect of any administrative decision according to the rules of administrative law, subject to considerations of national security.

In August 2016, the IDF informed the State Comptroller's Office in its response to the draft report, "**All the decisions made regarding operational cases include appropriate reasons, as required by virtue of the duty imposed on the army as an administrative authority**… The reference to the obligation to provide reasoning also exists in the draft of the Chief Military Prosecutor's guidelines, that are to be published soon" (emphasis in the original text).

The State Comptroller's Office points out to the IDF that since its response indicates that in practice the MAG follows the recommendation of the Turkel II report, the duty to provide reasoning should be expeditiously and officially anchored in the army's orders. This is in order to preserve the principle of transparency and to increase trust in the military justice system.

4. **Transfer of material to the command echelon**: In the Turkel II report it was determined, that at the end of an examination process and at the end of a MPCID investigation, irrespective of the outcome, the MAG should consider referring the relevant material to the commanding ranks.

   The Ciechanover Team recommended in this matter, "upon conclusion of the handling of a complaint or at the conclusion of a Military Police Criminal Investigation Division investigation, regardless of whether or not it was decided to conclude the handling of the complaint without an investigation or to close the case, the Military Advocate for Operational Affairs examines whether it is appropriate to transfer the investigation file or part thereof to the operational elements… It should be noted that the representatives of the MAG Corps updated us that this has been the practice... and that in any event, the Chief Military Prosecutor's Guideline Draft includes a provision concerning reporting to commanders, which implements this recommendation".

The audit revealed that the Operations Directorate order determined that a copy of the interim report of the FFA Mechanism (formulation of preliminary insights) would also be forwarded to the commander of the relevant regional or relevant branch commander. The audit also revealed that at the end of the examination procedures and after the MPCID investigations into the incidents that were examined and investigated, the MAG sends the relevant material, at his discretion, to the command echelons in the IDF as well.

The State Comptroller's Office points out to the IDF that it is appropriate that the actions of the MAG Corps be anchored in explicit instructions, and therefore the MAG should publish the guidelines of the Chief Military Prosecutor regarding the time and the guiding considerations for transferring the relevant material to the command echelon.

Recommendation No. 7 - The Independence of the MAG

1. **The legal status of the MAG**: The Turkel II report states that "the MAG's professional subordination to the Attorney General is consistent with the international legal requirement for independence… However, this professional subordination is not sufficiently institutionalized. This should be remedied by legislation and organizational arrangements".

   The audit found that the MAG's professional subordination to the Attorney General was not anchored in legislation but, in April 2015, the Attorney General's Directive (No. 9.1002) was published regarding "The Military Advocate General", which aimed to "clarify the points of interface between the military justice system headed by the Military Advocate General and the general system of justice headed by the Attorney General, to emphasize the independent legal status of the Military Advocate General as well as the framework of his professional guidance by the Attorney General".

   The MAG wrote in this regard to the Head of the Ciechanover Team in January 2015, "The professional relationship between the Attorney General and the MAG is a relationship based primarily on trust, cooperation and mutual consultation rather than dictates... Another unique feature is the anchoring of the status and functions of the MAG in primary legislation... Case law in this matter gives expression to this distinction and determines that the MAG will be **guided professionally**

by the Attorney General **only on certain matters**, with special sensitivity, and not in every matter... Case law also adopted the term "professional guidance" rather than "professional subordination" (emphasis in the original text).

In this context, it should be noted that in HCJ **Avivit Attia v. the Attorney General**[80], the Honorable Justice Dorit Beinisch ruled as follows:

> "It is therefore possible to summarize the issue of the involvement of the Attorney General in the MAG's decisions in the following guidelines:
>
> 1. The Attorney General may intervene and even instruct the MAG how to conduct himself in decisions which, in his opinion, are of special interest to the public or in cases the implications of which are, in his opinion, beyond the scope of the military framework. The Attorney General's involvement in these matters will be carried out within the framework of his position as bearing the supreme responsibility for the various prosecutorial authorities and for the various legal entities in the executive branch.
> 2. The Attorney General will intervene in the MAG's decisions in all cases in which the MAG's decision deviates from the accepted legal norms. The intervention of the Attorney General in these decisions shall be by virtue of his authority as the person in charge of the legality of the activities of the various branches of government.
> 3. In matters relating to general policy, such as the prosecution policy of the Military Prosecution, the MAG should take into account the general prosecution policy determined by the Attorney General and the need for uniformity and harmony among the various prosecutorial authorities. The Attorney General may intervene in the MAG's decisions when the latter do not give proper weight to this consideration".

The Honorable Justice Shlomo Levin ruled in this case: "It is also acceptable to me, as to the Honorable President [Justice Aharon Barak], that general considerations justify in principle a legislative arrangement recognizing the authority of the Attorney General, as head of the General Prosecution, to delay proceedings conducted before the Military Court".

80 HCJ 4723/96 **Avivit Attiya v. the Attorney General**, Supreme Court Rulings 51(3) 714 (1997).

The Ciechanover Team recommended in this respect, "the Turkel Commission's recommendation should be expressed through a new directive of the Attorney General... aimed at clarifying the relationship between the military justice system headed by the Military Advocate General and the general legal system headed by the Attorney General... The said directive was published in April 2015".

The State Comptroller's Office notes that the recommendation of the Turkel Commission regarding the regulation of the MAG's professional subordination to the Attorney General was implemented, although it was not anchored in primary legislation.

In September 2016, the Attorney General noted to the State Comptroller's Office in his response to the draft report, "The position of the Implementation Team, which was also shared by the Attorney General at the time, Yehuda Weinstein, was that these steps [publication of the Attorney General's directive No. 9.1002] provide appropriate expression to the principles underlying Recommendation No. 7".

The State Comptroller's Office notes that the Attorney General and the MAG should take steps to anchor the MAG's professional subordination in primary legislation.

2. **The Appointment of the MAG, the duration of his tenure and rank**: In the Turkel II report it was recommended, "The MAG should be appointed by the Minister of Defense, upon the recommendation of a public professional committee. In order to institutionalize the professional subordination of the MAG to the Attorney– General, the latter should be the chairman or a member of the public committee… The MAG's term of office should be fixed, like that of the Attorney– General, at one term of six years without any possibility of extension. The MAG should also be given a fixed rank".

   The Ciechanover Team recommended with respect to this recommendation: "The MAG should be appointed by the Minister of Defense based on the recommendation of the Chief of Staff, and with the consent of the Attorney General... Article 177 of the Military Justice Law, which regulates the appointment of the MAG, must be amended so that this appointment process of the MAG is established in legislation." The Ciechanover Team further recommended "that the MAG's rank should be that of Major General, reflecting the central position of the MAG in the army... In cases where at the time of his appointment the MAG bears the rank of Colonel, he will be promoted with his appointment to the rank of

Brigadier General and after a predetermined period (and in any event no later than in the middle of his term), he will be promoted to the rank of Major General... the tenure of the MAG shall be four years without the possibility to further extend it ".

The Minister of Defense at the time, Moshe (Bogie) Ya'alon, said in response to the interim draft, "I believe that with regard to the appointment of the MAG, it is appropriate that the appointment will be made with the consent of the Attorney General".

The audit found that the recommendation of the Turkel Commission regarding the appointment of the MAG and the limiting of his tenure was not implemented. Following are the details:

In his letter to the Head of the Ciechanover Team from January 2015, it was noted that Supreme Court President (retired) Mr. Meir Shamgar, who was consulted on the appointment of the MAG as recommended by the Turkel Commission, "expressed his opinion that the use of an external committee for the appointment of a senior officer at the General Staff does not conform to the nature of the army as a hierarchical body based on command responsibility". The letter further stated, "In our opinion, it is sufficient to anchor the manner of appointment of the MAG and his tenure in Supreme Command Order no. 2.0613 [on] 'The MAG Corps'... Regarding the duration of the MAG's tenure, we also believe that a four-year term is the appropriate period of time that suits all the characteristics of the position".

In July 2016, the head of the Ciechanover Team stated in his response to the draft report, "Regarding the manner in which the MAG is appointed, we believed that given the special status of the MAG, who is a senior officer in the Chief of General Staff's professional staff, it would not be right for him to be elected by a body completely outside the army, but rather with the significant involvement of the civilian echelon – the Attorney General... It should be noted that there is no requirement in international law that the appointment of the MAG be made in accordance with the recommendations of a professional-public committee".

In August 2016, the IDF informed the State Comptroller's Office in its response to the draft report, "**The IDF is committed to the cabinet decision [adopting the recommendations of the Ciechanover Team] and will act accordingly. On this subject, it was stated that an amendment was prepared for the Supreme Command**

The MAG's independence is a fundamental and essential principle for complying with the principles laid down in the rules of international law with respect to mechanisms for investigating events in which there is suspicion of a violation of international law. The IDF should immediately issue orders stating that the MAG will be appointed by the Minister of Defense upon the recommendation of the Chief of General Staff and with the consent of the Attorney General

Order 'The MAG Corps', which will be advanced in the near future" (emphasis in the original text).

In September 2016, the Attorney General informed the State Comptroller's Office, "The issue of the manner of appointment of the MAG was also discussed by the Cabinet, which, after examining the matter, approved the method that the Implementation Team saw fit to recommend... The arrangement adopted took into account, on the one hand, the position of the defense establishment, which also received the support of the Honorable President (retired) Shamgar, according to which imposing an external body on the defense establishment, which will determine the identity of a senior officer in the General Staff, is incompatible with the nature of the army, and on the other hand, the need to fortify the MAG's independence. I share the position of the Implementation Team as well as the position of the previous Attorney General that the method of appointment agreed upon provides a proper response to the rationale underlying Recommendation No. 7 of the Turkel Commission's report".

The State Comptroller's Office emphasizes that the MAG's independence is a fundamental and essential principle for complying with the principles laid down in the rules of international law with respect to mechanisms for investigating events in which there is suspicion of a violation of international law, and that this principle is based on three pillars: the working relationship with the Attorney General, the status of the MAG in the General Staff and the duration of his term of office. It is therefore appropriate that the process of appointing the MAG and determining his rank should be carried out while safeguarding this principle.

The State Comptroller's Office notes that the IDF should immediately anchor orders stating that the MAG will be appointed by the Minister of Defense upon the recommendation of the Chief of General Staff and with the consent of the Attorney General. This is in accordance with the recommendations of the Ciechanover Team regarding the appointment of the MAG, the limiting of his term in office and the establishment of his rank, as approved by the government. The IDF and the Ministry of Justice should take steps to anchor these arrangements in legislation.

In September 2016, the Attorney General further told the State Comptroller's Office in his response to the report, "In accordance with, [the Ciechanover Team's recommendation on the manner of appointment, rank and duration of the MAG] the Ministry of Justice began

acting to amend Article 177 of the Military Justice Law regulating the manner of appointment of the MAG. It should be noted that, despite the fact that the Military Justice Law has not yet been amended to reflect the method of appointing the MAG that was agreed upon by the Implementation Team, in practice, already as part of the process of choosing the MAG in 2015, prior to the publication of the Implementation Team's report, the appointment was done with the consent of the Attorney General at the time. In addition, the Ministry of Justice, together with the MAG Corps, examined the need to anchor in legislation the MAG's tenure and the manner of termination of his office".

Recommendation No. 8 – The MAG's Dual Role

The Turkel II report states that in order to prevent a perception of partiality due to the "dual role" of the MAG - as head of the Military Prosecution and as head of the legal consultation system - the Commission recommends taking two measures: (a) In order to strengthen the status and independence of the Chief Military Prosecutor, similar to the status of the State Attorney, the Chief Military Prosecutor should be appointed by the Minister of Defense, at the recommendation of a committee headed by the MAG. The Chief Military Prosecutor's term in office and rank will be determined in advance. (b) Regulating in legislation a procedure for appealing the MAG's decisions to the Attorney General (see below with respect to Recommendation No. 13).

The Ciechanover Team recommended with respect to this recommendation, "In order to strengthen the status and independence of the Chief Military Prosecutor, we recommend adding a new provision to the Supreme Command Order concerning the MAG Corps, which expresses, among other things, the Chief Military Prosecutor's professional independence in exercising his powers as enforcer of the law". As for the manner of appointment of the Chief Military Prosecutor, the Ciechanover Team accepted the decision of the defense establishment that the Chief Military Prosecutor be "appointed by the Minister of Defense on the recommendation of a committee headed by the Military Advocate Genera". The Ciechanover Team also recommended, "since he is an officer with the rank of colonel and the position of the Chief Military Prosecutor may not necessarily be his last position in the Military Advocate General's Corps... setting the tenure of the Chief Military Prosecutor at four years with the possibility of extension for a period not exceeding one year".

In December 2015, the Minister of Defense at the time, Moshe (Bogie) Ya'alon, said in response to the interim draft, "I accept the recommendation to change the manner of appointment of the Chief Military Prosecutor, so that he will be appointed by the Minister of Defense on the recommendation of a committee headed by the MAG".

The audit found that the recommendations of the Turkel II report and the Ciechanover Team were not implemented with regard to the process of appointing the Chief Military Prosecutor and the limiting of his term in office.

The State Comptroller's Office notes that now that the government has adopted the recommendations of the Ciechanover Team, the Minister of Defense and the Chief of General Staff, in coordination with the Attorney General, should prepare and adopt, as soon as possible, an IDF order regarding the appointment process of the Chief Military Prosecutor and the limiting of his tenure, in accordance with the recommendations of the Turkel Commission and the Ciechanover Team.

Recommendation No. 9 – Investigations of the Military Police Investigations Department

The Turkel II report states, that a Department for Operational Matters should be established in the MPCID to work with the MAG Corps for Operational Matters with bases in the areas where the incidents under investigation occur and that the investigators should include persons that are fluent in Arabic.

The Ciechanover Team recommended with respect to this recommendation: "[We recommend that] the military authorities establish a specialized unit within the Military Police Criminal Investigation Division for the investigation of operational incidents. It is proposed that this unit be set up within four months from the date of approval of this report's recommendations by the government".

The audit revealed that at the time of the completion of the audit, the IDF had not yet established the Operational Affairs unit in the Military Police Investigations Department, and no list of Arabic-speaking investigators was prepared.

The MPCID Commander told the audit team with respect to this matter in June 2015, "On the basis of the recommendation of the Turkel Commission to establish a Military Police Criminal Investigations Department base for operational investigations, the MPCID has prepared a proposal for the establishment of a national unit for operational investigations. The proposal was submitted for the approval of the Chief of General Staff', however, the final approval for its establishment, in the format proposed, has not yet been given so that as of today the unit has not yet been established (discussions are still being held in the General Staff in the matter)". In January 2016, the

MPCID Commander stated, "Upon the allocation of personnel, the posts, the structures and the means, the unit will be launched. We are waiting for their allocation".

In this context, it should be noted that despite the above, Attorney General Directive No. 4.5003[81] of April 2015 stated, "The IDF established highly professional and unique bodies in the area of examining allegations of violations of the law in the course of operational activity (the FFA Mechanism, the MPCID unit for the investigation of operational matters and the Military Advocate for Operational Affairs in the MAG Corps), who handle the majority the matters concerning these events [events in which a person was killed during an IDF operation, when there are allegations of a serious violation of the rules of customary international law]".

The IDF had not yet established the Operational Affairs unit in the Military Police Investigations Department, and no list of Arabic-speaking investigators was prepared

The State Comptroller's Office notes that the IDF should finalize the discussions and the staff work on the subject of "the department for operational affairs in the MPCID", and establish the department in accordance with the decisions taken.

In August 2016, the IDF informed the State Comptroller's Office in its response to the draft report that it "accepts the draft report and attaches great importance to the establishment of a unit in the Military Police Criminal Investigations Department, whose purpose is to investigate operational events... It was decided that the unit will be established by January 1st 2017".

Recommendation No. 10 - Establishing the Investigation Timeframe

The Turkel II report states: "The MAG in coordination with the Attorney General shall set a period of time between the decision to open an investigation and the decision to adopt legal or disciplinary measures or to close the case… the MAG shall publish, at least once a year, statistical data on the period of time taken to handle files".

The Ciechanover Team recommended that "the Chief Military Prosecutor publish a directive... The directive will determine that the duration of an investigation into a case concerning alleged violations of the rules of international humanitarian law will be limited to nine months from the date of

81 Was published in April 2015 and entitled: "Appealing the decisions of the MAG regarding the investigation of incidents in which a person was killed during operational activity of the Israel Defense Forces when it was alleged that this was a serious violation of the rules of customary international law".

opening the investigation. The Commander of the MPCID will be given the authority to extend the investigation's timeframe by three additional months based on a reasoned written decision documented in the case file. The timeframe for a decision by a prosecutor in the case will be set at nine months from the date of receiving the investigation file. In cases classified by the Military Advocate for Operational Affairs as 'complex' cases – for example, investigating incidents of death and serious injury – a prosecutor's decision will be made regarding the case within a period not exceeding one year from the date of receiving the case file.. The Chief Military Prosecutor may extend the time periods described above regarding… for a period not exceeding an additional three months, based on a reasoned written decision documented in the prosecution file. An additional extension beyond this period, including a further extension of the MPCID investigation, will require the MAG's approval by way of a reasoned decision, which will be documented also in the prosecution's file, and for a period not exceeding three months." Regarding the publication of statistical data, the Ciechanover Team recommended in this respect that "the Chief Military Prosecutor Directive determine that statistical data on the duration of handling operational files will be published once a year as part of the annual report of the MAG Corps.". In this context, the Ciechanover Team stressed, "the implementation of this timetable requires the allocation of adequate resources to the Military Prosecution and the Military Police Criminal Investigation Division, and we [Implementation Team] can only recommend that these resources indeed be granted."

The Chief Military Prosecutor's directive regarding the maximum period between the decision to open an investigation and the decision to take legal action had not yet been published

As of the end of the audit, the Chief Military Prosecutor's directive regarding the maximum period between the decision to open an investigation and the decision to take legal action as determined by the Ciechanover Team, had not yet been published. In addition, the MAG Corps and the Personnel Directorate of the General Staff, to which the MPCID is subordinate, have not yet arranged the allocation of the necessary resources so that the Military Prosecution and the MPCID could meet the timetable set by the Ciechanover Team on making a decision on the outcome of an investigation.

On February 10th 2016, the MPCID Deputy Commander told the audit team, "Regarding the resources allocated for the 'Protective Edge' investigations, the investigations have not yet been completed and therefore the means are still required. Without a doubt, the resources allocated thus far (days of reserve duty, months of reserve service and rented vehicles) have significantly assisted in carrying out the investigations, both in regard to the time needed to deal with the cases and mainly in regard to the quality of the investigation" (emphasis in the original text).

The State Comptroller's Office points out to the IDF that setting a time frame for making a decision on the outcome of an investigation is essential. Therefore, the MAG should anchor the recommendations in this matter, as soon as possible, in the Chief Military Prosecutor's guidelines. In addition, the Deputy Chief of General Staff should hold deliberations regarding the resources required to meet these recommendations in general, and for the preparation for combat events such as Operation "Protective Edge" in particular.

In August 2016, the IDF informed the State Comptroller's Office in its response to the draft report, "The Chief Military Prosecutor's guidelines regarding 'the examination of allegations on the activity of IDF soldiers in operational incidents' will be published in the near future. In this framework, all aspects pertaining to the activity of the Military Advocate for Operational Affairs are regulated, including a timeframe for its activities... Regarding the issue of the allocation of the required resources... The staff work is coordinated and led by the Deputy Chief of General Staff and the requirements will be transferred in a concentrated manner to the Ministry of Finance, as determined in the Cabinet resolution adopting the Ciechanover Report".

Recommendation No. 12 – Oversight of the Legal Advice given by the MAG Corps

The Turkel II report states," In order to strengthen the Attorney General in exercising his oversight powers over the legal advice given by the MAG, a unit specializing in international humanitarian law should be established in the Advice and Legislation Department at the Ministry of Justice".

The Ciechanover Team recommended the implementation of the Turkel recommendation as is.

The audit revealed that as of the end of the audit, the Counseling and Legislation Department at the Ministry of Justice had a unit specializing in rules of international humanitarian law, which is subordinate to the Deputy Attorney General (International Law). However, according to the Ministry of Justice, it should be enlarged and reinforced so that it can meet the tasks required of it.

In September 2016, the Attorney General informed the State Comptroller's Office in his response to the findings of the report: "Since the publication of

the Turkel report, the Ministry of Justice has been working to establish a professional body to specialize in international humanitarian law and the laws of war... In addition, the relationship between the legal counsel at the Ministry of Justice and the International Law Department of the MAG Corps has been regulated, and a written work procedure was formulated on the subject... The Ministry's resource requirements for staffing [the professional body being established within the Counseling and Legislation Department (International Law)] were formulated together with the Ministry's senior management… The allocation of the budget required to complete the implementation of the recommendations under the responsibility of the Ministry of Justice, will be concluded between the Minister of Justice and Minister of Finance in the budget discussions for the years 2017 - 2018".

The State Comptroller's Office reminds the Ministry of Justice and the IDF that in light of the significant expansion of legal practice in the rules of international humanitarian law, and as the engagement in this topic is highly intensified in times of war and during military events and for a long period thereafter, actions to strengthen this area should be completed as soon as possible, and the entities engaged in this field should be staffed, both in the Ministry of Justice and in the MAG Corps, with an appropriate number of suitable professionals. Delays in the implementation of the recommendations regarding this issue should also be raised by the relevant parties before the senior echelons of the government and the IDF.

In January 2017, the Attorney General told the State Comptroller's Office in his response to the draft report, "The establishment of the team in the Counseling and Legislation Department (International Law)… is in advanced stages".

Recommendation No. 13 – Individual and Systemic Review of the Military Prosecution System

1. The Turkel II report recommended "the enactment of an appeal procedure to the Attorney General concerning decisions of the MAG. This legislation should determine the period of time for filing an appeal and for the Attorney General to hand down his decision on the appeal".

   The Ciechanover Team determined in connection with the first part of this recommendation that the procedure of appealing the decisions of the MAG before the Attorney General is regulated by the Attorney General's directive published in April 2015, entitled: "Review of decisions of the

Military Advocate General regarding incidents involving the death of an individual in the course of Israel Defense Forces operational activity, when serious violations of customary international law are alleged".

The audit revealed that the recommendation of the Ciechanover Team would limit the possibility of appealing a decision of the MAG only to cases in which a person was killed, contrary to the recommendations of the Turkel Commission, as stated. Therefore, the Attorney General should ensure that the possibility of appealing the MAG's decisions anchored in his instructions (Directive No. 4.5003 and Directive No. 9.1002) of April 2015 not be limited only to the investigation of incidents in which a person is killed, but will rather be available in all cases in which there is suspicion of a serious violation of the rules of customary international law in the course of IDF activity.

In September 2016, the Attorney General told the State Comptroller's Office in his response to the report: "I ordered the amendment of Attorney General's Directive No. 4.5003 so that its application will not apply only to cases in which death was caused. It should be emphasized that the expansion of the directive is intended for significant cases, where it is alleged that there was an apparent grave violation of the rules of customary international law, where it is justified to conduct a process of appeal".

The audit also revealed that there is a difference in the wording between the Attorney General's directives, as follows:

Directive No. 4.5003 deals with the possibility of submitting to the Attorney General a request for review of the MAG's decision in connection with an action that led to the death of a person during **operational activity** and that the act constitutes a serious breach of international law. On the other hand, in Directive No. 9.1002 it was stipulated that a request for review can be submitted to the Attorney General in regard to "decisions of the MAG on criminal matters of special importance and public sensitivity, which will be explicitly anchored in the Attorney General's guidelines, such as... the MAG's decision to investigate an incident in which a person was killed during an **IDF operation**, where it was alleged that it was a serious violation of the rules of international law" (emphasis added).

The State Comptroller's Office notes that due to a difference between the two directives of the Attorney General: According to one, a request for review can be filed against the MAG's decision in respect of an incident arising from IDF activity (operational and non-operational) while the other allows the filing of a request for review of the MAG's decisions in connection with an event that resulted from operational activity only. The Attorney General should review the directives and amend them so that they are corresponding.

In September 2016, the Attorney General informed the State Comptroller's Office in his response to the report: "I ordered the amendment of Directive No. 4.5003 so that it refers to IDF activity in general and not only to operational activity".

2. Recommendation No. 13 of the Turkel II report also stated, "When the complaints commission for the civilian prosecution is established, it should be authorized to review all the branches of the military prosecution and to monitor the bodies at the IDF that conduct examinations and investigations. This is in order to ensure that the MAG's regulations and policy are being implemented *de facto*".

   The Ciechanover Team noted with regard to the second part of this recommendation that there is a new Commission for Public Complaints Against the State's Legal Representatives (hereafter – the Prosecution's Ombudsman) that was established by the Ministry of Justice and began operating on April 1st 2014, and recommended that one year after the application of the Prosecution's Ombudsman's powers to the police prosecution, i.e. from January 1st 2016, "the authority of the Commission [the Prosecution's Ombudsman] should be expanded so that it also apply to the activity of the military prosecution with respect to cases involving claims of violations of the Laws of Armed Conflict".

The audit revealed that although, as of the conclusion of the audit, the Prosecution's Ombudsman had been established, its authority regarding the control of the MAG Corps has not yet been established.

In September 2016, the Attorney General informed the State Comptroller's Office that the "wording of the law[82] adopted by the [Knesset Constitution, Law and Justice] Committee and subsequently approved by the Knesset

Although, the Prosecution's Ombudsman had been established, its authority regarding the control of the MAG Corps has not yet been established

82 The Commission for Public Complaints Against State Legal Representatives Law, 5776 - 2016.

on second and third readings on August 3rd 2016, did not apply the authority of the Prosecution's Ombudsman to the MAG Corps. In order to adapt the wording of the law to the recommendations of the [Ciechanover] Team, and with the agreement of the MAG Corps, I have instructed the Counseling and Legislation Department to prepare a proposed amendment to the law, which will apply the law, within one year from the beginning of the Prosecution's Ombudsman's activity, to the military prosecution as well, in cases regarding the violation of the Law of Armed Conflict".

The State Comptroller's Office notes that the Attorney General should expedite the amendment of the law in order to complete the application of control over the military prosecution as well.

The Turkel Commission determined, as stated, that the examination and investigation mechanisms in Israel for complaints and claims of violations of international humanitarian law and the methods they practice generally comply with the obligations of the State of Israel under the rules of international law. However, the Commission saw fit to recommend various amendments designed to improve the methods of work of the examination mechanisms in order to achieve ideal goals. In order to implement the recommendations of the Turkel Commission, the government set up an Implementation Team and approved its recommendations. The audit revealed that the various authorities, headed by the Ministry of Justice and the IDF, had taken steps to implement the recommendations of the Turkel Commission even before the Implementation Team completed its work. However, it was found that at the time of completion of the audit, there were other areas that required resolute action, and in some cases a proper allocation of resources was required in order to implement the recommendations of the Turkel Commission and the Implementation Team.

The FFA Mechanism during Operation "Protective Edge" and thereafter

Establishment of the Mechanism and the work of the Mechanism (according to Recommendation No. 5)

The IDF should have established a FFA Mechanism separate from the other operational debriefing mechanisms

The Turkel II report stated that sometimes, in order to determine whether a criminal investigation should be opened, it is necessary to conduct a fact-finding assessment process, the primary purpose of which is to gather sufficient information about the incident in a **professional and expedient manner**. The fact-finding assessment will assist potential future investigation by ensuring that the quality of the evidence is high without fear of "contamination of evidence"[83], which may render the future investigation ineffective.

The Turkel II report states that "a legal obligation to undertake an **investigation** applies to those acts that constitute serious violations of international humanitarian law otherwise known as 'war crimes'" (emphasis in the original text). When an investigation is required during an armed conflict, it should be conducted, as stated, according to the four general principles required for an effective investigation, and the fifth principle must also be realized - transparency. The Turkel II report emphasized that the preservation of the general principles would enable an effective investigation aimed at reaching the truth in order to decide the question of responsibility for a violation of international humanitarian law.

The Turkel II report states that the MAG told the Turkel Commission , "In case of death in course of combat, the decision of whether to open an investigation must be made only after conducting an initial assessment of the facts of the case through an operational debrief". The Turkel Commission found that as a result, in cases where complaints or allegations of violations of international humanitarian law are received as a result of "actual combat activity" incidents, "the decision to commence an investigation is delayed until an operational debrief is received. This allows the MAG to consider whether

83 The preservation of reliable and authentic evidence can contribute to the discovery of the truth, and the prevention of impact on evidence, such as in the case of coordinating testimony or influencing the content of testimony.

the circumstances of the incident justify the opening of an investigation. Thus, the operational debrief is used as an assisting tool in the conduct of a fact–finding assessment." In this regard, it was further noted in the Turkel II report that the MAG uses the operational debriefing in order to fulfill his obligation to conduct a fact-finding assessment, but the use of the operational debriefing may unreasonably delay the decision to open an investigation, and that the operational debriefing is not directed at questions relating to suspicions of criminal acts during the relevant event.

The Turkel II report details the reservations made before the Commission by academics and representatives of human rights organizations against the use made of the operational debriefing by the MAG as the basis for a decision to launch an investigation. Thus, for example, it was argued , "the operational debrief is tainted by an inherent conflict of interest because it is conducted by the same forces whose activity is under scrutiny" ", and , "the debriefing might hinder a future investigation... [and] the commanders, who conduct the debriefings, lack professional training for performing investigations, and often these take place in a superficial and non–exhaustive fashion".

The Turkel Commission believed that the operational debriefing of the IDF should serve primarily the operational needs of the army, and therefore "a **separate** mechanism shall be established in order to conduct a fact-finding assessment...which will enable conducting an assessment that complies with the international legal requirements... a prompt and professional assessment, which facilitates a potential investigation and does not hinder it" (emphasis in the original text). The Commission recommended that immediately upon receiving the Preliminary Report Form and its annexed materials, as required by the Reporting Procedure, the MAG or whomever he delegates to do so, shall decide on one of the following possibilities:

(a) here is reasonable suspicion of criminal activity and an investigation should be opened immediately. (b) There is no reasonable suspicion of criminal activity and the case should be closed. (c) Additional information is required to determine whether there is a reasonable suspicion of criminal activity. If additional information is required, the MAG will instruct a special team to be established to investigate the circumstances of the incident and to conduct a fact-finding assessment of the incident. The members of the fact-finding assessment team will have expertise in the field of operations, international law and investigations, and their task is to provide the MAG with as much information as possible, within a period of time determined by the procedures, which will enable the MAG to decide whether to open an investigation.

In October and November 2016, Prof. Newton wrote to the State Comptroller in his opinion that, according to the organizational conception of the Mechanism, the FFA Mechanism does not stand in itself as an independent

tool, since it is not intended to be a criminal investigation, and is conducted in a separate command line from the actual Israeli authorities empowered to exercise prosecutorial discretion and therefore cannot lead to prosecution in its own right. The FFA Mechanism is best conceived of as the first segment of a sequential process. An 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. The fulfillment of this obligation is not gaged according to results, but rather according to the measures taken. The authorities should take reasonable measures at their disposal to obtain evidence about the incident, including, *inter alia*, eyewitness testimony, forensic evidence, and more. In order for the investigation of unlawful killings by state officials 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 lack of hierarchical or institutional connection, but also practical independence.

Prof. Newton also noted that the FFA Mechanism is independent in the hierarchical sense because it operates under the authority of the Chief of Staff, and entirely independent from the military chain of command affected by its activity. The FFA Mechanism has "practical" independence in the sense that it operates under the authority of a high ranking officer with independent logistical support and the clear mission to investigate when and where needed with or without the support of affected operational commanders. In this sense, the FFA Mechanism operates on its own motion, which provides another indication of effectiveness. The FFA Mechanism in conjunction with the independent assessments of the MAG meet the standards of international law in the sense that a follow-on and completely independent criminal inquiry can be based upon the recommendation of the more rapidly concluded and focused FFA Mechanism's inquiry.

In November 2015, the IDF stated in its response to the findings of the interim draft: "At the height of the 'Protective Edge' campaign, the Chief of General Staff, Major General Binyamin (Benny) Gantz, ordered that a FFA Mechanism, headed by a Major General, examine exceptional incidents that occurred during the campaign. The FFA Mechanism was established as a permanent Mechanism and its task is to gather relevant data and materials, and to clarify facts about events that the Chief of General Staff (at the recommendation of the MAG) instructs the Mechanism to examine. This is in order to provide the MAG with as much information as possible that will enable him to decide whether there is a basis for opening a criminal investigation, and to draw operational lessons and make recommendations that will help prevent exceptional incidents in the future. To the extent required, the MAG can also instruct the FFA teams to collect additional information in any context in order to obtain a more complete factual picture".

The IDF also stated in its response, "The Turkel report recommended that this [FFA] Mechanism be separate from the operational debriefing... especially since the Turkel Commission sought to prevent a delay in decision-making by the MAG, as a result of the wait for the conclusion of the operational debriefing. As the Ciechanover Team report also points out, this concern may be alleviated in two ways: first, the stipulation of fixed periods within which the MAG is required to make a decision... Second, the establishment of a FFA Mechanism whose work is directed solely at clarifying the facts, but is separate from the question of the holding of an operational debriefing by the units involved". The IDF also stated, "This Mechanism fully complies with the recommendations of the Ciechanover Team regarding the conduct of a fact-finding assessment for the preliminary investigation of suspicion of violations of the Law of Armed Conflict".

The Ciechanover Team recommended the establishment of a permanent mechanism in the IDF "which will first and foremost serve the strategic and operational objectives of the IDF and will be responsible for fact-finding assessment". The Implementation Team further recommended, "In any case where an investigation of an event that raises suspicion of a violation of international humanitarian law is required, the head of the permanent mechanism shall establish, upon the recommendation of the MAG and by order of the Chief of General Staff, an examination team… whose task will be to make independent and effective inquiries of the event, including the gathering of various factual information about it". The Ciechanover Team further noted in its report, "The regular mechanism and the examination teams acting on its behalf should act in accordance with the principles detailed in Recommendation No. 5 of the Turkel Commission and conduct an independent, effective, unbiased, thorough and fast investigation".

The Ciechanover Team further recommended: "Prior to the beginning of the operation [of the FFA Mechanism], the members of the permanent Mechanism and the examination teams acting on its behalf shall be briefed by the MAG or his representatives on the facts required by the MAG for making a decision. The head of the Mechanism should take steps to forward his findings to the Chief of General Staff or to the person appointed by him, and to the MAG within 30 days of the transfer of the matter to the examination of the Mechanism... The Chief of General Staff or his deputy may extend this date for reasons that shall be recorded for periods not exceeding 45 days each... He [the MAG] will be able to instruct the examination team and request that his comments be addressed within a period of no more than 30 days". The Ciechanover Team stated, "The findings of the Mechanism will subject to privilege under Article 539a of the Military Justice Law as they are also used to draw operational lessons. The confidentiality ensures the cooperation of the commanders and the soldiers for the purpose of obtaining the most complete factual picture possible".

The State Comptroller's Office notes that the recommendation of the Ciechanover Team indicates that the Mechanism will be established on the recommendation of the MAG and by order of the Chief of General Staff, i.e., will be subordinate to him, its purpose is to serve the strategic and operational objectives of the IDF, and it will be in charge of conducting the fact-finding assessment for the MAG. Therefore, this recommendation is not fully consistent with the recommendation of the Turkel Commission to establish a FFA Mechanism separate from the operational debriefing mechanism. The Ciechanover Team's recommendations also indicate that the Chief of General Staff or his deputy may extend the work of the Mechanism for unlimited periods of time, which does not meet the Turkel Commission's stipulation in regard to limiting the time period for the purpose of rapid assessment.

The State Comptroller's Office points out to the IDF that in order to ensure a rapid and professional fact-finding assessment that will facilitate a possible investigation, the IDF should have established a FFA Mechanism separate from the other operational debriefing mechanisms, in order to prevent the possibility of diverting the Mechanism from its task – to carry out a fact-finding assessment – for the purpose of conducting operational general staff debriefings. The Mechanism should operate under the sole professional guidance of the MAG, and time should be allocated for the purpose of carrying out the fact-finding assessment, in accordance with the recommendations of the Turkel Commission, so as to prevent delay in the decision regarding the need to open a criminal investigation in cases where there is suspicion of a violation of international law.

In July 2016, the Head of the Ciechanover Team stated in his response to the findings of the draft report: "The professional authorities agreed that due to the nature and quality of the fact-finding assessment, which is separate from the criminal procedure, and which is intended, together with the operational lessons, to allow fast and effective gathering of information in a manner that will enable the MAG to make a decision regarding the opening of a criminal investigation, the findings of the inquiry should be subject to confidentiality... IDF soldiers are obliged to cooperate with the Mechanism in a way that will lead to a quick and effective investigation of the truth. They do not enjoy the right to remain silent or to representation by an attorney… Subjugating the Mechanism to the MAG on the one hand, while affording privilege to its findings on the other hand, raised considerable legal difficulties, and it was therefore decided, after a discussion on the matter, that it would be preferable for the Mechanism to be subordinate to the Chief of General Staff".

The head of the Ciechanover Team further noted: "In my opinion, there is no dispute that the FFA Mechanism established by the IDF in 2014 during Operation **'**Protective Edge**'** is a separate and different mechanism than the operational debriefing mechanisms that existed in the IDF prior to the establishment of the [FFA] Mechanism… This is a permanent and dedicated Mechanism with unique characteristics that relate to the professional, skilled and experienced manpower that staffs the examination teams, its training, etc... The Turkel report cannot be taken as implying that international law prohibits a situation in which the Chief of General Staff is the one to order a preliminary examination... and this does not impair the independence of the examination itself. The criticism that was presented to the Turkel Commission regarding the operational debriefing concerned its being conducted by the forces whose actions are examined… and not to the question of the entity instructing the debriefing to be carried out… The fact that the Chief of General Staff has the authority to order a fact-finding assessment does not detract from the authority of the MAG to order the opening of a criminal investigation, where he believes that this is required".

In August 2016, the IDF informed the State Comptroller's Office in its response to the findings of the draft report , "**The establishment of a unique Mechanism, <u>different</u> from the operational debriefing that is carried out routinely and separately from it, and the manner in which the structure and operation of the Mechanism were arranged, conform to the requirements and principles set by the Turkel Commission and constitute an optimal applicable response to its recommendations, while addressing additional considerations found in the Israeli legal system, such as the importance of confidentiality in such proceedings. <u>The operation of the Mechanism clearly conforms with the principles of international law</u>... The Mechanism operates under the professional guidance of the MAG**, and thus its work promotes both **the principle of thoroughness and the principle of independence and impartiality**… It should be emphasized that despite the subordination of the Mechanism to the Chief of General Staff, in practice much weight is given to the MAG's recommendation regarding the events requiring examination by the Mechanism and, to wit - **all of the events from the 'Protective Edge' campaign referred by the MAG to the examination of the Mechanism were indeed examined by the Mechanism** (the examination of some of them was not yet completed as of the date writing this response)" (emphases in the original text).

In October and November 2016, Professor Newton wrote to the State Comptroller an opinion on the issue of the independence of the Mechanism's work, stating that the combination of the independence of the FFA Mechanism and the sweeping discretion granted to the MAG for prosecution is

consistent with the requirements of international law for the following reasons:

1. The IDF system demands accountability when the circumstances warrant, so that the results of a particular inquiry into a particular accused do not provide prima facie evidence that the system was designed to shield a particular perpetrator from accountability.
2. The FFA Mechanism also operates according to the principle of independence required by international law by not being tied to the official chain of command, and since it is subordinate to the Chief of General Staff in a manner that does not place it under pressure from the operational commanders, in return it provides the MAG with an independent assessment as to prosecution.
3. The coordination process between the FFA Mechanism and the MAG is properly aligned so as to demonstrate independence and impartiality that are not influenced by the intent of a particular commander or by the chain of operational command in order to prevent delay in the work of the Mechanism. The standard under international law is that it is necessary to ensure that there are no unjustified delays in proceedings in a manner inconsistent with the intention to bring the person concerned to justice.

In his opinion, Professor Newton also stated that the Rome Statute was not intended to substitute the prosecutorial discretion of the Office of the Prosecutor (of the International Court) in lieu of the good faith, appropriate exercise of the independent and proper judgement of domestic officials.

The State Comptroller's Office believes that the existence of a fact-finding assessment by the Fact-Finding Assessment Mechanism in the current format, subject to the Chief of General Staff and acting separately from the chain of command, together with the integration of experts from various fields, while maintaining the independence of its actions, combined with the independent discretion of the MAG regarding the decision whether to open a criminal investigation, is consistent with the provisions of international law.

The existence of a fact-finding assessment by the Fact-Finding Assessment Mechanism in the current format, while maintaining the independence of its actions, combined with the independent discretion of the MAG regarding the decision whether to open a criminal investigation, is consistent with the provisions of international law

The State Comptroller's Office emphasizes that in order for the Fact-Finding Assessment Mechanism to fulfill its central purpose as a body that assists the MAG to make a decision regarding the need to investigate events in which there is a prima facie suspicion of violating international law, it should be separate from the other operational debriefing mechanisms, and the examination of every incident separately should be ensured, with explicit reference to the identity of the subject being examined that is liable to bear criminal liability. The examination should consider the question of the possible criminal liability of the persons examined for the purpose of examining whether there is justification for a criminal investigation, as opposed to the question of drawing professional lessons learned.

The work of the Fact-Finding Assessment Mechanism in the course of Operation "Protective Edge" and thereafter

The audit examined the implementation of Recommendation No. 5 of the Turkel Commission in the work of the FFA Mechanism during Operation "Protective Edge" and thereafter, including the examination of 120 cases in the Military Advocate for Operational Affair's staff[84] (hereinafter - the Cases) pertaining to the examination of exceptional incidents that occurred during Operation "Protective Edge". As noted, the data provided by the Military Advocate for Operational Affairs to the audit team shows that as of January 2016, the MAG Corps had received information on 464 exceptional incidents that occurred during Operation "Protective Edge". This information included, among other things, allegations by NGOs of violations of international law by the IDF during the operation, operational reports from which concern has arisen on harm to protected or sensitive sites or extensive harm to civilians, media reports and more.

The following table presents the main findings regarding the work of the FFA Mechanism during Operation "Protective Edge" and thereafter, including an examination of 120 of said files:

84 The staff of the MAG's Office coordinated the legal handling of issues characterized by operational and criminal aspects. The staff is also in charge of examining complaints by human rights organizations that raise suspicion of improper conduct by IDF soldiers in Judea and Samaria and, if necessary, may order the opening of a criminal investigation against the suspects.

Table 1: **The main findings regarding the Fact-Finding Assessment Mechanism**

No.	Topic	Main findings
1	Date of establishment of the FFA Mechanism	The procedure regulating the operation of the FFA Mechanism was published in the IDF only on August 31 2014, after the end of Operation "Protective Edge".
		The FFA Mechanism staff was appointed three days after the opening of Operation "Protective Edge", without prior preparation and without a formal procedure in place.
2	Failure to separate the General Staff debriefing team from the FFA Mechanism	The General Staff's debriefing mechanism, whose main purpose is to carry out operational debriefing, also deals with the fact-finding assessment of events unrelated to international law, and therefore these are not separate mechanisms, as recommended by the Turkel Commission.
3	Training of the fact-finding teams	The Military Law School belonging to the MAG Corps was tasked with preparing for the training of the FFA Mechanism on short notice. The training was comprised of one-day sessions and they were not optimal.
4	Expertise of the fact-finding teams	Legal advisors were not involved in the field work of the fact-finding teams. The legal advisors participated only in the hearings in which the fact-finding teams presented their findings. In contrast to the recommendation of the Turkel Commission, only some of the first fact-finding teams were assigned MPCID investigators, and their integration into the FFA was partial and limited.
5	The FFA Mechanism's independence	According to the existing order, the FFA Mechanism acts for the Chief of General Staff and is subordinate to him. Shortly after the conclusion of Operation "Protective Edge", a practice was developed whereby the Office of the MAG transferred to the Mechanism the events which the MAG decided should be examined by the Mechanism.
6	Impartiality	The Operations Directorate directive does not include a provision whereby interrogators that were part of the chain of command during the period in which the incidents were examined should not be assigned to the fact-finding teams.
7	Effectiveness and thoroughness	Flaws were found in the workings of the FFA Mechanism, whose amendment would improve the thoroughness of the Mechanism's work and possibly increase the effectiveness of the examination.
8	The expediency of the examination	In more than 80% of the cases that were transferred to the Mechanism, the time required for the Mechanism staff to complete the examination of the events referred to it exceeded, sometimes significantly, the timetables set forth in the Operations Directorate directive.

No.	Topic	Main findings
9	The examination transparency	The IDF's orders do not address the publication of a report regarding the MAG's decisions, the investigations and their findings.

Following are the findings of the FFA Mechanism's work and the 120 cases:

The date of establishment of the FFA Mechanism and the appointment of its staff

As early as March 2014, in his letter to the Ciechanover Team, the MAG stated, "A General Staff team will be established, consisting of officers and commanders with operational and investigative expertise, and some of them with legal training. The team members will undergo specialized training in the field of international law. The team will operate according to the criteria that will be determined in the directives and in accordance with the Chief of General Staff's decision". The MAG also noted, "The Deputy Chief of General Staff ordered the completion of a procedure for the operation of the [FFA Mechanism] staff by the beginning of April, in order to bring it to the Chief of General Staff for approval in the middle of the month".

The audit revealed that although the MAG noted that the procedure for operating a "General Staff team" would be submitted to the Chief of General Staff for approval in mid-April 2014, such a procedure was published in practice only on August 31st 2014, after the end of Operation "Protective Edge".

The audit further revealed that in practice, the FFA teams were appointed three days after the opening of Operation "Protective Edge", without prior preparation and without an orderly procedure, as stated, and this resulted in lack of clarity and difficulties in the FFA Mechanism's activity. Following are the details:

Only on July 10th 2014, three days after the start of the operation, did the Chief of General Staff appoint the commander of the 479th Corps at the time, Major General Noam Tibon, as "Head of the Fact-Finding Team - Operation 'Protective Edge'", which, *inter alia*, will conduct a fact-finding assessment to be used by the MAG in order to examine whether there is suspicion of prohibited conduct on the part of IDF soldiers in the context of the incident being investigated. The FFA Mechanism that was established included six

teams[85] (hereinafter - the first teams), which were mainly staffed by reserve officers from various professions, including jurists, and some were staffed with investigation professionals. The fact-finding teams conducted their work in the field, and periodic meetings in which they presented their findings to the commander of the teams and the FFA Mechanism commander. Following these meetings, the fact-finding team completed its work or transferred its findings to the MAG Corps.

The FFA teams were appointed three days after the opening of Operation "Protective Edge", without prior preparation and without an orderly procedure

On July 12th 2014, following the appointment of Major General Noam Tibon as Head of the FFA Mechanism, the MAG wrote to the Assistant Chief of General Staff a proposal "for criteria for the identification of exceptional incidents that require examination... The criteria serve as an indication of the identification of exceptional incidents that may require examination".

In August 2016, the IDF informed the State Comptroller's Office in its response to the draft report, "It is appropriate to formulate criteria that will serve as an indication of the identification of exceptional incidents... It should be emphasized that before the list [of criteria] was formed, there was no delay, in practice, in the decision-making process… The [FFA] Mechanism was established fully during the campaign, and a few days after its establishment, it set criteria for its workings".

On this matter, the State Comptroller's Office points out to the IDF that the FFA Mechanism was supposed to be ready and operational before Operation "Protective Edge" began, shortly after the recommendations of the Turkel II report were adopted, and clear criteria for examining exceptional incidents should have been set. The establishment of the Mechanism at a later date and its operation in the course of the operation without clear criteria constitutes a flaw, especially in view of the great importance that international law attributes to the effective investigation of an exceptional incident, when one of the principles of such an investigation is its rapid implementation with proper documentation.

On August 5th 2014, the Chief Military Prosecutor wrote to the MAG regarding "the policy of investigations and debriefings following Operation 'Protective Edge'", that "a number of work assumptions were in mind when formulating the proper policy: the recommendations of the Turkel Commission and in particular Recommendation No. 5... a desire to avoid appointing too many

85 A team headed by Major General Noam Tibon, a team headed by Brig. Gen. (res.) Benny Mer, a team headed by Brig. Gen. (res.) Ilan Peretz, a team headed by Brig. Gen. (res.) Yizhar Sahar, a team headed by Brig. Gen. (res.) Yuval Halamish, a team headed by Brig. Gen. (Res.) Ilan Baram.

examination teams, which may constitute a burden that cannot be maintained... The requirement that the final product that we produce also address questions from the field of international criminal law and humanitarian law... Over the past few days, a number of topics were found worthy of examination in a broad and systemic manner by thematic investigation teams... It may be more appropriate to refer some of the topics chosen... to the examination of the General Staff's Fact-Finding Assessment Mechanism for the examination of exceptional operational events. This means changing the nature of the examination... We will therefore recommend that, at the first stage, a General Staff thematic examination not be conducted on these matters, and that the examination of the specific incidents belonging to this group will be carried out by the General Staff FFA team".

Only on August 31st 2014, did the Operations Directorate - Doctrine and Instruction Division update the Operations Directorate order and added a chapter to it on "A General Staff Mechanism for debriefing exceptional incidents" (hereinafter - General Staff Mechanism or General Staff debriefing team), which defined the designation of the General Staff's Mechanism for examining exceptional incidents, its responsibility, its powers, the manner of its operation and the qualifications required for the staff of its examiners, and determined that it would also serve the MAG as a FFA Mechanism. Therefore, the order includes two chapters: chapter A on the subject of the military debriefing, which also deals with the process of implementing the lessons; and chapter B on the General Staff's Mechanism for debriefing exceptional incidents and for fact-finding assessment. It should be noted that chapter B of the order also states: "The debriefing carried out by the FFA teams... is a military debriefing that is subject to confidentiality".

In a document dated September 15th 2014, entitled "The General Staff Fact-Finding Team – Team Commander Summary", which was written by the head of the FFA Mechanism at the time, Major General Noam Tibon, it was written , "The General Staff Fact-Finding Team is a very important operational tool. We must quickly institutionalize under the command of a reserve Major General and train permanent members for the team. The team should be employed from the first day of combat in order to arrive at the truth, debriefings can be carried out in the course of combat without interrupting the combat forces".

On January 28th 2015, the Chief of the General Staff appointed Major General (Res.) Yitzhak Eitan as Commander of the FFA Mechanism to replace Major General Noam Tibon. The letter of appointment noted that the FFA Mechanism will carry out fact-finding assessments pursuant to the provisions of Article 539A of the Military Justice Law, 5715 – 1955, and Supreme

Command Order 2.0702[86]. It is noted that the letter of appointment did not specify the updated order published by the Training Division Doctrine and Instruction Division on August 31st 2014, which regulates the establishment of the Mechanism, including its purpose, responsibility, powers and manner of operation.

Brigadier General (res.) Ilan Peretz who headed one of the FFA teams, told the audit team in June and August 2015 that he was recruited to head the team shortly before the end of Operation "Protective Edge", and that the first team members were reservists with a background in conducting operational debriefings. Brigadier General (res.) Peretz noted, "The main gaps in the operation of the FFA teams relate to all five components of the force's makeup: operational concept (operation doctrine), organization and structure, training and qualifications, manpower and means".

Brigadier General (res.) Peretz also stated that the FFA Mechanism "began its work without orderly work procedures or a binding directive, and even today, the FFA teams do not have an operational concept and a SOP that defines areas of responsibility and authority with the resources required for this purpose". He further stated that often the FFA team's debriefing work is postponed and delayed due to the workload of the bodies or of the commanders that the team wishes to interrogate".

In November 2015, the IDF stated in its response to the findings of the interim draft, "The designation of the FFA Mechanism was defined even before its mission was established in the Operations Directorate order… The bottom line was that when the IDF needed the Mechanism for the first time since the Turkel report, in the course of Operation 'Protective Edge' and thereafter, the Mechanism was ready and prepared for immediate operation, and so it was done".

At the end of December 2015, the Deputy Chief of General Staff told the State Comptroller's Office, "At the beginning, the FFA Mechanism did not operate as well in terms of timeframes and began its operation too late, but during the course of its work it improved... At the beginning of the work of the FFA Mechanism it did not act fast enough and was not systematic enough, and these things improved in the course of its work. It is true that as time passes, it is more difficult to examine the events, but the difficulties initially were the difficulties of getting started and were not out of malicious intent".

In December 2015, the MAG, Brigadier General Sharon Afek, informed the State Comptroller's Office, "The FFA Mechanism was established during the 'Protective Edge' campaign, even before the Ciechanover Team report was

86 The order concerning "Debriefing that is subject to confidentiality" dated September 21st 2003.

submitted. As this was the establishment of a new body, tasked with a complex task, the FFA Mechanism dealt with "labor pains", related to staffing, regulation, cooperating with commanders, and so forth. The FFA Mechanism's operation developed and improved over time, in accordance with a learning curve and with the accumulation of experience and knowledge. In many cases, the FFA Mechanism provided a clear and comprehensive factual basis that led to the resolution of events, reaching involved individuals and making informed decisions".

In August 2016, the IDF informed the State Comptroller's Office in its response to the findings of the draft report, "Even if the preparations for the establishment of the FFA Mechanism took time, in practice, from the publication of the recommendations of the Turkel report in February 2013 until July 2014, when the "'Protective Edge' campaign began and the FFA Mechanism was established in practice, no combat event took place, requiring an inquiry process by the Mechanism. **In other words, from a result-oriented point of view, the FFA Mechanism began to operate in the first major combat event that took place since the publication of the Turkel report**… The ability to operate the FFA Mechanism in respect of the 'Protective Edge' campaign would not have taken place without the IDF's early preparations in formulating the image and structure of the FFA Mechanism… **Moreover, extraordinarily, the FFA Mechanism already began examining exceptional operational events in the course of 'Protective Edge', without waiting for the end of the campaign**. This functioning of the FFA Mechanism was not required under international law or pursuant to the conclusions of the Turkel report, and it reflects a higher level of compliance than necessary… The FFA Mechanism's work was characterized by improvements and growing professionalism 'on the go', and there is no dispute that additional improvements are required in the work of the FFA Mechanism, with an emphasis on regulating its work" (emphasis in the original text).

The State Comptroller's Office comments to the IDF that as early as March 2014, the MAG stated that a FFA Mechanism will be established. However, in practice, the Mechanism was established quickly, ad hoc, only after Operation "Protective Edge" began. This was done without comprehensive and organized preparation, without an orderly work procedure and without prior appointment of the functionaries in the FFA Mechanism, which caused difficulties in the FFA Mechanism's work. Therefore, the decision to establish the FFA Mechanism should have been accompanied by a procedure that regulated its establishment, including its purpose and main activities.

The State Comptroller's Office further notes that in the security reality of the State of Israel, where military operations and security escalations occur from time to time, it would have been appropriate for the IDF to prepare for the establishment of the FFA Mechanism shortly after the publication of the recommendations of the Turkel report in February 2013, and at the very least soon after the update given by the MAG to the Chairman of the Ciechanover Team in March 2014. This, in order to prepare with an organized operational concept, procedures and resources that will enable the IDF to establish the purpose and importance of the Mechanism in a timely manner, and enable the FFA Mechanism to act as expeditiously as possible so as to fulfil its tasks – an inquiry into the facts required by the MAG Corps for the purpose of deciding whether to launch a criminal investigation. In addition, early preparation for the operation of the Mechanism would have been, and still is of great importance in ensuring the rapid and professional operation of the fact-finding teams on the day of mobilization, in the event that another battle is forced upon the State of Israel.

Therefore, the Head of the Operations Directorate, in cooperation with the MAG, should publish without delay an operational concept for the FFA Mechanism and work procedures that are in place for its operation on the day of command, for the training and for maintaining the competence of the members of the FFA Mechanism so that they can fulfill its purpose and help the MAG in deciding on whether to launch an investigation. The Deputy Chief of General Staff should examine the possibility of a permanent mechanism to be allocated the necessary resources in accordance with its missions.

In addition, it is necessary to bring to the attention of all IDF soldiers the existence of the FFA Mechanism, its nature and methods of its operation, so that they understand the importance of its work and cooperate with it.

In August 2016, the IDF informed the State Comptroller's Office in its response to the draft report, "The very existence [of the FFA Mechanism] is set forth in the IDF orders (the Operations Directorate order), which are published on the IDF website and accessible to all IDF soldiers... The importance of the implementation of the FFA Mechanism and its operation among the commanders in the command echelons was understood, and this led to the inclusion of the subject in the legal training courses in various command courses, as well as many public announcements about it in real time made in the media".

The IDF also stated, "As time passed, and after sufficient knowledge and experience were accumulated in the FFA Mechanism, and out of a desire to impart this knowledge onward, it was decided to write a SOP for the FFA Mechanism that would reflect both the accumulated knowledge and the desired work process".

In November 2016, the IDF informed the State Comptroller's Office that on November 14th 2016, the SOP would receive the final approval of the Head of the Doctrine and Instruction Division and be distributed as a binding and guiding document.

Failure to separate the FFA Mechanism from the general staff operational debriefing

As stated, the Turkel II report recommended that a fact-finding assessment mechanism be established separately from the operational debriefing, in order to provide a fact-finding assessment that meets the requirements of international law. In the Turkel II report, as noted above, objections were raised before the Commission by academics and representatives of human rights organizations regarding the MAG's use of the operational debriefing as the basis for the decision to open an investigation. Thus, for example, it was argued, "the operational debrief is tainted by an inherent conflict of interest because it is conducted by the same forces whose activity is under scrutiny" ", and , "the debriefing might hinder a future investigation... [and] the commanders, who conduct the debriefings, lack professional training for performing investigations, and often these take place in a superficial and non–exhaustive fashion"

The audit revealed, as stated, that while the Operations Directorate Order propagated by the Doctrine and Instruction Division deals primarily with carrying out the general staff debriefing, it deals as well with the matter of fact-finding assessment, stipulating: "A FFA mechanism is established, which will serve as a tool for the Chief of General Staff in debriefing exceptional [operational] incidents... In addition, this mechanism will also conduct a fact-finding assessment that will be used by the MAG in order to examine whether there is suspicion of prohibited conduct on the part of IDF soldiers in the context of the examined incident ". In other words, the IDF's General Staff debriefing mechanism, whose main purpose is to conduct an operational debriefing, also deals with fact-finding assessment, and these are not two separate mechanisms, as recommended by the Turkel Commission, and it is not even stipulated that its main purpose is to serve the MAG in making a decision as to whether to launch an investigation.

Major General (res.) Yitzhak Eitan, head of the FFA Mechanism, told the audit team in March 2015: "The Turkel Commission believes that the FFA Mechanism should be an external body that conducts an investigation, not a debriefing", however, he believes that "the FFA Mechanism's operation in the format recommended by the Turkel Commission would be a mistake that would hamper the execution of the inquiry, since the military officials and soldiers who participate in the inquiry would not cooperate with those conducting it".

Brigadier General (res.) Ilan Peretz noted before the audit team in August 2015: "The debriefings carried out by the FFA teams are operational debriefings of key events that took place during the operation and are intended to generate learning and drawing conclusions for the IDF, on the one hand, and to examine whether in their course a violation of the rules of international law took place, meaning events that have a 'red flag' over them, on the other hand... The operational debriefing that is sometimes carried out in the operational unit as well is similar in its characteristics. The main difference between the two debriefings is that the General Staff's debriefing team has the tools to obtain a broader operational picture than that available to the operational unit that acted in Operation 'Protective Edge'". Brigadier General (res.) Peretz explained, "The first teams that were employed [towards the end of Operation "Protective Edge"] were the thematic debriefing teams according to the decision of the Operations Directorate - Doctrine and Instruction Division... The Operations Directorate - Doctrine and Instruction Division requested through these operational debriefings to understand what happened on the ground operationally in light of the reports of commanders and media reports. It should be noted that at the time these debriefing teams were activated, there were still no known complaints of violations of international law, which arrived later, and in respect of any complaint relating to an incident also connected to the thematic debriefing, further examination was carried out [by the debriefing team]".

In August 2016, the IDF informed the State Comptroller's Office in response to the findings of the draft report, "The IDF **opposes** subordinating the FFA Mechanism to the MAG. This is primarily because it conflicts with the need for confidentiality of the mechanism findings... The subordination of the mechanism to the MAG... will not allow the findings of the Mechanism to be privileged. As according to the accepted interpretation of Article 539A(b) of the Military Justice Law... confidentiality applies to inquiries whose purpose is to draw conclusions that are intended to save human lives. These inquiries are made under a command capacity and by commanders rather than by a body subordinate to the MAG, whose findings are intended solely for enforcement purposes. Therefore, subordinating the Mechanism to the MAG is liable to obviate the need to impose confidentiality on the findings of the examination... In light of the need to preserve confidentiality and to ensure

The integration of the FFA Mechanism's activity into the same directive and in the same organizational framework with a "General Staff debriefing mechanism" is not fully consistent with the recommendation of the Turkel Commission to establish a "separate mechanism for conducting the fact-finding assessment"

the effectiveness of the Mechanism's work, it is necessary to subordinate it to the commanders and to preserve the purpose of generating the operational lessons, alongside the unique purpose of gathering the facts for the MAG. Any other determination... cannot achieve the necessary goals. Moreover, it is important that the Mechanism derives its authority from the supreme commanding entity in the army... It should be emphasized that the fact that the examining body is not subordinate to the MAG does not harm the independence of the procedure and its professionalism" (emphasis in the original text).

In September 2016, the Attorney General informed the State Comptroller's Office in his response to the report, "Our position is that the FFA Mechanism, in the format described in the recommendations of the Implementation Team, meets the requirements of international law... The purpose of the Mechanism is to collect factual information in a quick and effective manner, in a manner that will allow the MAG to decide on whether to launch a criminal investigation. It was agreed that this goal would be best achieved if the findings of the work of the FFA teams were privileged... There is significant legal difficulty in arguing for the confidentiality of the fact-finding process that is directly subordinate to the MAG... I do not believe that the subordination of the Mechanism to the Chief of General Staff, and not to the MAG, as recommended by the Turkel Commission, undermines its independence. There is no requirement in international law that the fact-finding assessment be carried out under the MAG".

The State Comptroller's Office comments to the IDF that the integration of the FFA Mechanism's activity into the same directive and in the same organizational framework with a "General Staff debriefing mechanism" is not fully consistent with the recommendation of the Turkel Commission to establish a "separate mechanism for conducting the fact-finding assessment". The separation of the FFA Mechanism from the operational debriefing mechanism, including a general staff operational debriefing mechanism, would contribute to increasing the effectiveness of the Mechanism and to preserving its nature and purpose as a unique and dedicated body aimed solely at examine complaints of violations of the rules of international law attributed to the IDF. The regular operational debriefing, including a general staff operational debriefing, is intended to draw operational lessons for the future, while the FFA Mechanism, although operating in the form of an operational debriefing, is intended to examine whether there is room to open a criminal investigation in respect of past events. Mixing the two objectives may impair the realization of the purpose of the FFA Mechanism.

The State Comptroller's Office believes that in order to improve the work of the FFA Mechanism, the Operations Directorate should issue a separate directive in this matter, and it should be clarified that this FFA Mechanism, whose function is to examine whether there is room for a criminal investigation, is a separate body than the operational debriefing, whose purpose is different. Furthermore, the Operations Directorate should determine in a separate order that the FFA Mechanism will be subject to the rules applying to an operational debriefing, including confidentiality, but its main objective is different from that of regular operational debriefing, namely - a fact-finding assessment for the MAG. Within this framework, such an order will state that the FFA Mechanism is indeed subject to the Chief of General Staff, but its implementation will be carried out directly by the MAG, in order to achieve its objective - an independent inquiry that will assist the MAG to establish whether there is suspicion of prohibited conduct on the part of IDF soldiers in the incident under examination. The publication of the SOP on the FFA Mechanism's work is of great importance in anchoring the special status of the MAG with respect to the FFA Mechanism in order to strengthen the Mechanism's compliance with the requirements of independence.

In August 2016, the IDF informed the State Comptroller's Office in response to the findings of the draft report that, "Out of a desire to refine the status of the FFA Mechanism as a special type of operational debriefing with a dual purpose... the IDF will consider formalizing the establishment of the FFA Mechanism in an independent order that is separate from the order referring to the operational debriefing".

In November 2016, the IDF informed the State Comptroller's Office that "a detailed SOP entitled 'Standing Operating Procedure on the General Staff Mechanism for the Debriefing of Exceptional Incidents' has been formulated. The SOP relates to many issues raised in the draft report and regulates what is required... The MAG's unique position vis a vis the FFA Mechanism has been preserved and even anchored within the framework of the SOP on the Mechanism".

Training of the Fact-Finding Teams

The audit revealed that the Military Law School, which belongs to the MAG Corps, was required to prepare at short notice to train the fact-finding teams in the Mechanism designed to examine events that occurred during Operation "Protective Edge". These training programs included lectures on subjects such as the rationale for establishing the FFA Mechanism; the Law of Armed Conflict; the responsibility of commanders; and the commander's place on the battlefield. The training given to these teams was one-day long, and was not conducted optimally. Following are the details:

In May 2015, the head of a fact-finding team, Brigadier General (res.) Nitzan Nuriel, told the State Comptroller's Office that "with the exception of one training day given by the MAG Corps and an oral meeting with Major General Tibon (previous Head of the FFA Mechanism), there was no other contact or transfer of work between the fact-finding teams that came before the team headed by Nitzan [who replaced them]".

In August 2015, the Military Law School Commander told the State Comptroller's Office: "The preparations [of the Law School] for the training of members of the General Staff debriefing teams began six months before Operation 'Protective Edge', following the recommendation of the Turkel Commission. The Training Mechanism Administration for training of the military's main commands was the entity appointed to manage and coordinate the training of these teams. On June 2nd 2014 the MAG asked to formulate a proposal for the training of the debriefing teams. On July 8th 2014 the school was asked to prepare a two-day training schedule in order to train the debriefing teams that are to operate following Operation 'Protective Edge'. With short notice afterwards, and in view of the beginning of Operation 'Protective Edge', the school was asked to adapt the training for the fact-finding teams to a schedule of one training day... Some of the lecturers gave the training... to the fact-finding teams without presentations and without giving written material to the training participants".

The school commander further stated, "The Military Law School did not register the names of the participants in these training programs, as it was responsible for the content of the training only... Three training programs for the officers comprising the General Staff's fact-finding teams were conducted at the Glilot Base... It turned out that the first training was done to an irrelevant audience that did not take part in the work of the fact-finding teams... The Law School did not receive feedback from the fact-finding teams about gaps or the need to complete the training".

The State Comptroller's Office points out to the IDF that in the absence of documentation of the names of the training participants, the ability to monitor the training is impaired. It is not possible to verify that all the members of the teams participated in such training, which is essential for their work.

The training programs of the fact-finding teams in the Mechanism designed to examine events that occurred during Operation "Protective Edge" were not conducted optimally

The State Comptroller's Office further notes that the fact that the training lasted only one day raises concern that the training process was not thorough and optimal, and that this could have affected the professional functioning of the FFA Mechanism. Moreover, the Law School did not draw lessons together with the training participants in order to learn about gaps in training that require completion. In light of this, the MAG Corps should prepare a dedicated training program for the members of the FFA Mechanism, which will include the distribution of written material, and will be based, among other things, on lessons learned from the training conducted and the deficiencies that arose in this audit regarding the FFA Mechanism's work. All this in order to give members of the FFA Mechanism the knowledge required to fulfill their duties. In addition, the MAG Corps should prepare a plan to preserve the professional competence of the members of the FFA Mechanism and to document in an organized manner the content of the training and the identity of the participants therein.

In August 2016, the IDF informed the State Comptroller's Office in its response to the draft report, "The SOP regarding the FFA Mechanism, which is being worked on, will determine required qualifications from office holders, as well as a proposal for establishment training that includes training and programs to preserve the FFA Mechanism's competence during routine times... The IDF, with the MAG Corps in the lead, is prepared with a two-day training program which, in our opinion, provides comprehensive and in-depth training that includes relevant content... This program will be updated and will incorporate lessons learned from the previous training and even contain written materials".

The expertise of the FFA teams

The Turkel II report states that the members of the team should have "expertise in the operational field, in international law and in the field of investigations", and that "fact-finding assessment should be conducted in a manner that will not prejudice the investigation". The Operations Directorate order states, "One should strive for having all the information verified. The verification will be done, for example, by checking the compatibility between the statements given by different people questioned or with documents and information systems". The Operations Directorate order also states that there will be no representatives of the MAG Corps in the inquiry teams.

In the MAG's letter to the Chief of General Staff's assistant from September 2014 regarding "Referring exceptional incidents that took place during Operation 'Protective Edge' to an examination by the FFA Mechanism and

fact-finding assessment team", it said that "it is important to ensure the integration of officers with a legal education and experience in investigations [in the Mechanism team] as recommended by the Turkel Commission".

The audit revealed that the team members had expertise in various military professions, as recommended by the Turkel Commission. However, its recommendation that the team has expert members in international law and in the field of investigations was not fully implemented. Legal advisors were not involved in the work of the fact-finding teams on the ground. The legal advisers participated only in the discussions in which the fact-finding teams presented their findings. Furthermore, unlike the Turkel Commission recommendation, only some of the first teams were assigned investigators from the MPCID, as was revealed by the audit, and their involvement in the debriefings was partial and limited. Following are the details:

The Turkel Commission recommendation that the team has expert members in international law and in the field of investigations was not fully implemented

Brigadier General (res.) Ilan Peretz, told the audit team in August 2015, that in his teams, investigators from the MPCID were indeed integrated, but they were deliberately not included in the fact-finding work in the field: "A MPCID representative who was integrated into Ilan's first teams was included only in the interim meetings and the conclusion of the team members' work", since "in no case at any point in time was there an intention or demand that the fact-finding teams act in the form of an investigation, but rather as an operational debriefing".

Brigadier General (res.) Ilan Peretz also stated: "The FFA teams made sure to meet as necessary in every event that was debriefed, including with commanders and with soldiers, sometimes in private and sometimes together, according to the circumstances, the subject of the debriefing and its objectives... There were no attempts to coordinate stories or testimonies... If this were to happen, the teams are skilled enough to notice".

In October 2015, the MAG informed the State Comptroller in his response to the findings of the interim draft: "We also believe that it is appropriate to permanently embed in the FFA Mechanism an officer with experience in investigations".

In November 2015, the IDF stated in response to the interim draft: "The importance of including an investigator lies primarily in the experience accumulated by the investigators in (other) processes aimed at investigating facts, and secondly, in their experience in questioning civilians".

The State Comptroller's Office comments to the IDF that the integration of investigators into the fact-finding assessment is necessary to ensure that questions asked by the FFA team do not impair a possible future investigation process. It will ensure skilled handling of possible discrepancies between versions and proper documentation of the statements of those being questioned. All of this is to ensure that the fact-finding assessment will aid a criminal investigation, were it to be launched, and not impair it. The full integration of investigators into the work of the fact-finding teams would increase the professionalism of the fact-finding assessment and assist the MAG in deciding whether or not to open a criminal investigation.

In November 2016, the IDF informed the State Comptroller's Office that "in the General Staff Mechanism SOP regarding the FFA Mechanism for debriefing exceptional incidents, which will be approved on November 14th... it is stipulated that the Head of the Investigations Branch of the Quality Control and Safety Department of the Ground Corps will be part of the permanent staff of the FFA Mechanism".

The State Comptroller's Office further notes that in order for the fact-finding process to achieve its objective - providing the necessary information to the MAG's Office to decide whether to open an investigation - there is a need for the integration of experts in international law into the fact-finding assessment teams, including on the ground.

In November 2016, the IDF informed the State Comptroller's Office that "the General Staff Mechanism SOP regarding the FFA Mechanism for debriefing exceptional incidents... has anchored the integration of legal advisors with a background in the field of operational consultation as advisers to the Mechanism commander and to each of the Mechanism teams' commanders [the FFA teams]".

The State Comptroller's Office comments to the IDF that achieving the purpose of the FFA Mechanism and its objective depends on the proper training of the personnel and the proper use of their skills. These are necessary in order to ensure that the MAG receives the best information required for making a decision regarding the need to open a criminal investigation. Therefore, the Operations Directorate and the MAG's Office should act to incorporate the SOP, which regulates the work of the FFA Mechanism and ensure its implementation, in order to ensure that the fact-finding teams have investigators and experts in international law integrated therein, in sufficient numbers.

The Mechanism's operation in accordance with the principles of international law

As abovementioned, the Turkel II report stated that "a fact-finding assessment should be made in a manner that will not impair the investigation", and therefore "the fact-finding assessment should be carried out professionally, expertly and expeditiously, so that it will assist a potential investigation and will not impair it".

The Turkel II report states that in order to ensure that the fact-finding assessment fulfills its purpose and to justify, in the eyes of international bodies, the MAG's decision not to open a criminal investigation, it is appropriate to apply to the FFA Mechanism the general principles set forth in international law as material requirements for the existence of an investigation that will be considered effective. Although this Mechanism does not deal with an investigation, if the fact-finding assessment is not "effective", it may endanger the investigation, if required. This is especially so in view of the centrality, complexity and importance of the fact-finding assessment process, which has implications on the international level. In this context, it should be noted that the Ciechanover Team stated, "the permanent FFA Mechanism and assessment teams acting on its behalf must operate in accordance with the principles set out in recommendation no. 5 of the Turkel Commission, and conduct independent, effective, impartial, thorough and prompt assessments".

The audit examined whether the activity of the FFA Mechanism was consistent with these principles. Below are the findings:

The independence of the FFA Mechanism

The Turkel II report states that an effective investigation should be conducted independently according to the body, the institution, or the person conducting the investigation. This principle encompasses both institutional independence (for example, that the prosecution is separate from the judiciary) and practical independence (for example, that investigators are not in any way related to the event being examined). The military justice system can be independent enough to conduct an effective investigation.

The Turkel II report also states that since the Mechanism is supposed to be an auxiliary tool for the MAG in deciding on the opening of a criminal investigation in a particular case, it is the MAG who should determine the events to be investigated: "If the MAG decides that more information is required [to decide on whether to open a criminal investigation], he shall order a special team, established for this purpose [a fact-finding assessment team], to examine the circumstances of the incident."

It should be noted that on March 20th 2014, the MAG wrote to the Head of the Ciechanover Team, among other things, that "in the event the General Staff team is not activated by the Chief of General Staff, does not inquire into the necessary facts, or does not comply with the timeframe that will be determined – the MAG will order the opening of a MPCID investigation".

According to the Operations Directorate order, the FFA Mechanism is subordinate to the Chief of General Staff, its activities are coordinated by the Operations Directorate - Doctrine and Instruction Division, and it is professionally directed by the Operations Directorate and the MAG Corps. The Chief of General Staff determines who will be the members of the FFA Mechanism, what events will be debriefed, as well as the guidelines regarding the focus of the debriefing and the main facts required for debriefing. The order also states that if the Chief of General Staff decides on a General Staff debriefing of an event, the debriefing team will be appointed from among the members of the FFA Mechanism.

The audit also revealed that even according to the letters of appointment of the heads of the FFA Mechanism, the Chief of General Staff is the one who determines the events that the debriefing mechanism should debrief. The audit further revealed that although the letter of appointment of the Head of the FFA Mechanism at the time, Major General Noam Tibon, stipulated that he "should appoint additional staff to carry out the fact-finding ", the Head of the Deputy Chief of General Staff Office distributed on August 1st 2014 to the IDF units a document attached to an order of the Head of the Doctrine and Instruction Division of the same date, entitled "Appointment of Officers in the General Staff Debriefing Mechanism - Order", stating that "the names of the team members [office holders in the General Staff FFA Mechanism] will be

submitted to the Chief of General Staff for approval for the issue of letters of appointment on August 5th 2014".

The MAG's letter to the Assistant of the Chief of General Staff on September 18th 2014, regarding "Referring exceptional incidents that took place during Operation 'Protective Edge' to an examination by the FFA Mechanism" stated: "Given the fact that the various fact-finding teams, comprised mostly of reservists, are completing their work regarding the group of events that was referred to them for their examination, the need arises to continue to maintain the FFA Mechanism". In reference to the letter of the MAG, the Chief of General Staff wrote on September 29th 2014 to the Head of the FFA Mechanism, that he would appoint a "Major General who is a reservist to join you [the Head of the FFA Mechanism] and who will later serve as the permanent commander of the General Staff debriefing team". On January 28th 2015, the Chief of the General Staff appointed Major General (res.) Yitzhak Eitan as the commander of the General Staff debriefing team in place of Major General Noam Tibon.

As stated, according to the letter of appointment of the heads of the FFA Mechanism and the Operations Directorate order, the Chief of General Staff is the one who should decide which events the FFA Mechanism will debrief. However, it became clear in the audit that shortly after the fighting in Operation "Protective Edge", a practice was established whereby the MAG Corps transferred to the FFA Mechanism information about the events in which the MAG decided that the FFA Mechanism would assess, and at the same time giving notice of the fact to the Assistant to the Chief of General Staff.

Notwithstanding the above, the audit revealed that the MAG's letter to the Assistant to the Chief of General Staff on September 18th 2014 stated: "The table attached to my letter lists a list of additional exceptional incidents that I would like to examine through the FFA Mechanism ". In the response of the Chief of General Staff to the Head of the FFA Mechanism on September 29th 2014 it was stated: "The Chief of General Staff instructs that you continue and lead an inquiry of these events".

In this context, Brigadier General (res.) Ilan Peretz noted before the audit team in August 2015 that "the head of the fact-finding team or the Head of the FFA Mechanism meet once every two weeks for a status discussion headed by the Deputy Chief of General Staff... These meetings are also attended by the MAG or his representative", and that "at no stage of the work of the fact-finding teams, including the above-mentioned status discussions, did the Deputy Chief of General Staff or anyone of the General Staff, take steps to influence the work of the fact-finding teams".

In February 2016, the Assistant to the MAG told the audit team: "The FFA Mechanism was not subordinated to the MAG because of the view that its function is to conduct a fact-finding assessment professionally, led by a commander with relevant military knowledge, and subordinated to the highest command echelon. According to this view, although the FFA Mechanism has some affiliation with the MAG and the MAG Corps, this is not command subordination. As can be seen from the Ciechanover Team report, the FFA Mechanism and the view underlying it were presented to the team and were acceptable, subject to the determination in Recommendation No. 5".

In August 2016, the IDF informed the State Comptroller's Office in its response to the draft report that "The rule in practice is that the MAG forwards events for the examination of the FFA Mechanism as a matter of routine, sending cases for completing an inquiry therein, and the FFA Mechanism handles all said cases as a matter of routine without dispute".

The State Comptroller's Office comments to the IDF that the Operations Directorate order and the MAG's understanding of the principle of the FFA Mechanism's work indicate that the FFA Mechanism works for the Chief of General Staff and is subordinate to him. This is not fully consistent with the recommendation of the Turkel Commission, and therefore the Chief of General Staff and the MAG should work to anchor the independent status of the MAG, so that the appointment of the Head of the FFA Mechanism and the staffing of the fact-finding assessment teams will be carried out by the Chief of General Staff in coordination with the MAG and with his consent, and the operation of the FFA Mechanism in practice will be in the hands of the MAG.

In November 2016, the IDF informed the State Comptroller's Office in this context, "In practice, all the incidents in respect of which the MAG thought that there was room to open an examination, were transferred to the examination of the Mechanism and were examined by it in practice. The SOP concerning the FFA Mechanism has anchored the MAG's special status in respect of the FFA Mechanism and it was determined that the MAG or a person authorized by him for this purpose is authorized to summon the head of the relevant team and guide him as to the main facts required for the inquiry in order to formulate a factual response to the question of whether there is suspicion of prohibited conduct on the part of IDF soldiers in the context of the incident being examined".

The Chief of General Staff and the MAG should work to anchor the independent status of the MAG, so that the appointment of the Head of the FFA Mechanism and the staffing of the fact-finding assessment teams will be carried out by the Chief of General Staff in coordination with the MAG and with his consent, and the operation of the FFA Mechanism in practice will be in the hands of the MAG

Impartiality

This principle is intended to ensure that an investigation is conducted objectively and without the personal bias of the investigator or bias of the evidence on which the investigation is based, and without fear of a conflict of interests that might harm the conduct of an effective investigation. The Turkel II report states that the implementation of this principle and the principle of independence should be expressed by ensuring that the investigator is separated from the chain of command, so that he has no potential involvement in the events and therefore is not in a conflict of interest or appearance of conflict of interests when examining the event. This should be done without derogating from the requirement that the investigator have sufficient operational knowledge in order to realize the objective of an effective investigation. A fact-finding assessment, like a criminal investigation, cannot be conducted in a manner that raises suspicion of bias.

The audit found that the Operations Directorate order does not include a directive that FFA Mechanism members that were part of the chain of command during the fighting, in which the incidents being examined occurred, should not be assigned to the FFA teams. However, the order issued on January 22nd 2015 by the Head of the FFA Mechanism at the time, Major General Noam Tibon, entitled "The Establishment of Temporary Fact-Finding Teams in Active Army Service to Complete the Assessment of "Protective Edge" – Order", he wrote that "it is necessary to ensure that the officers who will be manning the debriefing teams were not part of the chain of command during the fighting in "Protective Edge", and that they did not take an active part in the fighting itself".

In this matter, the MAG stated in April 2015: "The FFA Mechanism that was also employed in Operation 'Protective Edge', headed by Major General Noam Tibon... provides a response to the questions raised in this matter regarding the issues of objectivity, conflict of interest and appearance, since the examination is being conducted by an objective commanding officer, who is not part of the chain of command responsible for the events and bodies under examination".

The audit revealed that despite the order of the Head of the FFA Mechanism at the time, one of the members of the fact-finding team of the Mechanism he headed, participated in operational activities during Operation "Protective Edge" as part of his military role as a pilot in the Israeli Air Force.

One of the members of the fact-finding team participated in operational activities during Operation "Protective Edge".

Brigadier General (res.) Ilan Peretz noted before the audit team in August 2015 that "with the exception of two separate cases in which it became clear [to him]… that an officer (from the IDF's active military) was chosen to serve as a member of the debriefing team despite taking part in the operation, all the other members of the team who worked [with him]... did not take part in Operation 'Protective Edge'... When it was discovered in those two exceptional cases, he decided... immediately on the removal and non-participation of these officers in the work of the fact-finding team".

In October 2015, the MAG informed the State Comptroller in his response to the findings of the interim draft: "In my opinion, one of the main reasons for the success of the FFA Mechanism that was established in fulfilling its mission is its establishment as a FFA Mechanism... whose members are professionals in their field, who were not part of the chain of command in the events being examined… since it is necessary to ensure that the teams do not include members who were part of the chain of command relevant to the events examined by them".

In November 2015, the IDF stated in its response to the findings of the interim draft: "As a rule, it is preferable that officers who took part in the fighting should not be members of a FFA Mechanism... However, when there is a need to integrate officers with appropriate background who took part in the fighting, there is no legal impediment to doing so, provided that these officers do not examine exceptional incidents in which they themselves were involved or events relating to their commanders or commands".

In August 2016, the IDF informed the State Comptroller's Office in its response to the draft report: "The IDF agrees with the recommendation regarding preventing the integration of those who took part in the fighting or were part of the chain of command of the event that is the subject of the fact-finding, in the fact-finding team... It is true that following the establishment of the FFA Mechanism in the "Protective Edge" campaign, the commanders of the FFA Mechanism discovered that a number of staff members took part in the fighting, however when it became known, it was decided to end their duties in the fact-finding teams... Although said team members took part in the fighting in the course of the operation, they did not take part in the events that were examined by the teams they were assigned to".

The State Comptroller's Office comments to the IDF that the inclusion of those involved in the fighting in Operation "Protective Edge" as part of the FFA teams could have significantly impaired the objectivity of the factual assessment. The State Comptroller's Office further notes that the Operations Directorate order that was published, as stated, on August 31st 2014 should have included explicit instructions that members of the FFA Mechanism would not have any members who took part in the fighting during which the exceptional incidents that the Mechanism had to examine took place. Therefore, the order should include a provision according to which the Head of the Mechanism should conduct a preliminary examination of each of the members of the fact-finding teams and ensure that they did not take an active part in the fighting itself and were not in the chain of command of the fighting, in order to avoid fear of bias, even ostensibly, in their examination of the exceptional incidents.

In November 2016, the IDF informed the State Comptroller's Office in its response to the draft report that "the SOP on the General Staff mechanism... anchored the requirement that those who took part in the fighting or were part of the chain of command should not be included in the fact-finding".

Effectiveness and thoroughness

The Turkel II report states that "effectiveness and thoroughness are a basic principle in achieving the purpose of the investigation, i.e. arriving at the truth". This principle, which requires that the investigation be conducted professionally for the purpose of arriving at the truth, concerns the overall investigation process, including the collection, documentation and preservation of evidence, the thorough identification and questioning of all relevant witnesses and the process of drawing conclusions based on these materials. Based on this principle, the investigative authorities should also strive to collect the testimony of civilians regarding the relevant incident, if it is found that they are pertinent and that their testimony is important for conducting an effective and thorough investigation in an effort to arrive at the truth. The Turkel II report further states that during the course of an armed conflict, the practical ability to conduct an effective and thorough investigation is undermined, and that nonetheless "reasonable measures should be taken to collect and preserve accurate and reliable findings for the purpose of the investigation and it should be conducted professionally". Although the fact-finding assessment is not a criminal investigation, it should also be carried out thoroughly and effectively.

Regarding the FFA Mechanism's working procedures, the Operations Directorate order stipulated: "With the formulation of preliminary insights into the facts of the incident [being examined], and no later than the date set forth below, the IDF Chief of General Staff will be given a report detailing the factual findings to date regarding the incident and its recommendation regarding the manner in which the examination should continue".

The audit revealed that at the end of the fact-finding assessment, the FFA Mechanism prepares a document that constitutes a summary of the assessment; this document is submitted to the Prosecution for Operational Affairs, and on the basis of which it formulates its recommendation to the MAG on whether to open a criminal investigation into the incident. The audit further revealed that in the training given to the members of the FFA Mechanism, the MAG Corps distributed a leaflet prepared by the Prosecution for Operational Affairs, entitled "Emphasis for Operational Investigations", with emphasis and guidelines for the work of the FFA team. These included, *inter alia*, the following requirements: "Ensure that the entire debriefing is documented in writing in an orderly manner... It is important to receive the complete **intelligence information** (to the extent possible, raw) on which the attack was based... To the extent there is a difference between the information provided in the complaints in respect of a specific event and the details gathered in the debriefing - to try to bridge the gap and understand why it was created" (emphasis in the original text).

As stated, the audit examined 120 cases in the Prosecution for Operational Affairs, which deal with the examination of exceptional incidents that occurred during Operation "Protective Edge". The audit found faults in the work of the FFA Mechanism, the correction of which would improve the thoroughness of its work and increase the effectiveness of the examination. The deficiencies detailed below were revealed in about 20 cases sampled from these cases. Following are the details:

Deficiencies in the factual foundation in the FFA Mechanism's work

The Operations Directorate order determined that the fact-finding assessment to be conducted by the FFA Mechanism should include factual information about the incident, which would be sufficient to establish a factual foundation that would enable the MAG to examine whether there is suspicion of prohibited conduct on the part of IDF soldiers in the incident being debriefed justifying the launch of a criminal investigation.

The letters of appointment of the heads of the FFA Mechanism state: "As part of the debriefing, you should ... collect any findings that may contribute to the debriefing".

The audit revealed cases in which the FFA Mechanism did not forward to the Military Advocate for Operational Affairs a relevant and full factual foundation for the purpose of formulating its opinion. Following are examples:

(a) In one of the debriefings carried out by the FFA Mechanism, the Military Advocate for Operational Affairs requested factual supplements to formulate its opinion. The audit revealed that the FFA Mechanism was unable to complete some of the details that were necessary for understanding the full picture.

(b) In another case, the Military Advocate for Operational Affairs requested the FFA Mechanism to conduct a joint debriefing of the parties involved in the incident who were responsible for employing firepower "in order to arrive at a joint conclusion as to the entity that approved the attack, the reason for the attack and the conclusion as to whether the entity that approved the attack examined the expected collateral damage". The FFA Mechanism responded to the MAG Corps that "the operational debriefing has exhausted itself and it does not see an operational need to examine beyond the conclusions and recommendations that appear in the debriefing already carried out". In the MAG Corps documents in this context it was noted that the MAG Corps believes that "an attempt is still required to formulate through the parties involved... one factual picture. This was not carried out, and in its absence... we will need to examine the need to open a MPCID investigation". As of February 2016, the FFA Mechanism had not carried out the joint debriefing, and the MAG had yet to make a decision on this case.

    In August 2016, the IDF informed the State Comptroller's Office that in response to the findings of the draft report, the FFA Mechanism proposed an alternative way of examining the matter, according to which the MAG would review the matter with the commander of the relevant corps, since the core of the incident was on the command-professional level – and that this proposal is acceptable to the MAG Corps.

(c) The audit found that the Military Advocate for Operational Affairs was assisted by documents that it itself located and collected (on the internet and from other sources) in order to formulate a factual foundation and to formulate a recommendation. In addition, files were found, that the FFA Mechanism transferred to the Military Advocate for Operational Affairs without including all the relevant documents on which the debriefing was based, and the MAG Corps needed to request them in order to formulate a recommendation.

(d) In additional cases, after the FFA Mechanism transferred summaries of debriefings to the MAG Corps, the MAG Corps asked for completions. Review requests by the MAG Corps for supplements in eight cases

reveals that the requests focused mainly on technical details, such as a video documenting the attack, summary of the Head of Air Operations, aerial photographs, etc.

In November 2015, the Deputy Prosecutor for Operational Affairs told the audit team: "The case [which the FFA Mechanism transfers to the MAG Corps] should include all the documents accompanying the debriefing. This is so that the MAG prosecutors can form an impression and rely on the documents that led the debriefing team to the conclusion it reached in the case, in the course of formulating their recommendation to the MAG. It is important to emphasize that the MAG Corps does not have a closed list that defines which documents should accompany each case, since each case is different and each case requires different documents... In cases where, in a review of the debriefing summary and the material accompanying it, a document that is material for an enforcement decision in the case is found to be missing, the Military Advocate for Operational Affairs requests the missing document from the relevant party in the debriefing team. (For example - where the Air Force debriefing is missing, the MAG Corps will request the debriefing directly from the Air Force representative in the debriefing team)".

In August 2016, the IDF informed the State Comptroller's Office in response to the findings of the draft report: "When the MAG Corps comes to formulate its opinion regarding a specific incident, it is not limited to the information gathered by the FFA Mechanism, since it should address both the material gathered in the IDF and the claims raised by various other sources... It is important to note that where the MAG Corps located information that is not consistent with the assessment conducted by the Mechanism staff, the incident was returned for re-examination by the Mechanism until a complete resolution was found for the contradictions. Many times, the MAG corps refers the Mechanism team to various sources that can assist in the examination".

The State Comptroller's Office comments to the IDF that although in some cases it was necessary to supplement the factual foundation, eventually the MAG had a sufficient factual foundation for making a decision. However, there was a flaw in the fact that the Mechanism transferred to the Military Advocate for Operational Affairs some of the debriefing summaries, without including all the documents relating to the incident, and as a result the Military Advocate for Operational Affairs needed to request supplementation or accumulate the information itself, thereby delaying the processing of the cases.

In August 2016, the IDF informed the State Comptroller's Office in response to the findings of the draft report: "In view of the comment, the addition of a provision to the SOP will be considered, which will require the FFA Mechanism

Although in some cases it was necessary to supplement the factual foundation, eventually the MAG had a sufficient basis for making a decision

to collect materials related to the incident from open sources as well (from websites on the military or civilian internet, reports of human rights organizations, etc.) ".

Documentation of the fact-finding assessment conducted for officials as part of the FFA Mechanism

As stated, the Turkel II report noted that "a fact-finding assessment should be carried out in a manner that will not impair the investigation".

The Operations Directorate order states that "The collection of information and documentation are essential, and are the basis for the findings of the debriefing". The order states that all information gathered at all stages of the debriefing must be saved. The order further states that "one should strive to have all the information verified. Such verification may be done, for example, by checking statements against statements given by different people questioned or against documents and information systems".

In the instructions regarding the "Debriefing of the Relevant Forces" given by the Military Advocate for Operational Affairs to the debriefing teams during their legal training at the Military Law School, it was stipulated: "Ensure that the entire debriefing is documented in writing in an orderly manner".

In August of 2015, the Law School Commander told the audit team that "these training sessions did not provide instructions on how to document the documents and preserve the evidence, although the importance of documentation of all stages of the debriefing was emphasized".

In the audit, files were found that were submitted by the FFA Mechanism to the Prosecution for Operational Affairs, which did not include records of the debriefings conducted by the FFA Mechanism of officials relevant to the assessment.

In November 2015, the Deputy Military Advocate for Operational Affairs told the audit team in this matter: "A large number of cases are transferred to the MAG Corps without any records of the debriefings themselves attached to them (the interviews with the relevant entities for the debriefing). In some cases, the MAG Corps asked the FFA team for the records of a specific assessment. In the opinion of the MAG Corps, the records of the debriefings should be prepared by the debriefing team and submitted as part of the file. It was emphasized that in the opinion of the MAG Corps, even in cases where there is no record of the oral statements made to the debriefing team, it is still **usually** possible to settle for the findings presented in the debriefing

report, which are based on this oral debriefing, for the purpose of formulating a decision on enforcement" (emphasis in the original text).

The Office of the State Comptroller comments to the IDF that in the absence of records in the work of the debriefing teams, the debriefing process is not documented and there is no corroboration of the findings arising from it, which are expressed in the summary of the debriefing. In the absence of records, the FFA Mechanism is also unable to verify the information provided in the debriefing by comparing the statements of the various people questioned. Preparing complete records in the course of the work of the FAA teams and the documentation of the teams' findings are required to assist the MAG, through the Prosecution for Operational Affairs, to get an impression of the fact-finding assessment process and its thoroughness.

The State Comptroller's Office further notes that the preparation of the records, as aforesaid, will assist in monitoring the manner in which the fact-finding assessment was conducted, in order to ensure transparency vis a vis possible bodies of inquiry. In addition, this increases the efficiency of fact-finding assessment and helps to prevent damage to a potential investigation should one be initiated.

In November 2016, the IDF informed the State Comptroller's Office, in its response to the report, that "in the General Staff SOP regarding the Mechanism... the need for the preparation of such records was clarified".

Summary of the findings of the debriefing

As stated, at the end of the fact-finding assessment, the FFA Mechanism prepares a summary document of the debriefing, and this document is submitted to the Prosecution for Operational Affairs.

In the audit, files were found that included summaries of debriefings that do not bear a date and debriefing summaries that are not signed.

In this regard, the Deputy Military Advocate for Operational Affairs told the audit team in November 2015, that "indeed, a considerable portion of the debriefing summaries do not bear a date and are not signed". The Deputy Military Advocate for Operational Affairs noted that "there is no directive that defines a fixed format for debriefing summaries" and stressed that "it is proper and appropriate that the debriefing summation of the FFA team's be signed and bear a date. The same is true for the debriefing summaries of various officials conducted by the FAA team".

In August 2016, the IDF informed the State Comptroller's Office in its response to the draft report: "**The IDF accepts** the comment that real-time records should be prepared for fact-finding assessment conducted by the FAA teams. The comments regarding the addition of a date and the signing of the fact-finding assessment summary document are also accepted. **These comments are supposed to be embedded in the SOP that regulates the FFA Mechanism's work**. In the future, they will be meticulously implemented... According to our approach... these flaws are not flaws that go to the root of the Mechanism's work. They certainly do not detract from the fact that in the end the FFA Mechanism generated a thorough and comprehensive factual foundation, to the extent possible, with regard to all the events examined by it and in respect of which a decision was made by the MAG" (emphases in the original text).

Files were found that included summaries of debriefings that do not bear a date and debriefing summaries that are not signed

The State Comptroller's Office comments to the IDF that including a

on the findings of the debriefing in the examination of the incident, to know when the debriefing summary was prepared, thereby helping it monitor the period of time during which the incident was examined by the FFA Mechanism, and monitor the chronological sequence of documents in the case. The State Comptroller's Office believes that the absence of an official date and signature in the debriefing summary is not merely a technical flaw, but indicates a flaw in the professionalism and thoroughness of the FFA Mechanism's work. Furthermore, the absence of a signature affects the document's formality. This constitutes a flaw in the proper administrative operation of the FFA Mechanism, and this may even damage the MAG's ability to use materials provided by the Mechanism for the purpose of making a decision. The MAG should establish clear working instructions in these aspects within the FFA Mechanism's operating instructions.

In November 2016, the IDF stated in its response to the draft of the report: "in the General Staff's SOP concerning the FFA Mechanism... it was clarified that all the documents of the Mechanism would bear a date or signature". It was further noted that "a demand for the preparation of such records was anchored in the SOP concerning the FFA Mechanism".

The use of the term "investigation" in the FAA Mechanism documents

The fact-finding conducted by the FFA Mechanism is not an investigation, but is intended, as stated in the recommendations of the Turkel Commission, to provide the MAG with as much information as possible to decide whether to open an investigation.

The Operations Directorate order stated, "The purpose of the debriefing and the implementation of the lessons is to improve the operational benefit and prevent the recurrence of undesirable events, and thus they are forward looking. This is in contrast to an investigation whose purpose is to investigate suspicions of the committing of a criminal offense". The order also states that "the debriefing carried out by the FAA teams... is a military debriefing that is subject to confidentiality and will be carried out in accordance with the rules of conducting a debriefing, detailed in this Operations Directorate - Doctrine and Instruction Division order, unless it is explicitly determined otherwise by the Chief of General Staff". The order also states that "according to the law, a soldier being debriefed by the team is not entitled to refuse to give information or to refrain from answering questions in the debriefing, and he must tell the truth".

As mentioned above, the rules relating to the legal status of the operational debriefing, and especially the confidentiality of the information collected in its course, are intended to ensure the reliability of the data collected in the framework of the debriefing.

The audit found cases in which the documents that the FFA Mechanism prepared and forwarded to the MAG Corps sometimes used the term "investigation" rather than "debriefing" or "conducting a debriefing".

The audit also found that in the legal training given by the Military Law School for the FAA Team in December 2014, the training participants received a lecture by the Military Advocate for Operational Affairs on "Lessons from operational **investigations** and professional emphases", and a leaflet that was drafted by the Prosecution for Operational Affairs, entitled "Emphases for operation **investigations**" containing emphases and guidelines for the work of the General Staff's FAA Team (emphasis added).

Major General (res.) Yitzhak Eitan, head of the FFA Mechanism, told the audit team in March 2015: "The rules of the operational debriefing apply to the inquiries conducted by the FFA Mechanism and it cannot be used for investigational purposes... If a MPCID investigation is opened, then the MPCID do not receive the debriefing and the MPCID investigators should re-take testimonies. This is because the purpose of the debriefing is to learn to improve, while an investigation is aimed at looking for those who are criminally liable. Therefore, commanders should feel open in a debriefing, in contrast to an investigation in which they must defend themselves and beware of self-incrimination".

He further added: "Already now, one of the problems of the FFA Mechanism's work is that army officials have a harsh view of the members of the FFA Mechanism and consider them to be representatives of the MAG and as someone conducting an investigation. Because of this, the members of the

FFA Mechanism find it difficult to obtain material relevant to the inquiries they are conducting, and the soldiers participating in the inquiry are reluctant to cooperate with the members of the FFA Mechanism".

The State Comptroller's Office notes that the MAG should instruct the members of the FFA Mechanism to refrain from using the term "investigation" in their work and to use the expression "fact-finding assessment".

In August 2016, the IDF informed the State Comptroller's Office in its response to the draft report that "the **IDF accepts** the Comptroller's comment on this matter and the use of the appropriate terms will be highlighted in the future for the FFA Mechanism staff, including in the relevant SOP" (emphasis in the original text).

The questioning of civilians

The Operations Directorate order determined that the FFA team may summon any soldier and officer for questioning. However, the order does not explicitly state that the FFA Mechanism may question civilians and does not state that it should strive to question all relevant witnesses, including those who are not soldiers. It should be noted that in the letters of appointment of the heads of the FFA Mechanism it was written that "in the framework of carrying out the debriefing, you should collect testimonies from any entity that may contribute to understanding the circumstances of the incident".

In this regard, it should be noted that the publication made by the MAG Corps on September 10th 2014 indicates that the debriefing teams have extensive powers that enable them to collect data from external sources as well, including the taking of testimony from civilians. In practice, according to data available to the State Comptroller's Office at the time of the completion of the interim draft, August 2015, the debriefing teams did not question civilians, and it is possible that they did not take advantage of a very extensive range of possible evidence that would have assisted in processing of the debriefing.

In October 2015, the MAG stated that "there is room to clarify and highlight the authority of the FAA teams to collect testimonies from civilians".

On February 15th 2016, the Assistant MAG told the audit team in this context: "This [the taking of testimony from civilians] is not explicitly set forth in the Doctrine and Instruction Division order [the debriefing and the implementation of the lessons] regarding the FFA Mechanism... but the teams are fully aware of their ability to do so. In the course of the FFA Mechanism's

work, civilians were also questioned (e.g., UNRWA representatives) [the United Nations Relief and Works Agency for Palestinian Refugees]".

The State Comptroller's Office comments to the IDF that adding an explicit provision on the subject of questioning civilians would help to improve the work of the FFA teams in the fact-finding assessment, and therefore the provisions should be clarified and an explicit stipulation should be included as to the authority of the teams to receive information from civilians.

In August 2016, the IDF informed the State Comptroller's Office in its response to the draft report that "the FFA Mechanism staff appeal to citizens whenever it is necessary to clarify the full facts of the incident... This authority of the FFA Mechanism will be anchored in the SOP".

In conclusion of this sub-chapter, the State Comptroller's Office comments to the IDF that detailed work instructions will assist the FFA Mechanism's work and increase its thoroughness and effectiveness, and ensure that the FFA Mechanism fulfills its mission and provides the MAG with as much information as possible for making a decision on whether to open an investigation.

The Operations Directorate and the MAG Corps should immediately incorporate the SOP regarding the workings of the FFA Mechanism, including work instructions for the Mechanism, detailing how the debriefing should be conducted, the manner in which the information should be collected, the ways to prevent damaging the quality of the evidence, the manner of documentation of the information collected as part of the debriefing and the proper way to present to the MAG Corps the findings of the debriefing and the information gathered. These guidelines are necessary to ensure professional and thorough work, in order to enable the MAG to decide whether to order the opening of a criminal investigation, without prejudice to the possibility of a future investigation.

The expediency of the examination

This principle requires that an investigation be opened as quickly as possible, and that it continue without unreasonable delays that could undermine the

credibility of the evidence and undermine the public's trust that justice will come to light. The Turkel II report stated, "The function of the team will be to provide the MAG with as much information as possible, within a timeframe that is stipulated in procedures, in order to enable the MAG to make a decision about whether to open an investigation". The report also states that "Promptness is also required for a fact–finding assessment because a failure to conduct it promptly would cause unjustified delays in a subsequent investigation, rendering that subsequent investigation ineffective". The demand for expediency arises immediately when the obligation to investigate arises, however when applying this principle during an armed conflict the reasonableness of the delay should be determined, depending on the circumstances and extent and intensity of the violence. Maintaining this principle may help to implement the principle of effectiveness and thoroughness. When it is not possible to conduct an investigation at the appropriate speed, the preservation of the evidence is even more essential.

The Operations Directorate order stipulates that the Chief of General Staff will order the appointment of a debriefing team (a FFA team) no later than a week from the day he becomes aware of the incident or from the date on which a complaint or report or request to investigate the incident was received. An interim report by the debriefing team will be submitted within two weeks of the date of its appointment. In the event the Chief of General Staff ordered the continuation of the team's work after submitting the interim draft, the team should submit its conclusions to the Chief of General Staff within 30 days. In exceptional cases, the Chief of General Staff may, for special reasons to be recorded, extend the period of a team's work.

In contrast to the timetables for completing the debriefing work detailed in the Operations Directorate order issued on August 31st 2014, the Chief of General Staff at the time, Lieutenant General Benny Gantz wrote in the letter of appointment to the head of the Mechanism that was issued to Major General Noam Tibon on July 10th 2014: "You should complete the debriefing and present it to me, as well as transfer the entire investigation material to the MAG for review (including findings, conclusions and lessons) **up to seven days** from the date on which the incident was transferred for your examination". It should also be noted that in the letter of appointment of the head of the FFA Mechanism issued by the Chief of General Staff at the time, Major General (res.) Yitzhak Eitan, on January 28th 2015, it was written: "You should complete the debriefing work and present it to me, and also submit to the MAG for review the entire investigation material (including findings, conclusions and lessons) **up to fourteen days** from the date on which the incident was transferred for your examination" (emphasis added).

On August 5th 2014, the Chief Military Prosecutor wrote to the MAG a document on "The investigations and debriefing policy following Operation

The time required for the staff of the FFA Mechanism to complete the examination of more than 80% of the cases that were transferred to it exceeded, sometimes significantly, the timetables set forth in the Operations Directorate orderthe cases that were transferred to the FFA Mechanism, the time required for the staff of the FFA Mechanism to complete the examination of the incidents referred to it exceeded, sometimes significantly

'Protective Edge', in which he referred to the FFA Mechanism's work and wrote that "it is agreed by all that a situation should be prevented where we are waiting for an extended period of time for the fact-finding assessment findings [of the FFA Mechanism] in a manner that greatly harms the effectiveness of the investigation and the duration of its handling".

The audit found that in more than 80% of the cases that were transferred to the FFA Mechanism, the time required for the staff of the FFA Mechanism to complete the examination of the incidents referred to it exceeded, sometimes significantly, the timetables set forth in the Operations Directorate order.

The State Comptroller's Office notes that shortening the time required by the FFA Mechanism to carry out a fact-finding assessment will help MPCID investigators to collect the evidence in the event that the MAG decides at the end of the fact-finding assessment to open a criminal investigation. This improvement is necessary since, if a decision is made to open an investigation, the MPCID will have to start examining the incident from the beginning and the prolonged examination by the FFA Mechanism is liable to damage the evidence and thereby hamper a future investigation, should one be initiated.

In August 2016, the IDF informed the State Comptroller's Office in its response to the draft report: "**The draft report on this matter is acceptable**. The IDF's position is that anchoring the timetable set by the Ciechanover Team, in the framework of Recommendation No. 6, as approved by the Cabinet, will provide an adequate response to this issue" (emphasis in the original text).

Regarding the work of the FFA Mechanism, the IDF stated in December 2016 that "the FFA Mechanism has not yet completed the evaluation of 9 cases and that 25 additional cases (examination supplements) should be completed. In addition, the Mechanism is still completing the examination of the combat events in Rafah (August 1st 2014) and Shejaiya (July 20th 2014)".

The State Comptroller's Office comments to the IDF that the number of open files that the FFA Mechanism has not yet completed for a long time since the end of Operation "Protective Edge" is problematic and may hamper the possibility of future investigation. The IDF should ensure that the FFA Mechanism completes its work as soon as possible, or alternately transfer the investigation in these cases to the investigating authorities in order to open an investigation in their matter.

The State Comptroller's Office further notes that the IDF should provide the FFA Mechanism with all the resources required for its work. The MAG should immediately set forth instructions and guidelines in which reasonable and feasible time frames for the work of the FFA Mechanism are established, and ensure that compliance therewith is enforced. In cases where the examination is overly prolonged, the MAG should provide reasons for the delay, and in cases where the start of the examination is delayed, the MAG should consider ordering an investigation while waiving the examination stage.

The examination's transparency

The Turkel II report noted that this principle is not recognized in international humanitarian law, but the Commission believed that "ensuring the principle of transparency is indeed desirable". The report further states that "this principle concerns the publication of decisions and actions in the investigative process", so as "to ensure a culture of accountability and public oversight of the law enforcement and legal authorities, as well as public confidence in the legal system and the rule of law". The Turkel II report further states that under international human rights law, there is an obligation to maintain transparency in the investigation from two separate perspectives: the obligation to notify victims of crime or their families of their rights to receive information regarding the circumstances of said offense, and the obligation to publish a comprehensive public report on the investigations and their findings, to ensure the reliability of the system or the authority investigating and the public's confidence in them. However, the report states that this principle should be applied in accordance with the circumstances, including when questions arise regarding state security.

The audit revealed that although the Operation Directorate order does not refer to the publication of a report on the MAG's decisions, investigations and their findings, the MAG publishes on the MAG Corps' website, general information on the examination process of the exceptional incidents and their numbers. He also publishes general data on incidents forwarded for criminal investigation, those that were closed and those in which a decision was made to prosecute. Under the limits of information security, the MAG provides details regarding decisions pertaining to certain exceptional incidents in respect of which a decis ion was made to close them.

In August 2016, the IDF informed the State Comptroller's Office in its response to the draft report: "It is improper to set out rules for the IDF in this matter [the duty of publication] and the IDF should be given broad discretion in the matter according to circumstances, including the nature of the combat

event, its circumstances, its scope, the number of exceptional incidents that took place in its course, etc… The IDF and the MAG Corps routinely publish data and individual decisions regarding decisions made, with the aim… to ensure transparency, maintain the credibility of the military system and the public's confidence therein".

The State Comptroller's Office notes that when allegations have been raised against the IDF regarding an alleged violation of international law, the MAG Corps should anchor in a directive the duty to publish and the manner in which a public report will be published on the MAG's decisions and on investigations of complaints and exceptional incidents and their findings, to ensure the credibility of the military system and public confidence in it.

In conclusion of this chapter regarding the implementation of the recommendations of the Turkel Commission and the work of the FFA Mechanism in Operation "Protective Edge", the State Comptroller's Office stresses that the need to observe international humanitarian law has much influence on political and military decisions, sometimes fateful. In light of this, the State of Israel should prepare itself thoroughly and optimally and in a timely fashion to meet the requirements of international law and the legal campaign in this area, and not wait for a crisis. This issue is of great importance also because of the long-term effects, even after the end of hostilities, derived from the military activity, especially with regards to employing firepower.

The State Comptroller's Office notes that flaws were found regarding the efficiency and expediency of the FFA Mechanism's work, and relating both to the manner in which the findings are collected and to the manner in which the information collected is documented. However, the audit revealed that the FFA Mechanism did its work in good faith and out of a sincere desire to conduct a thorough and complete fact-finding assessment and to arrive at the truth. Moreover, the audit found that the MAG acted to prevent material damage to the factual foundation on which he based his enforcement decisions.

In September 2016, the IDF added to its response to the draft report: "From a broad historical perspective, the FFA Mechanism's work regarding the 'Protective Edge' events has been successful and constitutes a significant breakthrough, as within a short period of time, the FFA Mechanism collected

Flaws were found regarding the efficiency and expediency of the FFA Mechanism's work. The FFA Mechanism did its work in good faith and out of a sincere desire to conduct a thorough and complete fact-finding assessment and to arrive at the truth. The MAG acted to prevent material damage to the factual foundation on which he based his enforcement decisions

factual data regarding hundreds of combat incidents, and brought before the MAG a detailed factual foundation in order to make a decision on them... In our opinion, in the work of the FFA Mechanism during the first few months, there were no substantive defects which go to the root of the matter, and the labor pains do not raise doubts as to the professionalism of the FFA Mechanism and the quality of its products... All of the MAG's decisions regarding the events examined by the FFA Mechanism were ultimately based on a solid and comprehensive factual basis that made it possible to make informed and professional decisions".

In November 2016, the IDF informed the State Comptroller's Office in its response to the draft report: "Even in cases examined during the audit, when the factual foundation provided to the MAG Corps by the FFA Mechanism was inadequate or insufficiently documented, the MAG Corps took steps to supplement it, mainly by way of requests to the FFA Mechanism. The FFA Mechanism as a whole would carry out the necessary supplementary work and transfer the additional materials to the MAG Corps. In the few cases in which the MAG believed that the factual foundation presented to him was insufficient to formulate an informed enforcement decision, the MAG ordered the incident to be transferred to MPCID investigation or to the completion of the preliminary investigation by the MPCID".

The State Comptroller's Office also notes that the audit revealed flaws in the FFA Mechanism's work regarding its expediency and effectiveness, which stemmed from its rapid establishment during Operation "Protective Edge" without prior preparation and an orderly procedure. Therefore, the IDF should complete the process of formulating and integrating the SOP relating to the work of the FFA Mechanism as soon as possible, and act to implement it in practice.

In January 2017, the IDF informed the State Comptroller's Office in its response to the draft report: "**The 'General Staff SOP for the debriefing of exceptional incidents'**... came into force and was distributed in the IDF on November 15th 2016... The SOP included many of the amendments mentioned in the draft of the audit report... **The composition of the FFA Mechanism and the characterization of its functionaries** were determined... **the position of the MAG vis a vis the FFA Mechanism;... training of the FFA Mechanism staff and maintaining their qualifications;... integration of experts in investigations and in international law within the framework of the FFA Mechanism;... refraining from the integration of those who took part in the fighting or were part of the chain of command in the debriefing;... collection of open source materials by the FFA Mechanism;... transfer of the findings** [all raw materials] **by the FFA Mechanism to the MAG;...**

preparing real-time records of debriefings conducted by the debriefing teams... questioning civilians" (emphases in the original text).

The State Comptroller's Office notes that the IDF should act to implement the audit's comments in the framework of the 'General Staff SOP for the debriefing of exceptional incidents' which, according to the IDF, came into effect and was distributed by the IDF.

The State Comptroller's Office is aware of the complex legal reality facing the State of Israel and the political and military echelons, and notes that the political establishment and the military establishment should ensure that when dealing with terrorist elements, the State of Israel conforms to the accepted principles and rules of international law to which the State of Israel is party. This is necessary in order to foster success, to the extent possible, in the legal campaign as well, which will probably be inevitable. The State Comptroller's Office finds that the adoption of the recommendations of the Implementation Team by the Government of Israel is an important step in establishing the status of the State of Israel as a leading state in strict observance of the principles of international humanitarian law, and that the Israeli government and the IDF should act without delay to implement these recommendations and act to rectify the flaws raised in this audit report concerning the workings of the FFA Mechanism.

Conclusion

The State of Israel is a Jewish and democratic state, whose military operates in accordance with the principle of the rule of law and the international obligations of the state. The State of Israel's confrontation with its enemies is conducted with a view to finding the proper balance between the protection of human rights and the defense of national security. This reflects a recognition of the fact that the protection of human rights even in times of conflict and crisis, while properly balancing security needs, is of great significance to the national strength of the state. There is no national security without preserving the values of democracy and human rights.

For years, the enemies of the State of Israel have been attempting to undermine its legitimacy to defend itself by trying to initiate legal proceedings in various countries around the world against senior officials in the Israeli political echelon and against IDF soldiers, with claims that they committed war crimes and violated international humanitarian law. In this context, it is important to note that the terrorist organizations, including the Hamas organization, which operates primarily in the Gaza Strip, attempt to exploit the State of Israel's commitment to the rules of international humanitarian law, including the obligation to avoid intentionally harming uninvolved civilians in the hostilities, so as to harm the State of Israel in military, political and economic areas, and in order to hinder the IDF and to narrow its operational scope of action in combat and during routine times.

The rules of international humanitarian law regulate the duties, rights and protections available to the State and individuals involved in or affected by an armed conflict and constitute part of the framework for the prevention of unnecessary human suffering in times of war and armed conflict. The State of Israel is a party to these rules, which establish norms and rules of conduct during the conduct of the combat and in the examination and investigation activities in cases where there is suspicion of their violation.

A humanitarian disaster among the civilian population in times of hostilities may, in addition to its moral significance, constitute a violation of the State of Israel's obligations on the international level, and may seriously damage the State's image and its international standing, and may even have legal implications. In addition, such a disaster could affect the IDF's ability to achieve the objectives of combat. In view of the sensitivity of the issue and its importance, and in light of the flaws raised in this report, the IDF should ensure that the plan for dealing with a humanitarian disaster takes into account the realistic scope of population that may require humanitarian assistance during combat, and validate it from time to time to ensure its implementation in real time.

Due to the weighty implications of the abduction event, and in light of the differences in understanding the instructions of the "Hannibal" Orders in the IDF and the possible ramifications this may have, the "Hannibal" Order should have been revoked - as it was ultimately, by the Chief of General Staff in the course of the audit in June 2016. The new format of the Order should provide a response to the findings of this audit. Therefore, the Chief of General Staff should order an examination of the possibility of raising the level of authority required to employ firepower during an abduction or fear of abduction, in accordance with its severity, in accordance with the possibility that it will lead to an escalation of the security situation and in accordance with the environment in which it is taking place and the degree of certainty as to the actual occurrence of the incident. The orders should be amended accordingly in conjunction with the MAG.

The State Comptroller notes that, according to the minutes of the Cabinet discussions that took place from the time of the decision to embark on Operation "Protective Edge" to its conclusion, as well as from the statements made by the cabinet ministers at the time and other senior officials, the significant weight given to the rules of international law in the IDF activity in Gaza are evident, as well as the ongoing legal support of all Cabinet discussions during the operation, and enlisting to assist the civilian population in Gaza. In providing their instructions at the cabinet meetings, the political echelon and the military echelon were careful to take steps to prevent potential violations of the provisions of international law.

The audit discovered flaws regarding aspects of the efficiency and expediency of the work of the FFA Mechanism during and after Operation 'Protective Edge'. However, the audit revealed that the FFA Mechanism did its work in good faith and out of a sincere desire to conduct a complete and thorough fact-finding assessment and to arrive at the truth. In addition, it was found that the MAG acted to prevent material damage to the factual basis on which he made his enforcement decisions, and that the need to observe international humanitarian law is an important influence on sometimes fateful political and military decisions. In light of this, the State of Israel should continue to prepare itself in a thorough, optimal and timely manner to meet the requirements of international law and the legal campaign in this area, and not wait for a crisis. This issue is of great importance also because of the long-term effects, even after the cessation of hostilities, derived from military activity, especially in the field of employing firepower.

The State Comptroller's Office is aware of the complex legal reality facing the State of Israel and the political and military echelons, and notes that the political establishment and the military establishment should ensure that when dealing with terrorist elements, the State of Israel conforms to the accepted principles and rules of international law to which the State of Israel is a party. Acting in compliance with international law, may also help deal with the legal, political, and public battles that will almost certainly be inevitable.

The State Comptroller's Office finds that the Ministry of Justice and the IDF took steps to implement the recommendations of the Turkel Commission, even before the end of the Ciechanover Team's work, which was established for this purpose. However, it was found that at the time of the conclusion of the audit there were other areas that required resolute action - some of which required proper allocation of resources - in order to quickly implement the recommendations of the Turkel Commission and the Ciechanover Team. The adoption of the Ciechanover Team recommendations by the Israeli government is an important step in establishing the State of Israel's status as a leading country in strict adherence to the principles of international humanitarian law. The Government of Israel and the IDF should act without delay to implement the Ciechanover Team recommendations and to act to correct the flaws revealed in this audit report regarding the work of the FFA Mechanism.

Appendix: Abbreviations and References

Abbreviations and References	Full text
HCJ	High Court of Justice
Ciechanover Team	a team to review and implement the Second Report of the Public Commission to Examine the Maritime Incident of May 31st 2010
COGAT	the Coordination of Government Activities in the Territories
Debriefing Material	Statements made in the debriefing, the minutes of the debriefing, any other material prepared in its course, as well as the summaries, findings and conclusions
FFA	Mechanism for fact-finding assessment
General Staff Order	General Staff Order issued by the Operations Directorate
IDF	Israel Defense Forces
MAG	Military Attorney General
MAG Corps	Military Attorney General staff
Mechanism	mechanism for fact-finding assessment
MPCID	Military Police Criminal Investigation Division
NSC	National Security Council
SOP	standing operating procedure regarding the Mechanism's work
the Coordinator	Coordinator of Government Activities in the Territories
the first teams	six teams to examine whether there is suspicion of prohibited conduct on the part of IDF soldiers in the context of the incident being investigated
the New Reporting Order	standing order regarding "The provision of an initial report and debriefing to the MAG Corps"
the Prosecution's Ombudsman	Commission for Public Complaints Against the State's Legal Representatives