



Position paper, October 1, 2015

## **The Ciechanover Report – dodging the criminalization of war crimes and practical steps toward implementation**

**An analysis of the report of the Ciechanover Commission, a team appointed to review and implement the recommendations made by the Turkel Commission on Israel's mechanisms for examining and investigating complaints and claims of violations of the laws of armed conflict according to international law**

The Ciechanover Commission was established for the purpose of recommending practical steps towards implementing the recommendations of the Turkel Commission for improving Israel's mechanisms for investigating alleged violations of the laws of war.

The report published by the Ciechanover Commission completely fails to fulfil its purpose, and most of the recommendations it contains remain general rather than practical and functional. The Ciechanover Commission avoided making concrete practicable recommendations related to the human resources and budgeting requirements needed to effectuate the Turkel recommendations, and some of its recommendations lack timetables and stages for implementation. **Without tackling these practical aspects, the various agencies involved will not be able to carry through the recommendations, sentencing them to remain a dead letter for some time to come.**

The Ciechanover Commission eschewed the recommendations made by the Turkel Commission on one central aspect, namely the need to bring the legal situation in Israel on par with the standards of international law on the criminalization of war crimes and the responsibility of commanders and civilian superiors. In this context, the Ciechanover Commission confined itself to advising that the Attorney General promote legislative measures focusing on torture and crimes against humanity, **and blatantly refrained from advocating the adoption of domestic legislation defining the offenses of war crimes in a manner that conforms with international law.**

### **Background:**

Following the May 2010 flotilla incident (the Mavi Marmara), former High Court Justice Jacob Turkel was appointed to chair a public commission that would look into the flotilla incident itself, as well as Israel's mechanisms for examining and investigating allegations and claims of violations of the laws of armed

conflict according to international law.<sup>1</sup> The Turkel Commission submitted its report to Prime Minister Netanyahu in February 2013. The commission found that: “[T]here are grounds for amending the examination and investigation mechanisms and [...] in several areas there are grounds for changing the accepted policy”. It also found that, “certain accepted practices – that are appropriate in themselves – should be enshrined in express written guidelines that are made publicly available”.<sup>2</sup> The Turkel Commission compiled these desirable changes into 18 recommendations directed at various agencies: the IDF, the Israel Police, the Israel Prison Service, the Israel Security Agency and the Ministry of Justice.

Recommendation No. 18 in the Turkel Report focused on the implementation of the remaining recommendations, stating that: “The Commission recommends that the Prime Minister should appoint an independent implementation team that will monitor the implementation of the recommendations in this Report and report periodically to the Prime Minister”.

It was not before January 2014, a year after the publication of the Turkel report, that the Government of Israel decided to put together a team to review and implement its recommendations.<sup>3</sup> Dr. Joseph Ciechanover was chosen to chair this new commission. Its remaining members were Brig. Gen. Herzl Halevi, Brig. Gen. (reserves) Rachel Dolev, Dr. Roy Schondorf and Mr. Raz Nizri. The Ciechanover Commission took twenty months to complete its task and publish its recommendations regarding the implementation of the Turkel recommendations. Its report, listing these recommendations, was submitted to Prime Minister Binyamin Netanyahu in August 2015 and released to the public at the end of September 2015.<sup>4</sup>

### **Avoiding legislation that incorporates war crimes**

The Ciechanover report overtly avoids issuing instructions for the full implementation of the first two recommendations made by the Turkel Commission with respect to legislation that incorporates norms and standards of international law into Israeli law.

On the issue of incorporating war crimes into Israeli domestic law (Turkel Recommendation No. 1), the Ciechanover Commission chose to advise the preparation of draft bills on the incorporation of the crime of torture and crimes against humanity into Israeli law, when such crimes are committed as part of a systematic or widespread policy. The fact that in addressing legislative measures, the Ciechanover Commission glossed over offenses that are commonly committed in the West Bank and may amount to war crimes, yet are not committed in the context of systemic use of force, such as beating restrained

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<sup>1</sup> Government Resolution No. 1766, 32<sup>nd</sup> Government, “Appointment of an Independent Public Commission, Headed by Former Supreme Court Justice, Jacob Turkel, to Examine the Maritime Incident of 31 May 2010”, June 14, 2010 (hereinafter: the **Turkel Commission**).

<sup>2</sup> The Public Commission to Examine the Maritime Incident of 31 May 2010, **Second Report – The Turkel Commission – Israel’s Mechanisms for Examining and Investigating Complaints and Claims of Violations of the Laws of Armed Conflict According to International Law**, February 2013 (hereinafter: the **Turkel Report**)

<sup>3</sup> On January 5, 2014, the 33<sup>rd</sup> Government of Israel passed Resolution No. 1143 regarding “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”.

<sup>4</sup> **Report of the Team for the Review and Implementation of the Second Report of the Public Commission for the Examination of the Maritime Incident of May 31st 2010 Regarding Israel’s Mechanisms for Examining and Investigating Complaints and Claims of Violations of the Law of Armed Conflict According to International Law**, August 2015 (hereinafter: the [Ciechanover Report](#)).

detainees and other violent offenses, is a cause for concern. The Commission also ignored offenses committed during times of war, leaving the current lacuna in Israeli law unchanged. While Israeli criminal law contains offenses that may be used against soldiers who beat civilians in checkpoints or harm property (though, these soldiers cannot be charged with war crimes) when it comes to offenses committed during combat, criminal law offers no parallel offenses that allow laying charges.<sup>5</sup>

The Ciechanover Commission entirely circumvented the implementation of Recommendation No. 2 of the Turkel report with respect to imposing special responsibility on military commanders and civilian superiors for offenses committed by their subordinates. The Ciechanover Commission opted instead to recommend that: “[T]he question of the explicit anchoring of the responsibility of military commanders and civilian superiors in Israeli law would continue to be examined by the relevant parties before being decided”.<sup>6</sup> This means that the current situation, whereby there are no criminal tools for imposing liability on commanders and superiors for the actions of subordinates will remain as it is.

**Refraining from incorporating war crimes and liability of commanders and superiors into Israeli law has grave implications for Israel’s claim that the principle of complementarity is fulfilled, thus shielding it from prosecution in international tribunals.**

### **The recommendations lack concrete, practical directives**

As stated, the purpose of the Ciechanover Commission was to monitor the implementation of the Turkel recommendations in consultation with the relevant professional officials and agencies, with a focus on the practical, functional side. Instead, the recommendations contained in the Ciechanover report are broad, general and do not address the practicalities of implementing the Turkel recommendations.

Implementing recommendations on the scale of those made in the Turkel report requires resource allocation – budgets, staffing, human resources, timetables and operative steps toward implementation on the ground. The Ciechanover report lacks such practical details, and its recommendations address implementation at a general level only, similarly to the Turkel recommendations. **The lack of reference to the practical aspects involved in implementing the Turkel recommendations raises concern that the various agencies involved will not be able to carry them through.**

So, for instance, with respect to Recommendation No. 9 of the Turkel report, relating to the establishment of an operational matters unit within the Military Police Criminal Investigations Division, the Ciechanover Commission did not find it necessary to determine, in consultation with the relevant professionals, what the staffing requirements for such a new unit would be or what training staff would need, nor did it find it necessary to assess the budgetary implications of establishing and running such a unit. The Ciechanover Commission merely repeated the Turkel recommendation to establish a new unit, without addressing the human and financial resources this would require.

The same holds true for Recommendation No. 10 of the Turkel Commission, which concerns establishing a timeframe for criminal investigations. While the Chief Military Prosecutor is preparing draft guidelines that would cap investigations at nine months, the Ciechanover Commission report does not address the

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<sup>5</sup> See, [Lacuna: War Crimes in Israeli Law and Court Martial Rulings](#), Yesh Din, July 2013.

<sup>6</sup> **Ciechanover Report**, p. 13.

critical question of whether this new timeframe can, in fact, be met with the number of Arabic speaking investigators currently serving in the Military Police Criminal Investigations Division, or whether more staff should be recruited and more investigators should be trained. The Commission also failed to address the length of time required to train investigators and the budgetary implications of these measures. Effective investigations within reasonable timeframe clearly require enough staff who are able to handle the workload. Investigations, which are currently inordinately protracted, sometimes taking years, cannot reasonably be expected to become more expeditious without the allocation of suitable resources.

The lengthy duration of each stage of the investigation process (the process leading up to the decision whether to open an investigation, the investigation itself and the process leading up to the decision whether to prosecute after the investigation is concluded) plays a major role in the closure of many investigation files, and in effect, obviates the possibility of prosecuting offenders, including those who have committed war crimes. Setting timeframes without making the changes that would allow them to be met may perpetuate the current lamentable state of affairs and severely undermine the ability to conduct timely, effective investigations.<sup>7</sup>

## **Conclusion**

Twenty months after the establishment of the Ciechanover Commission (January 2014), and five years and four months after the establishment of the Turkel Commission, with the wars and military operations such as Pillar of Defense and Protective Edge that took place in the interim, there are still no prospects for improvement in Israel's investigation and examination mechanism or for legislative measures that would bring Israel in line with its obligations under international law.

The long wait for the publication of the Ciechanover Commission report and the recommendations it finally made suggest that instead of effecting the changes in the investigation mechanism recommended by the Turkel Commission, the Ciechanover Commission set out to buy time, create the false impression that the investigation and examination mechanism is undergoing improvements and continue to grant impunity to members of the security forces and civilian superiors who violate the laws of war under international law.

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<sup>7</sup> See for instance, the outrageously slow proceedings in every stage of the investigation into the death of Bassem Abu Rahmeh: beginning with the decision to open an investigation, the investigation itself, the decision at the conclusion of the investigation and the decision in the appeal filed against its closure, <http://www.yesh-din.org/infoitem.asp?infocatid=706>.