



Promoting Accountability:

**The Turkel Commission Report on Israel's
Addressing Alleged Violations of
International Humanitarian Law**

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Cover photo: Ruins of homes demolished by the military during Operation Cast Lead. 'Izbet 'Abd Rabo neighborhood, east of Gaza City. Muhammad Sabah, B'Tselem, 19 January 2009.

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Background

In May 2010 Israeli naval commandos took over six ships sailing from Turkey to the Gaza Strip. The flotilla's declared purpose was breaking the blockade that Israel had imposed on Gaza. When the troops attempted to take over the Mavi Marmara, they encountered violent resistance on the part of the ship's passengers. In the course of the takeover, soldiers killed nine passengers and wounded twenty others; ten soldiers were wounded.

Following harsh international criticism of Israel – both of the military's actions during the takeover and of the prolonged blockade of Gaza – the government appointed an independent public commission of inquiry headed by former Supreme Court Justice Jacob Turkel. Two international experts were appointed to act as observers of the commission. They also took full part in the sessions.

In Part I of its deliberations, the commission examined whether the naval blockade Israel had imposed on the Gaza Strip and Israel's actions during the takeover of the flotilla complied with international law. The commission published its findings in January 2011.

In Part II of its sessions, the commission was charged with reviewing "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, conform with the obligations of the State of Israel under the rules of international law".¹ The commission published its findings on this issue in February 2013.

The commission's deliberations centered on the "investigation and inquiry mechanism" of the military – the primary entity that engages in warfare and the object of most of the complaints regarding violations of international humanitarian law (IHL). However, the commission also examined the investigative procedures of other organizations, including the Israel Police and Israel Security Agency (ISA, also known by its Hebrew acronym "Shabak").

¹ Article 5 of the government resolution to establish the commission. For more details on the commission and the events that led to its formation, see Turkel Commission website: <http://www.turkel-committee.gov.il/index-eng.html>.

The commission took two years to examine the question of investigative procedures. Over the course of that period, the commission heard testimony from various officials, including representatives of the Military Attorney General (MAG) Corps, the Military Police Investigations Unit (MPIU), the State Attorney's Office, the Israel Police, ISA, international law experts, and delegates of human rights organizations, including B'Tselem. In order to understand how investigations are carried out in practice, the commission obtained investigation files from the MPIU and the MAG Corps. It then examined how cases had been handled, from the time of the incident to the final decision in the case. The commission's report also presented a comparison of the investigative policy of suspected war crimes in six countries: the United States, Canada, Britain, Australia, Germany and Holland. Lastly, the commission examined whether the investigative procedures implemented in Israel comply with the state's obligations under international law.

In its report, the commission emphasized that all states are legally bound to investigate suspected violations of the laws of war. The commission held that Israel fulfills this duty, and 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 noted 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".² Once these changes are made, "Israel should be confident that its examination and investigation mechanisms will reflect international best practice".³

Despite the cautious wording of the above statement, the commission made far-reaching recommendations that, if implemented, could effect a dramatic qualitative change in investigations as well as in the entire law enforcement system in Israel. Given the flaws in Israel's current system of accountability for harm done to Palestinians, such change is vital. Below is a review of the commission's major recommendations. It is followed by a description of the potential consequences of their

² The second Turkel Commission report, "Israel's Mechanisms for Examining and Investigating Complaints and Claims of Violations of the Laws of Armed Conflict According to International Law", p. 49. For the full report, see <http://www.turkel-committee.gov.il/files/newDoc3/The%20Turkel%20Report%20for%20website.pdf>.

³ Ibid, p. 50.

implementation and of the issues where the recommendations fall short of the mark.

The Turkel Commission's recommendations

The commission's recommendations relate to various levels of Israel's law enforcement system.

Amendments to Israeli law:

- **Legislation on "war crimes":** Israeli law makes almost no mention of "war crimes" so that indictments for breaching IHL are achieved by matching criminal IHL offenses to others listed in Israeli law. The commission found this state of affairs satisfactory, as long as the offense for which the person is tried reflects the severity of the actions, as perceived by IHL. Notwithstanding, the commission noted that Israeli law does not cover all IHL prohibitions, first and foremost, the prohibition on torture and ill-treatment. The commission recommended introducing legislative amendments to ensure full correspondence between the international system of law and the Israeli one. The commission further proposes that, in order to promote deterrence and education, the norms relating to war crimes be fully incorporated into Israeli law.⁴
- **Imposing direct criminal accountability on commanders and superiors:** Under IHL, it is the duty of commanders and other superiors to prevent their subordinates from committing offenses. This includes either taking disciplinary action against perpetrators of such acts, or conveying their cases to law enforcement authorities with a demand that criminal proceedings be initiated. Israeli law does not impose comparable obligations on commanders. The commission recommended that the law be amended so that it impose direct criminal liability on commanders and superiors who did not take all reasonable measures to prevent offenses by their subordinates.⁵

⁴ Recommendation 1, see pp. 362-366 of Commission's report.

⁵ Recommendation 2, see pp. 366-369 of Commission's report.

Streamlining the military's examination and investigative procedures

The commission noted that, while the military's law enforcement system largely complies with the standards of international law, the procedures are not implemented in practice and the system is not committed to schedules that would force it to make decisions within a reasonable amount of time. According to the commission, the guiding principles of an "effective investigation" include the principle of promptness, which requires that an investigation be launched shortly after the incident. Similarly, a decision regarding further treatment of the involved parties must also be made without delay. To that end, the commission recommended setting deadlines for the decisions necessary at every stage of the proceedings, and that an upper time limit be set for the interval between the decision to investigate and a final decision in the case:

- **Reporting duties:** In 2005, during deliberations on a petition filed by B'Tselem and the Association for Civil Rights in Israel (ACRI) against the military's investigative policy, the chief of staff instated a special procedure for reporting incidents in which Palestinians uninvolved in combat were killed or wounded by soldiers. The procedure requires that every such incident be reported within 48 hours to the chief of staff, the Operations Branch and the MAG, and that the scene of the incident be documented. The commission found that this procedure is not implemented, thereby limiting the MPIU in its ability to investigate incidents. The commission recommended that the procedure be assimilated by all staff responsible for its implementation and that sanctions be imposed on commanders who do not comply with it. The commission further recommended that the procedure be implemented in every case of suspected breaches of IHL, not only in cases of death or injury.⁶
- **Fact assessment:** MAG Corps procedure requires that an investigation be launched immediately in cases in which there are reasonable grounds to suspect a criminal offense, such as in incidents involving violence and looting. However,

⁶ Recommendation 3, see pp. 370-375 of Commission's report.

when more information is needed to establish whether suspicion is warranted – primarily in incidents that the military defines as “combat incidents” – the MAG awaits the findings of the operational inquiry before deciding whether to open an investigation. The commission found this practice problematic on a variety of grounds, such as that it can delay the opening of an investigation and that the operational inquiry is meant to serve the military’s operational needs, not determine criminal responsibility. The commission recommended that, when such additional information is needed, the MAG form a fact-finding assessment team comprised of experts in the fields of military operations, international law and investigations. The team will be given a predetermined timeframe within which to provide the MAG with the supplementary information needed to reach a decision on whether to open an investigation.⁷

- **Ordering investigations:** Currently, the MAG has unlimited time to decide whether to order an investigation. The commission noted that, as these decisions are greatly delayed, a timeframe of no more than several weeks must be set for making these decisions.⁸
- **Investigations:** The commission recommended that the MPIU form a special department for operational affairs. Soldiers serving in it will be specially trained in IHL. If possible, the department will include Arabic-speaking investigators. Moreover, in order to render the MPIU more accessible to complainants, the department should have bases located in the areas where the incidents under investigation occur. The commission also recommended that investigations be set a time limit so that they do not drag on for years on end.⁹

⁷ Recommendation 5, see pp. 378-384 of Commission’s report.

⁸ Recommendation 6, see pp. 384-386 of Commission’s report.

⁹ Recommendations 9 and 10, see pp. 396-399 of Commission’s report.

Transparency of proceedings

The commission emphasized that, like any administrative authority, the MAG must justify his decisions, both due to their public and legal importance and because publishing the justifications will enable appealing these decisions. Contrary to the current *modus operandi*, it is recommended that the MAG also explain when a decision is made not to launch an investigation, and that case files be continually and meticulously updated with records of all actions carried out in connection with the case. The commission further recommended that the Rights of Victims of Crime Law be applied to Palestinians injured in the course of law enforcement activity being investigated by the MPIU, thereby enabling the Palestinians to get information on the criminal proceedings. However, as regards "combat actions", the commission stated that as IHL does not require that victims be involved in the investigation, it would not demand that the law apply to them.¹⁰

Autonomy of the MAG

At present, the MAG is appointed by the minister of defense, based on the chief of staff's recommendation. As the MAG's term in office and promotion in rank depend on the discretion of his superiors, he is dependent on them, a state of affairs that limits his autonomy. Although the MAG is professionally subordinate to Israel's Attorney General, this hierarchy is not legally institutionalized. Therefore, the commission proposes that the MAG be appointed by the minister of defense alone, based on the recommendations of a professional public committee, which would include the Attorney General. It further suggests that the MAG's tenure be restricted to six years and that the office have a predetermined rank.¹¹

The commission also addressed the problem of the MAG's dual set of responsibilities. The MAG is responsible both for providing legal counsel to the military as well as for deciding whether to launch investigations in cases of suspected offenses. The MAG may find himself in a conflict of interest when he must form an opinion on his own previous decisions. To resolve this quandary, it is suggested that

¹⁰ Recommendation 11, see pp. 399-400 of Commission's report.

¹¹ Recommendation 7, see pp. 389-392 of Commission's report.

the Chief Military Prosecutor's status be upgraded so it is comparable to that of the State Attorney, by having the minister of defense make the appointment and by predetermining the post's tenure and rank. The commission further recommended that a legal procedure be established for appealing the MAG's decisions, as will be elucidated below.¹²

Supervising the MAG Corps

At present, the only state authority that has specialized knowledge of IHL is the military, particularly the International Law Department of the MAG Corps. Representatives of the department advise all state authorities, even outside the military, on matters concerning the laws of war. While the Attorney General is supposed to oversee this counsel, the fact is that he does not have the necessary knowledge, and therefore, does not fulfill that role. In order to enhance the Attorney General's ability to oversee the MAG's decisions, the commission recommended that a unit specializing in IHL be formed in the Department of Counseling and Legislation of the Ministry of Justice.

Regarding oversight of the law enforcement system, the commission noted that, at present, the only way to appeal a decision by the MAG is through a petition to Israel's High Court of Justice. The efficacy of that avenue is limited, as such petitions are usually filed long after the original incident, often when there is no longer any possibility of bringing those responsible to trial, or when the statute of limitations has expired. To enable oversight of the MAG's decisions, it is proposed that a process of appeal to the Attorney General be enshrined in law – including setting timeframes for the filing of the appeal and for ruling on it.¹³

¹² Recommendation 8, see pp. 392-396 of Commission's report.

¹³ Recommendations 12 and 13, see pp. 401-408 of Commission's report.

Complaints concerning ISA interrogators

When persons who have undergone ISA interrogation file a complaint, it is first checked by the Interrogatee Complaints Comptroller (Hebrew acronym "Mavtan"). Until recently, this office was held by ISA staff. The comptroller examines the complaint and passes on a recommendation to his supervising attorney at the Office of the State Attorney, who then conveys his own recommendation to the Attorney General, who decides whether to order an investigation. If he decides an investigation should be launched, the case is given to the Department for the Investigation of Police (DIP).

In 2007, an examination of this procedure by the Office of the State Attorney found it to be inefficient. It concluded that the process takes too long and that the comptroller does not properly examine complaints, adding that such an undertaking is problematic to begin with, given that ISA interrogations are not documented. In 2010, the Attorney General decided to transfer the office of the Interrogatee Complaints Comptroller to the Ministry of Justice, and, in early June 2013, a new comptroller was appointed as part of the ministry.

The commission, however, recommended that the office of comptroller be transferred to the DIP and subordinated to its chief, in the interest of achieving uniform investigative procedures. It also proposed that ISA interrogations be visually documented in full, a proposal that the director of ISA backed in his appearance before the commission.¹⁴

Complaints concerning civil authorities

The commission noted that, when there is an obligation to open an investigation, the investigation does not necessarily have to be a criminal one, but can be carried out by a commission of inquiry. In Israel, the government has the authority to establish State or Government Commissions of Inquiry. Such commissions have been established in the past to examine suspected violations of IHL. The commission recommended that complaints against civil authorities be handled in the framework of such commissions of inquiry.¹⁵

¹⁴ Recommendation 14, see pp. 408-413 of Commission's report.

¹⁵ Recommendation 17, see pp. 419-421 of Commission's report.

Analysis of the recommendations against the backdrop of reality

It has been B'Tselem's experience, based on its work with the military, that the system for investigating Palestinians' complaints regarding infringement of their rights is barely functional. On the face of it, the system seems to operate – complaints are filed, investigations are opened and decisions are made – but in point of fact, the process is inefficient and drags on for many years.

According to an update the MAG Corps sent B'Tselem in May 2013, 130 complaints that B'Tselem had filed with military authorities still remained in different processing stages. The complaints concerned various issues, including cases in which Palestinians were killed or wounded, acts of violence and property damage:

- 44 complaints await a MAG Corps decision whether to even open an investigation – 38 of these incidents occurred before December 2012.
- In 26 cases, the investigation has been completed, and the case awaits the MAG's decision – all of these incidents occurred before December 2012.
- 61 cases are still under investigation (including 17 awaiting completion of investigative details) – 54 of the incidents occurred before December 2012.

Although the MAG Corps recently changed its policy regarding cases in which Palestinians are killed by soldiers in the West Bank, the processing of such cases is also lengthy. When the second intifada began, the MAG Corps announced that, as a rule, there would be no MPIU investigations of incidents in which soldiers killed Palestinians, unless the findings of the operational inquiry raised suspicions of a criminal offense. In 2003 B'Tselem and ACRI petitioned the High Court of Justice against this policy.¹⁶ In April 2011, just before the MAG's appearance before the Turkel Commission, the State informed the Court of a change in its policy, and undertook that an MPIU

¹⁶ HCJ 9594/03 - **B'Tselem – The Israeli Information Center for Human Rights in the Occupied Territories et al. v. Judge Advocate General**, Petition for Order Nisi.

investigation would be automatically opened in such cases, excepting "combat incidents".¹⁷

Indeed, MPIU investigations were launched in 15 of 16 cases in which soldiers killed Palestinians in the West Bank since April 2011. The single case not investigated involves a soldier who was stabbed. However, by June 2013, the MAG reached a decision in only three of these cases: two case files were closed, and in a third, a soldier was indicted. Nine cases are still under investigation – two from 2011, one from 2012, and six from 2013. The remaining three, all from 2012, are still awaiting the MAG's decision, the investigation in each having been completed.

The commission addressed these problems, proposing changes to the MAG Corps' mode of operation, such as setting obligatory time limits for each stage of the proceedings. If the commission's suggestions are implemented, the existing system will be dramatically improved: the MAG will decide whether to open an investigation shortly after the incident; a speedy investigation will be carried out by more professional and experienced officials; and the decision about the further handling of the case will be made in a timely manner that will enable, if necessary, bringing charges against the offenders. Furthermore, reasons will be given for all decisions made by law enforcement officials, and victims will be able to appeal them effectively and receive an answer within a reasonable amount of time. Such a system will strengthen law enforcement and improve the odds of bringing offenders to justice, thereby deterring future offenders.

B'Tselem also welcomes the commission's recommendation to forego operational inquiries in cases where suspicion of a criminal offense is unclear. As the commission noted, operational inquiries are a useful learning tool for averting future mistakes and play an essential role in improving military performance. The object of criminal proceedings is just the reverse: they focus on the past, serving to expose the truth and bring offenders to justice. Moreover, operational inquiries are actually harmed when used for criminal proceedings: since the MAG will consider the findings of these inquiries to determine whether the MPIU should investigate the soldiers involved, it stands to reason

¹⁷ HCJ 9594/03 - **B'Tselem et al. v. Judge Advocate General**, Updated Statement on Behalf of the Respondent, 4 April 2011.

that soldiers will naturally shy away from reporting everything that occurred, for fear of incriminating themselves or their friends.

The manner in which operational inquiries are used to assist criminal proceedings is also problematic. The officers who carry out these inquiries are trained as military personnel, not as investigators; testimonies are not gathered from Palestinian witnesses or from the victims themselves, resulting in a partial picture of the event; and soldiers are exposed to versions given by others leading to possibly coordinated versions, even if subconsciously. In addition, waiting for the results of the operational inquiry delays the decision regarding opening an investigation, so that when the investigation does finally begin, the scene of the incident may no longer exist and there may no longer be an option of using basic investigative tools such as autopsy, collecting evidence from the scene, and gathering witness accounts.

Implementing these recommendations will improve the investigation of specific events in which soldiers are suspected of having breached military orders, such as cases in which Palestinians were killed in the West Bank in non-combat situations, or incidents involving violence, looting or the destruction of property. Although the commission did address the military's duty to investigate incidents of severe injury in the theoretical part of its report, it refrained from recommending that such cases be investigated immediately and with no preliminary inquiry. The distinction between fatalities and severe injuries is groundless, as the rules of engagement are supposed to prevent any form of unjustified injury.

However, the main problem with the commission's recommendations is that they are aimed at improving the existing system, instead of proposing fundamental changes to the military's methods of investigating alleged violations of IHL. The commission thereby ignored the fact that the military, and the military alone, is the body investigating such suspicions, thereby rendering the autonomy of the investigative proceedings questionable.

The recommendations regarding complaints against ISA interrogators are also welcome. Although more than 700 complaints have been filed with the Interrogatee Complaints Comptroller since the establishment of the office in 1992, not a single complaint has led to an investigation.¹⁸

¹⁸ Letter to B'Tselem from Att. Dan Eldad, Head of the Department for Special Assignments, Office of the State Attorney, 5 December 2011.

Since the procedure for checking such complaints completely lacks transparency, the reasons for this remain unknown. Transferring the responsibility for investigating such complaints to the DIP and visually documenting interrogations, as recommended, is highly likely to make the handling of these complaints more effective.

Two major problems with the military investigative system remain unresolved. One is the question of dealing with soldiers who obeyed commands that had been authorized by the MAG or by government officials, but may, in themselves, violate IHL. The MAG's responsibility for both legal counsel regarding such commands and for making the decision whether to open an investigation into such incidents places him in a conflict of interest, making it more difficult and unlikely that he initiate an investigation.

This dual role of the MAG's is virtually unparalleled in the world. In most European countries, complaints against soldiers suspected of violating IHL are investigated outside the military, in the civil system. In Britain, Australia, Canada and the United States, investigations are carried out within the military but civilians are involved in the proceedings, and the military's legal counsel is separate from the investigation and prosecution systems.¹⁹

To resolve this issue, the commission recommended a series of measures that would increase both the MAG's autonomy and the possibilities for overseeing his work. As detailed above, these are: predetermining his rank and term in office, and removing the chief of staff from the appointment process; forming a specialist IHL unit in the Ministry of Justice to advise the Attorney General; and legislating a procedure for appealing the MAG's decisions. While these are all worthy proposals, they are not sufficient for an independent investigation in cases in which the very commands given, or their guiding policy, are themselves in breach of IHL.

The second problem that the commission left unresolved concerns cases in which civil authorities are involved in setting military policy or giving commands to the military. The commission recommended that, in such cases, suspicions will not be examined in a criminal

¹⁹ For more information on these systems, see Chapter B of the commission's report (pp. 152-264). See also, Amichai Cohen and Yuval Shany, *The IDF and Alleged International Law Violations: Reforming Policies for Self-Investigation*, Policy Paper No. 93, The Israel Democracy Institute, pp. 81-85 [Hebrew].

investigation, but rather by a specially formed commission of inquiry. The commission emphasized that “the fact that the government establishes a commission of inquiry does not, in itself, compromise the independence of the commission”,²⁰ as long as the government ensures that there is no conflict of interest among any members of the commission and that they act independently.

Indeed, under IHL, investigations do not have to be criminal. As the commission noted, the only obligation is that the investigation be effective – “capable of identifying those responsible and committing them to justice”.²¹ To that end, the investigation must meet five basic principles derived from human rights law: independence, impartiality, effectiveness and thoroughness, promptness, and transparency.

However, non-criminal proceedings were recommended only for civil authorities. The problem is not the independence of the appointed commission members, but the fact that the actual formation of the commission depends on the goodwill of the government and on its readiness to investigate suspicions of war crimes by civil authorities who, in many instances, will include members of the government itself.

The problems inherent to both issues became evident after Operation Cast Lead, when suspicions were raised regarding violations of IHL, not just instances committed by individual soldiers, but as a matter of policy. For instance – what is considered a legitimate target? To what extent is Israel responsible for protecting civilians not taking part in the hostilities? Once the operation was over, human rights organizations, including B’Tselem, wrote to the Attorney General demanding that he order the establishment of an independent investigative procedure for examining the conduct of the military and the government during the operation. The demand was rejected, and the only reply given was that the organizations may apply to the Office of the State Attorney if they have concrete information regarding the IDF’s conduct during the operation. As a result, to this day, none of the suspicions raised regarding policy and orders given during the operation have been investigated.

Even if all of the Turkel Commission’s recommendations are implemented, suspected violations of IHL will still be investigated only within the military, with all the power concentrated in hands of the MAG: he is

²⁰ Commission’s report, p. 421.

²¹ Commission’s report, p. 114.

the one responsible for ordering an investigation to be opened, for overseeing it, and for deciding how to further handle the case. It is not within his authority to initiate investigations of civil authorities, and there is an inherent conflict of interest when he must order an investigation of orders given based on counsel provided by the MAG Corps – at times, even by the MAG himself.

One systemic change that could solve these problems is the establishment of a permanent independent committee, as suggested by Prof. Yuval Shany and Dr. Amichai Cohen, both in their appearance before the commission and elsewhere. They propose that an independent committee examine issues currently not being addressed, including “claims and suspicions regarding actions based on decisions and directives given by senior policymakers in the military and in the political establishment”.²² The committee would be authorized to look into claims of illegality regarding military policies, as well as to examine particular incidents of assassination in which many civilians were killed or which caused much damage, and to examine other suspected breaches of the law that do not require a criminal investigation or that the MAG has decided not to investigate. The committee would also be able to consider appeals of the MAG’s decisions. If necessary, it will be able to transfer a case to criminal investigation. The committee, headed by a retired judge, will have independent investigative authority, and the power to summon witnesses and to have official documents disclosed. As a rule, its sessions will be open to the public.²³

The Turkel Commission chose not to recommend this solution, yet offered no other option for investigating civil authorities and senior military officers – including the MAG himself – for involvement in policies suspected of violating IHL. Consequently, incidents in which military policy and the orders given are suspected of being illegal cannot be investigated. The fact that investigations have, therefore, been left solely in the hands of the MPIU may result in full blame being placed on the soldier in the field, while those responsible for giving the orders and setting policy get off scot free.

²² Shany and Cohen, see footnote 19 above.

²³ Ibid.

Conclusion

While the tone of the Turkel Commission's report is positive, emphasizing the full half of the glass, its conclusion is harsh: the system is not working. The commission demands fundamental, not merely superficial, changes in the MAG Corps. Those responsible for applying the commissions's recommendations must bear that in mind and ensure that the spirit of the recommendations is upheld.

The Turkel Commission has unequivocally stated that Israel is obliged to investigate suspected violations of the laws of war. It is essential that this duty be fulfilled by bringing to justice security forces in the Occupied Territories who breach those laws. This will serve to deter other soldiers from similar actions. An unenforced law – as is largely the case, at present – rings hollow and is worthless. The commission's message is clear: the theoretical mechanisms exist for Israel to fulfill its duties under IHL, but the fact that they exist is meaningless when they do not function, and the state must take action to remedy them.

After the Turkel Report was published, various officials – including Prime Minister Benjamin Netanyahu and former MAG Maj. Gen. Avichai Mendelblit – were quick to praise the commission's work. The prime minister even promised that the recommendations would receive serious consideration.²⁴ The authorities' must now take action to ensure that the recommendations are implemented, fulfilling both the spirit and the letter of the report.

²⁴ See prime minister's statements (in Hebrew): <http://www.pmo.gov.il/MediaCenter/Events/Pages/eventturkel060213.aspx>.