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Human rights situation in Palestine and other
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Report of the Committee of independent experts in international humanitarian and human rights laws to monitor and assess any domestic, legal or other proceedings undertaken by both the Government of Israel and the Palestinian side, in the light of General Assembly resolution 64/254, including the independence, effectiveness, genuineness of these investigations and their conformity with international standards

Summary

This report is submitted to the Human Rights Council pursuant to its resolution 13/9. The Committee reviewed numerous reports, including the official reports submitted to the United Nations Secretary-General by the Government of Israel and the Palestinian side pursuant to General Assembly resolution 64/254, as well as other documents, reports and articles by non-governmental organizations and military justice experts. The Committee undertook two field missions, to Amman and to the Gaza Strip, to interview victims and witnesses, Government officials and human rights organizations. The Committee was not granted access to Israel and the West Bank.

The Committee sought to assess investigations for compliance with international standards of independence, impartiality, effectiveness, thoroughness and promptness.

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I. Introduction

1. By its resolution 13/9, the Human Rights Council decided, in the context of the follow-up to the report of the International Independent Fact-Finding Mission (hereinafter FFM report),¹ “to establish a committee of independent experts in international humanitarian and human rights laws to monitor and assess any domestic, legal or other proceedings undertaken by both the Government of Israel and the Palestinian side, in the light of General Assembly resolution 64/254, including the independence, effectiveness, genuineness of these investigations and their conformity with international standards”.
2. On 14 June 2010, the High Commissioner for Human Rights announced the appointment of Mr. Christian Tomuschat, Professor Emeritus at Humboldt University Berlin, former member of the United Nations Human Rights Committee and the International Law Commission (President in 1992), as Chair of the Committee. The other two members were: Judge Mary McGowan Davis, former Justice of the Supreme Court of the State of New York and former federal prosecutor, who has advised widely on international justice issues, including for the International Criminal Tribunal for Rwanda and the International Criminal Court; and Mr. Param Cumaraswamy, jurist and former Special Rapporteur of the Commission on Human Rights on the independence of judges and lawyers.
3. The Office of the United Nations High Commissioner for Human Rights (OHCHR) established a secretariat to support the Committee.
4. The present report is submitted to the Human Rights Council pursuant to its resolution 13/9.

II. Mandate and approach

A. Mandate

5. The Committee interpreted its mandate by reading Human Rights Council resolution 13/9 in conjunction with General Assembly resolution 64/254, in which the General Assembly reiterated its call upon the Government of Israel and the Palestinian side to conduct investigations “that are independent, credible and in conformity with international standards into the serious violations of international humanitarian and international human rights law reported by the [United Nations] Fact-Finding Mission [on the Gaza Conflict], towards ensuring accountability and justice”.
6. The Committee understood “domestic, legal or other proceedings” to refer to investigations, disciplinary proceedings and prosecutions undertaken by either military or civil justice systems. In accordance with the General Assembly’s resolution, the Committee’s primary focus was on those proceedings related to the serious violations alleged in the FFM report. However, the reference to “any” proceedings in the Human Rights Council’s resolution meant that the Committee was not restricted to the allegations in the FFM report but could review proceedings pertaining to any incident connected to the military operations in Gaza. Additionally, the Committee looked into specific legal issues of institutional responsibility and reform processes relating to the legal regime of armed

¹ A/HRC/12/48.

conflict in the aftermath of these operations, which Israel codenamed “Operation Cast Lead”.

7. Regarding the temporal scope of the mandate, the Committee considered that any proceedings initiated by Israel or the Palestinian side which commenced on or after 18 December 2008 were relevant to its task.

B. Methods of work

8. The Committee sought to discharge its mandate by analysing information in the public domain and supplementing this information through consultations with stakeholders. It relied primarily on the FFM report, the three reports on the Gaza conflict prepared by the Government of Israel,² the report of the Independent Investigation Commission of the Palestinian Authority,³ and the reports of the Government Committee and the subsequent Independent Legal Committee established by the de facto Gaza authorities in response to the recommendations set forth in the FFM report.⁴

9. The Committee also consulted Governments, witnesses and victims, non-governmental organizations (NGOs), a national human rights institution, and experts in international law and military justice (see annex I). The Committee held three consultations in Geneva on 28-30 June, 11-12 August and 1-3 September 2010, and one in Brussels on 1 July 2010. They included meetings with civil society organizations and military justice and international law experts. The Committee undertook a mission to Amman on 26-30 July 2010 and another to Gaza on 15-16 August 2010 to meet representatives from Governments and NGOs as well as witnesses and victims of the incidents mentioned in the FFM report.

10. The Committee views the relevant government authorities as among the most important sources of information about the progress of investigations mandated by the General Assembly and so sought their cooperation from the initial stages of its work. On 22 June 2010, its Chair wrote to the Permanent Representative of the Permanent Observer Mission of Palestine, on behalf of the Committee, seeking a meeting and on 30 June 2010 the Committee met a representative of the Permanent Observer Mission. With the assistance of the Permanent Observer Mission, the Committee was able to meet three members of the Independent Investigation Commission Established Pursuant to the Goldstone Report on 28 July 2010. The Committee met the representative of the Permanent Observer Mission again on 12 August 2010 and the Permanent Representative himself on 1 September 2010. The Committee is grateful to the Palestinian Authority for the cooperation extended to it throughout its term.

11. To access the fullest information available on investigations undertaken by the Palestinian side, the Committee met the Chair of the Government Committee for Follow-up

² “The operation in Gaza: factual and legal aspects—27 December 2008 – 18 January 2009”, July 2009 (hereinafter “The operation in Gaza”); “Gaza operation investigations: an update”, January 2010 (hereinafter “January update”) (A/64/651, annex I); “Gaza operation investigations: second update”, July 2010 (hereinafter “Second update”) (A/64/890, annex I).

³ “Report of the Palestinian Independent Investigation Commission established pursuant to the Goldstone Report”, August 2010 (A/64/890, annex II).

⁴ “Case of applying recommendations of the United Nations Fact-Finding Mission report in relation to the Israeli aggression against Gaza (December 2008 to January 2009)” prepared by the Government Committee for Follow-up to the Implementation of the United Nations Fact-Finding Mission Report of the de facto Gaza authorities; “Report of the Independent Legal Committee to Monitor Implementation of the United Nations Fact-Finding Report Recommendation on Gaza Conflict”, presented to the Committee in Gaza on 15 August 2010.

to the Implementation of the United Nations Fact-Finding Mission Report in Gaza. In addition, it met the three national members of a second investigation committee, the Independent Legal Committee to Monitor Implementation of the United Nations Fact-Finding Report Recommendation on Gaza Conflict, as well as the Prosecutor-General. The Committee is grateful for the assistance extended to it while in Gaza.

12. The Committee also sought the cooperation of the Government of Israel. On 22 June 2010, its Chair wrote to the Permanent Representative of Israel requesting a meeting and they met, on 30 June 2010. As the possibility of cooperation between Israel and the Committee was left open at that meeting, the Chair wrote again to the Permanent Representative on 30 June seeking Israel's cooperation, including by providing access to Israel, the Gaza Strip, the West Bank and East Jerusalem. The Chair requested a response by 6 July 2010. On 8 July 2010, the Chair wrote to the Permanent Representative inviting the Government of Israel to make official submissions to the Committee describing the domestic, legal and other proceedings it had undertaken in response to the FFM report. The Chair wrote again to the Permanent Representative on 12 July 2010 reiterating his request for cooperation and asking for a response to the letter of 30 June by 15 July 2010. The Committee did not receive a response. On 3 August 2010, the Chair wrote to the Permanent Representative noting the Committee's intention to travel to the Gaza Strip through an alternative route, given its inability to enter Gaza through Israel. On 5 August 2010, the Chair sent a letter to the Permanent Representative requesting a meeting and, on 12 August 2010, they met to discuss the Committee's work. On 24 August 2010, the Chair wrote to the Permanent Representative requesting a telephone conference with the Military Advocate General to discuss matters related to the Committee's mandate. On 31 August 2010, the Permanent Representative of Israel contacted the Chair to suggest that governmental legal representatives might meet the Committee. The Committee spoke with the Permanent Representative on 1 September to express its great interest in this possibility. The Committee received no further communication from the Permanent Representative and in fact never received any official responses to its efforts to reach out to the Government of Israel. The Committee deeply regrets the lack of cooperation from the Government of Israel.

13. The Committee met many witnesses and victims. In its view, their experience in accessing investigatory bodies provides an important perspective on the operation of such bodies. Given the restricted time available in the Gaza Strip, the Committee met a representative group of victims and witnesses concerning the following incidents: the attack on al-Quds hospital; attacks on the houses of Ateya al-Samouni and Wa'el al-Samouni in Zeytoun; the killing of Majda and Rayya Hajaj; the shooting of Amal, Souad, Samar and Hajja Souad Abd Rabbo; the shooting of Rouhiyah al-Najjar; the attack on the al-Daya family house; the destruction of el-Bader flour mill; the alleged use of Abbas Ahmad Ibrahim Halawa and Mahmoud Abd Rabbo al-Ajrami as human shields; and deprivation of liberty and ill-treatment in the al-Atatra sandpits.⁵

14. Finally, the Committee consulted experts in various fields related to its mandate, principally those with knowledge about military justice systems and the international standards relevant to investigations during armed conflict. The discussions were informal in nature and provided a means for the Committee to deepen its understanding of the legal and military issues underlying the mandate and to supplement the available written materials.

15. The totality of this information has provided the basis for the Committee's efforts to implement its mandate "to assess" domestic, legal or other proceedings undertaken by

⁵ A/HRC/12/48, paras. 596–629, 706–735, 764–769, 770–779, 780–787, 844–866, 913–941, 1064–1075, 1076–1085, 1112–1126.

Israel and the Palestinian side. The Committee has faced considerable constraints in discharging the other part of its mandate, namely “to monitor” relevant proceedings. Owing to the lack of access to Israel and the West Bank, the Committee was able to visit only the Gaza Strip. While in Gaza, the Committee did not receive any detailed information substantiating claims that criminal or other proceedings had been initiated by the de facto Gaza authorities.

16. The Committee has laboured under strict time limitations.

III. Applicable law and standards

17. The General Assembly called upon Israel and the Palestinian side to conduct independent and credible investigations that conform with international standards. The Human Rights Council added to these criteria the requirements of effectiveness and genuineness. Initially, the Committee must identify the standards by which the Israeli and the Palestinian investigations should be evaluated.

18. International standards are derived from the duty to investigate under international humanitarian law (IHL) and international human rights law (IHRL). Because of the intensity of the clashes between the Israeli Defense Forces (IDF) and the armed Palestinian groups, “Operation Cast Lead” in the Gaza Strip constitutes an armed conflict governed by IHL. The Committee views this conflict as being of an international character, as do both Israel and the Palestinian side.⁶ Consequently, IHL was applicable to the conduct of hostilities in the Gaza Strip. The other violations alleged in the FFM report, such as those in the West Bank, did not take place within the context of an armed conflict. They must, therefore, be assessed by the yardstick of IHRL.

19. IHL imposes the duty to investigate and prosecute grave breaches of all four Geneva Conventions on High Contracting Parties.⁷ The duty to investigate and prosecute allegations of war crimes arises also under customary international law.⁸ Article 146 of the Fourth Geneva Convention requires each High Contracting Party “to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches and bring such persons, regardless of their nationality, before its own courts.”⁹ The article requires legal safeguards for the accused in prosecutions, but beyond that, the treaty offers little guidance as to the relevant standards an investigation must satisfy. The ICRC Commentary provides some direction, specifying that the Parties must actively search for and prosecute the accused with speed and that the necessary police action should be taken spontaneously and not merely at the request of another State. The Commentary further provides that court proceedings should be carried out in a uniform manner and that “nationals, friends, enemies, all should be subject to the same rules of procedure and judged by the same courts”.¹⁰

⁶ See discussion in the FFM report (A/HRC/12/48, paras. 281–285).

⁷ First Geneva Convention, art. 49; Second Geneva Convention, art. 50; Third Geneva Convention, art. 129; Fourth Geneva Convention, art. 146.

⁸ International Committee of the Red Cross (ICRC), *Customary International Humanitarian Law*, vol. I, Jean-Marie Henckaerts and Louise Doswald-Beck, eds. (Cambridge University Press, 2005), rule 158.

⁹ The Committee follows the position of the FFM report that the substantive rules applicable to either international or non-international armed conflicts are broadly converging in this area (A/HRC/12/48, para. 281).

¹⁰ Jean Pictet (ed.), *Commentary: Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (Geneva, ICRC, 1958), pp. 592–593.

20. In contrast, international human rights law sets out more elaborate standards with respect to the duty to investigate. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment requires “prompt” and “impartial” investigations by competent authorities into allegations of torture (art. 12). The International Covenant on Civil and Political Rights does not refer explicitly to a duty to investigate; however, the Human Rights Committee has consistently urged States parties to undertake full criminal investigations in cases of serious violations of human rights so as to bring the perpetrators to justice.¹¹ Despite the Covenant’s silence on this point, the Human Rights Committee has held that a failure to investigate alleged human rights violations, such as violations of the right to life and enforced disappearances, itself constitutes a violation of the Covenant.¹²

21. The human rights treaties and soft law instruments rely on a range of criteria or standards, at times overlapping, to guide investigations. Most of the relevant pronouncements stem from the Human Rights Committee. Its jurisprudence runs largely parallel to the jurisprudence of the European Court of Human Rights and the Inter-American Court of Human Rights. The most common criteria – referred to in the FFM report as “universal principles”¹³ – are independence, impartiality, thoroughness, promptness and effectiveness. In addition, soft law standards specify that investigative bodies should have adequate powers to carry out their duties; soft law standards also provide direction with respect to collecting and analysing evidence, undertaking autopsies, reporting by medical experts, calling and protecting witnesses, involving victims and family members, providing budgetary and technical resources, as well as establishing independent commissions of inquiry.¹⁴ Transparency is also a key element, both as to the manner in which the inquiry is conducted and in ensuring there is public scrutiny of the results.¹⁵ Human rights bodies have defined the most common criteria as follows:

22. Independence. Both the body undertaking the investigation as well as its members should be independent in the sense of being institutionally detached from those implicated in the events. For example, those potentially implicated in violations should have no supervisory role, whether direct or indirect, over those conducting the investigation.¹⁶ Independence goes beyond institutional independence, however: investigatory bodies and

¹¹ See, e.g., its general comment No. 31 (2004) on the nature of the legal obligation on States parties to the Covenant, para. 15.

¹² See, e.g., A/HRC/12/48, footnote 1153; *Umetaliev et al. v. Kyrgyzstan*, communication No. 1275/2004, views of 30 October 2008, paras. 9.4–9.6; *Amirov v. Russian Federation*, communication No. 1447/2006, views of 2 April 2009, paras. 11.2–11.4.

¹³ A/HRC/12/48, para. 1814.

¹⁴ Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions (Economic and Social Council resolution 1989/65, annex, principles 9–17); Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (General Assembly resolution 55/89, annex).

¹⁵ Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, principles 10, 16 and 17; Principles on the Effective Investigation and Documentation of Torture, principles 2, 3, 4 and 5 (b). See also Committee against Torture, *Danilo Dimitrijevic v. Serbia and Montenegro*, communication No. 172/2000, views of 16 November 2005, para. 7.3, and *Osmani v. Serbia*, case 261/2005, 8 May 2009, para. 10.7; and Inter-American Court of Human Rights, case of the “Las Dos Erres” Massacre, No. 211, Judgement, 24 November 2009, para. 236.

¹⁶ European Court of Human Rights, *Davydov and Others v. Ukraine*, application Nos. 17674/02 and 39081/02, Judgement, 1 July 2010, para. 277; Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, principle 15; Principles on the Effective Investigation and Documentation of Torture, principle 3 (b).

their members should not be unduly influenced by powerful social groups, such as the media, industry or political parties.¹⁷

23. Impartiality. Impartiality is closely related to independence. While independence relates to the establishment and functioning of an investigative body and its members, impartiality refers to the question of whether an investigator is or is likely to be biased. The Human Rights Committee has stated that “judges must not harbour preconceptions about the matter put before them, and that they must not act in ways that promote the interests of one of the parties”.¹⁸ Similar considerations apply to investigators. Indications that investigators uncritically adhere to one interpretation of events without bothering to explore alternatives, including the version of events advanced by the complainant, or fail to acknowledge a lack of evidence to support their interpretation of events, could indicate a lack of impartiality.¹⁹

24. Thoroughness and effectiveness. This standard refers to the completeness and comprehensiveness of an investigation. Thorough and effective investigators should: undertake necessary autopsies and medical examinations; collect and record all relevant evidence; conduct site visits as appropriate; identify, question and take statements from all relevant witnesses; question witnesses comprehensively so that the investigation is able to establish the cause of the alleged violation and those responsible; and provide conclusions based on a comprehensive analysis of all relevant elements.²⁰ The Committee against Torture has found that inconsistencies in the results of investigations, as well as a lack of qualifications of key experts, such as the doctor undertaking an autopsy, can be evidence of a lack of thoroughness.²¹

25. Promptness. As a general rule an investigation should commence and progress with reasonable expedition.²² Determining whether an investigation has met this standard of reasonableness depends on the specific circumstances of the case. Cases of torture and extrajudicial killings – where medical evidence might disappear – and enforced disappearances – where an individual’s life might be in imminent danger – require immediate action. The Committee against Torture suggests that the requirement to undertake a prompt investigation means that an investigation should be initiated immediately when there is a suspicion of torture or ill-treatment, namely, within hours or days.²³ It has found delays of 15 months and 10 months between the alleged act and the

¹⁷ Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, 2nd rev. ed. (N.P. Engel, 2005), pp. 320–321.

¹⁸ *Karttunen v. Finland*, communication No. 387/1989, views of 23 October 1992, para. 7.2.

¹⁹ European Court of Human Rights, *Assenov and Others v. Bulgaria*, Judgement, 28 October 1998, para. 103.

²⁰ European Court of Human Rights, *Musayev and Others v. Russia*, application Nos. 57941/00, 58699/00 and 60403/00, Judgement, 26 July 2007, para. 162; *Gül v. Turkey*, Case 22676/93, Judgement, 14 December 2000, para. 89–90; *Cennet Ayhan and Mehmet Salih Ayhan v. Turkey*, application No. 41964/98, Judgement, 27 June 2006, para. 88; *Nachova and Others v. Bulgaria*, application Nos. 43577/98 and 43579/98, Judgement, 6 July 2005, para. 113.

²¹ *Ristic v. Yugoslavia*, communication No. 113/1998, views of 11 May 2001, para. 8.6. See also European Court of Human Rights, *Kopylov v. Russia*, application No. 3933/04, Judgement, 29 July 2010, para. 169; *Akulinin and Babich v. Russia*, application No. 5742/02, Judgement, 2 October 2008, para. 51.

²² European Court of Human Rights, *Isayeva, Yusupova and Bazayeva v. Russia*, application Nos. 57947/00, 57948/00, 57949/00, Judgement, 24 February 2005, paras. 209–213; *Benuyeva and Others v. Russia*, application No. 8347/05, Judgement, 22 July 2010, para. 112.

²³ *Blanco Abad v. Spain*, communication No. 59/1996, views of 14 May 1998, para. 8.5.

opening of an investigation to be unreasonable.²⁴ When examining the progress of investigations, frequent and unexplained adjournments can unacceptably compound delay.²⁵

26. The Committee must determine what standards are applicable to investigations in the present context. Both Israel and the Palestinian side have a duty to investigate alleged serious violations of IHL and IHRL. This duty arises as a result of international law and is further imposed by General Assembly resolution 64/254.

27. As extensively explained in the FFM report,²⁶ all parties to the armed conflict are bound by the relevant rules of IHL. Israel is a party to the Fourth Geneva Convention and is, moreover, bound by the rules of customary international law reflected in the 1907 Hague Regulations concerning the Laws and Customs of War on Land and Additional Protocol I of 1977. Palestine is not a party to any of the relevant international instruments. However, in June 1989, the Palestinian Authority submitted a unilateral written undertaking to Switzerland, the depositary of the Geneva Conventions, to be bound by the four Geneva Conventions of 1949 and the two Additional Protocols of 1977.²⁷ This declaration established a binding commitment under international law.²⁸ Additionally, both the Palestinian Authority and the de facto Gaza authorities are subject to the IHL rules of customary international law that apply also to non-State actors.

28. With regard to inquiries into alleged violations of IHRL, Israel has accepted legal responsibility to investigate by ratifying the International Covenant on Civil and Political Rights and the Convention against Torture. As clarified by the International Court of Justice, the Covenant is applicable also to actions by Israel in the occupied Palestinian territory.²⁹ The Palestinian Authority has also pledged to respect international human rights law by several declarations addressed to the international community³⁰ and by enshrining that commitment in its Basic Law (arts. 9–33). Lastly, the de facto Gaza authorities have also made a series of unilateral declarations of respect for human rights and have acknowledged that the Palestinian Basic Law applies to the Gaza Strip.³¹

29. The question remains whether the more elaborate IHRL standards on investigations also govern inquiries into violations of IHL. In principle, IHRL continues to apply during armed conflict alongside IHL, subject to the possible derogation of certain civil and political rights in states of emergency. IHL may prevail as *lex specialis*.³² There is no

²⁴ See *Halimi-Nedzibi v. Austria*, application No. 8/1991, 18 November 1993, para. 13.5; *M'Barek v. Tunisia*, case 60/1996, 10 November 1999, paras. 11.5–11.7.

²⁵ *Musayev and Others v. Russia*, para. 160.

²⁶ A/HRC/12/48 paras. 270–285, 304.

²⁷ On 13 September 1989, the Swiss Federal Council informed the States parties that it was not in a position to decide whether the letter constituted an instrument of accession “due to the uncertainty within the international community as to the existence or non-existence of a State of Palestine”.

²⁸ See *Nuclear Tests (Australia v. France)*, Judgment, I.C.J. Reports 1974, p. 253 (p. 267, para. 43).

²⁹ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004, p. 136 (pp. 179–180, paras. 109–111).

³⁰ See, for instance, the Barcelona Declaration of the Euro-Mediterranean Ministerial Conference, 27–28 November 1995.

³¹ A/HRC/12/48, para. 307.

³² *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996, p. 226 (p. 240, para. 25); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*, Advisory Opinion, I.C.J. Reports 2004, p. 136 (p. 178, para. 106); *Case concerning Armed Activity on the Territory of the Congo (Democratic Republic of Congo v. Uganda)*, Judgment, I.C.J. Reports 2005, p. 168 (p. 243, para. 216); *Application of the International Convention on the*

conflict as such between the duty to investigate under IHL and IHRL. Accepting that the IHRL standards apply in the current situation of armed conflict, the question arises as to how to interpret the more elaborate IHRL standards of investigation in the light of the pre-eminent position of IHL as the specialized body of law designed for armed conflict.

30. The Committee believes that the gap between the expansive standards under IHRL and the less defined standards for investigations under IHL is not so significant. Several criteria under human rights law can be met within the context of armed conflict. Above all, investigators must be impartial, thorough, effective and prompt; otherwise, an investigation would be no more than a manoeuvre of artful deceit. Any investigations that meet these criteria may be called credible and genuine. Credibility presupposes also that the investigating bodies enjoy some measure of independence. The standard of promptness is alluded to in the ICRC Commentary, which refers to the duty to search for and prosecute the perpetrator with speed.

31. It is important to note the growing trend towards requiring comparable standards for investigations under IHL and IHRL. The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted by the General Assembly on 16 December 2005 as a set of rules designed to develop the law, state that the “obligation to respect, ensure respect for and implement international human rights law and international humanitarian law as provided for under the respective bodies of law, includes, inter alia, the duty to: ... (b) Investigate violations effectively, promptly, thoroughly and impartially and, where appropriate, take action against those allegedly responsible in accordance with domestic and international law”.³³

32. Nonetheless, there are constraints during armed conflict that do impede investigations. For example, not every death during an armed conflict can be effectively investigated. Similarly, the level of transparency expected of human rights investigations is not always achievable in situations of armed conflict, particularly as questions of national security often arise. The nature of hostilities might obstruct on-site investigations or make prompt medical examinations impossible. The conflict might have led to the destruction of evidence, and witnesses might be hard to locate or be engaged in conflict elsewhere. When the fighting is over, some of these constraints tend to lose their relevance. As summarized by the Special Rapporteur on extrajudicial, summary or arbitrary executions: “On a case-by-case basis a State might utilize less effective measures of investigation in response to concrete constraints. For example, when hostile forces control the scene of a shooting, conducting an autopsy may prove impossible. Regardless of the circumstances, however, investigations must always be conducted as effectively as possible and never be reduced to mere formality.”³⁴

33. The purpose and objectives of IHL also affect the legal significance of some IHRL standards of investigation beyond the common criteria of independence, impartiality, thoroughness, effectiveness and promptness mentioned above. The overriding concern of IHRL to protect the rights and freedoms of individuals from the abuse of State power is not the primary focus of IHL. The latter seeks first to balance the lawful use of force with the protection of individuals. Consequently, some human rights standards, such as the involvement of victims in investigations, while desirable, are not requisite for evaluating the inquiries into alleged IHL violations. However, the Committee acknowledges that, in

Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Provisional Measures, Order of 15 October 2008, I.C.J. Reports 2008, p. 353 (p. 387, para. 112).

³³ Resolution 60/147, annex, para. 3.

³⁴ E/CN.4/2006/53, para. 36.

the light of the Basic Principles and Guidelines on the Right to a Remedy and Reparations, victims' access to justice is increasingly being accepted as a relevant criterion applicable to investigations into alleged war crimes.

34. Finally, international humanitarian law and human rights standards do not require any specific body to undertake investigations. Military justice systems usually take the lead in inquiring into alleged violations of IHL. This is consistent with Additional Protocol I to the Geneva Conventions reflecting customary law principles, which places a duty on High Contracting Parties to require military commanders "to prevent and, where necessary, to suppress and to report to competent authorities breaches of the Conventions and of this Protocol" as well as "to initiate disciplinary or penal action against violators" (art. 87). Military investigators have the specialized knowledge of combat conditions and munitions that are important to such investigations. However, the use of military courts for prosecution of alleged human rights violations has been controversial and has been found to lack the independence and impartiality required under IHRL.³⁵ Nonetheless, both military and civilian justice systems may properly undertake investigations of incidents occurring in armed conflict, the only requirement being that the mechanisms employed conform to the various standards discussed above.

IV. The Government of Israel

A. Investigations conducted

35. Israel has issued three reports detailing the proceedings it has undertaken, including investigations into some of the allegations raised in the FFM report (see footnote 2 above). At the centre of Israel's investigation system is the Military Advocate General (MAG). He supervises the rule of law in the military, acts as legal adviser to the Chief of Staff and to other military authorities in respect of law and justice, and provides legal supervision of disciplinary law in the military.³⁶

36. The MAG relied on three mechanisms for examining and investigating allegations related to the Gaza conflict. The first is the operational debriefing or command investigation: an "inquiry held in the army, in accordance with IDF orders, regarding an event which occurred during training or operational activity, or in relation to them".³⁷ The command investigation forwards its findings to the MAG, who decides whether or not to order a criminal investigation. Ordinary command investigations examined 90 allegations, including civilian injuries and deaths, and destruction of civilian property.

37. Second, the Minister of Defense and the Chief of General Staff may appoint an officer or group of officers, often high-ranking, to investigate in confidence high-profile or sensitive matters and then submit their findings and recommendations to the MAG. These investigations are known as special command investigations. On 20 January 2009, the Chief of General Staff ordered five special command investigations headed by Colonels not personally related to the incidents. The investigations covered 30 alleged violations of IHL grouped as follows: harm to a large number of civilians not directly participating in the hostilities; damage to United Nations and international facilities; shooting at medical facilities, buildings, vehicles and crews; destruction of private property and infrastructure

³⁵ See, e.g., E/CN.4/1995/61, para. 93.

³⁶ Military Justice Law, sect. 178.

³⁷ *Ibid.*, sect. 539A (a).

by ground forces; and use of weaponry containing phosphorous.³⁸ A sixth command investigation was established in November 2009 to investigate the allegations relating to the al-Samouni residence, the mistreatment of Palestinian detainees by IDF and the attack on the al-Maqadmah mosque.³⁹

38. Third, the MAG may order the Military Police Criminal Investigation Division (MPCID) to open a criminal investigation into allegations of criminal behaviour.⁴⁰ He does so either directly upon receipt of a complaint from any source or on the basis of the results of a command investigation. A team of 16 investigators was designated to undertake investigations stemming from the Gaza conflict.⁴¹ By July 2010, the MAG had launched 47 such criminal investigations, of which he had referred 34 directly for criminal investigation while the remaining 13 cases had previously been the subject of command or special command investigations.

39. Once the review is concluded, MPCID reports to the military prosecution and transfers the file for review by a prosecutor. The MAG or Chief Military Prosecutor then decides whether to initiate disciplinary or criminal proceedings or to undertake further investigations. The military prosecution files an indictment before a military court if it determines that there is sufficient evidence to obtain a conviction.⁴²

40. In total, Israel has launched more than 150 investigations into allegations of misconduct or violations of IHL during “Operation Cast Lead”. As previously noted, this has led to 47 criminal investigations and 4 criminal indictments, one of which led to a conviction for the crime of looting.⁴³ In addition, investigations have examined operational procedures and the use of certain munitions, such as white phosphorous.⁴⁴

41. The FFM report set out 36 incidents alleging serious violations of IHL and IHRL. Annex II below illustrates the status of investigations into these incidents based on available information. While most have been investigated, the Committee does not have information on whether inquiries into certain matters have been launched and these are discussed below.

B. Assessment

Positive developments

42. The Committee welcomes certain positive steps that have resulted from Israel’s investigations into complaints raised in relation to the Gaza conflict. The adoption of new written procedures for the protection of civilians in urban warfare should help to increase that protection in armed conflict and ensure that IDF places more emphasis on civilian safety. The establishment of a “humanitarian officer” for every fighting battalion with responsibility for handling the civilian population should be highlighted as an innovative means to educate soldiers and advise commanders on the protection of civilians and civilian property and the planning and coordination of humanitarian assistance. Likewise, the New Order Regulating the Destruction of Private Property for Military Purposes should help to minimize such destruction in the future. The establishment of a clear doctrine and strict

³⁸ “January update”, para. 96.

³⁹ *Ibid.*, paras. 124–126.

⁴⁰ *Ibid.*, para. 50.

⁴¹ *Ibid.*, para. 132.

⁴² *Ibid.*, para. 67.

⁴³ “Second update”, para. 10.

⁴⁴ “January update”, paras. 117–120.

orders on the use of munitions containing white phosphorous is a step forward. In addition, the Committee notes the establishment of the Turkel Commission, which includes two international observers.⁴⁵ Part of its mandate is to examine “the question of 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,... conform with the obligations of the State of Israel under the rules of international law”.⁴⁶

43. In spite of the many investigations undertaken and the sophisticated nature of Israel’s military justice system, the Committee has concerns about the investigations conducted into the Gaza conflict thus far.

Lack of cooperation

44. As a result of the lack of cooperation from Israel, the Committee could rely only on three public reports of the Government, supplemented by information from NGOs and witnesses. The information in the three reports is inadequate as a basis for a reliable evaluation of the independence, effectiveness and genuineness of investigations into such serious allegations. The available information is extensive, providing detail on many investigations although not on all. The Committee would have preferred to speak directly with investigators to assess the thoroughness and effectiveness of their work. Instead, the Committee is left with many questions. The fact that it had difficulty verifying whether Israel had investigated all 36 incidents in the FFM report illustrates the opacity of the information available. Owing to the lack of cooperation, the Committee is unable to make a definitive determination as to whether the investigations carried out by Israel meet the criteria in resolution 13/9.

45. First, in some cases, the Committee could not ascertain whether Israel had met its duty to investigate in relation to all 36 incidents. For example, the Committee was unable to find any information as to whether or not an investigation into the death of Muhammad Hajji and the shooting of Shahd Hajji and Ola Masood Arafat⁴⁷ was launched. This incident might have been the subject of one of the 90 command investigations or the first special command investigation that considered harm to civilians not directly participating in the hostilities. No reference is made to any investigations into the alleged deprivation of liberty of AD/02.⁴⁸ Likewise, the Committee was unable to find information on whether inquiries were made into the allegations of indiscriminate killing of members of the Abu Halima family⁴⁹ and instead had to rely on NGO material.⁵⁰ Cooperation with Israel would have enabled the Committee to verify that information.

46. In other cases, it is evident that investigators compiled a good deal of information. A case in point is the incident at the el-Bader flour mill, destroyed by an air attack.⁵¹ The MAG reopened the investigation upon receiving new evidence and provided further explanations to support his conclusion that the mill had not been intentionally targeted. The example illustrates a serious attempt on the part of Israeli investigators to explain what happened at the flour mill.

⁴⁵ “Second update”, paras. 158–163.

⁴⁶ Ibid., para. 160.

⁴⁷ A/HRC/12/48, paras. 745–754.

⁴⁸ Ibid., paras. 1127–1142.

⁴⁹ Ibid., paras. 788–801.

⁵⁰ Human Rights Watch, *Turning a Blind Eye: Impunity for Laws-of-War Violations during the Gaza War* (April 2010), p. 40, footnote 132.

⁵¹ A/HRC/12/48, paras. 913–941.

47. A second category of cases raises questions about the extent of the inquiries undertaken. For example, the Committee would have benefited from clarification from Israeli investigators with respect to the shooting of Majda and Rayya Hajaj at Jühr ad-Dik on 4 January 2009.⁵² The Israeli report of the investigation into this incident notes the indictment of a soldier on the charge of manslaughter for shooting a civilian at the time and place where the Hajaj women – one of whom was carrying a white flag – were killed.⁵³ Yet, the press release announcing the soldier’s indictment appeared to concern an incident where a man, rather than two women, was shot, suggesting that the indictment may relate to an entirely different incident.⁵⁴ The admitted confusion as to the identity and number of the victims at Jühr ad-Dik that day calls into serious question whether a full and prompt investigation was undertaken into the shooting of the Hajaj women.

48. Another case concerned the Abd al-Dayem condolence tents incident.⁵⁵ The Fact-Finding Mission alleged that Israeli soldiers had launched a deliberate attack on civilians, killing 5 and injuring 20. The results of the command and criminal investigations suggest instead that soldiers were firing on combatants launching a Grad rocket and that soldiers “did not identify any civilians in the vicinity” of “the terrorist squad”.⁵⁶ The Committee notes the discrepancy in the two versions of the incident. Owing to the lack of cooperation from Israel, it is unable to confirm that extensive efforts were taken by investigators to reconcile these conflicting accounts.

49. In the al-Quds hospital case,⁵⁷ there is insufficient information to determine with any accuracy what the results of the inquiry demonstrate. Israel has communicated very little with respect to this incident. The first Israeli report indicated that an inquiry was ongoing into attacks on medical facilities.⁵⁸ The second report noted that the third special command investigation examined incidents of shootings at medical facilities, buildings, vehicles and crews.⁵⁹ The third report reflected that disciplinary action was taken against some officers as a result of these attacks,⁶⁰ but it is unclear whether that disciplinary action corresponded to the attack on al-Quds hospital or to attacks on other medical centres. The Committee has no basis for assessing whether this investigation was, in fact, effective and thorough.

50. Third, owing to a lack of cooperation from Israel, the Committee is not in a position to evaluate a range of allegations in the FFM report about the way in which the Israeli system of military investigations actually functions. For example, it is alleged that: the system of command investigations was not effective owing to the failure of investigators to comply with regulations and orders;⁶¹ command investigations obstructed criminal investigations by destroying the scene of the crime and obstructing and delaying the process of identifying and collecting evidence;⁶² penalties imposed on Israeli offenders had been noticeably more lenient than those imposed on Palestinians;⁶³ command investigations had

⁵² Ibid., paras. 764–769.

⁵³ “Second update”, paras. 99–102.

⁵⁴ See IDF Military Advocate General takes disciplinary action, indicts soldiers following investigations into incidents during Operation Cast Lead, 6 July 2010. Available from <http://dover.idf.il/IDF/English/Press+Releases/10/07/0601.htm>.

⁵⁵ A/HRC/12/48, paras. 867–885.

⁵⁶ “Second update”, paras. 113–117.

⁵⁷ A/HRC/12/48, paras. 596–629 (al-Quds hospital) and paras. 630–652 (al-Wafa hospital).

⁵⁸ “The operation in Gaza”, para. 376.

⁵⁹ “January update”, paras. 111–112.

⁶⁰ “Second update”, para. 60.

⁶¹ A/HRC/12/48, para. 1816.

⁶² Ibid., para. 1817.

⁶³ Ibid., paras. 1818 and 1825.

no established methods of criminal investigations “such as visits to the crime scene, interviews with witnesses and victims, and assessment by reference to established legal standards”;⁶⁴ the delay of six months to start some 13 criminal investigations constituted undue delay;⁶⁵ criminal investigations had been conducted in an unprofessional way, making it virtually impossible to prove charges beyond reasonable doubt;⁶⁶ and command investigations were generally a tool to review performance and learn lessons, which can hardly be an effective and impartial investigation mechanism to respond to allegations of serious violations.⁶⁷

Promptness

51. The Committee has reservations as to whether investigations were sufficiently prompt. Promptness requires investigations to commence and progress with reasonable expedition. The Committee notes that many Palestinian witnesses were interviewed only at the very end of 2009, while many allegations of IHL and IHRL violations were reported almost immediately at the end of “Operation Cast Lead” in January 2009 and at the latest in September 2009 with the publication of the FFM report. Such delays can result in evidence being lost or compromised, and in the kind of confusing and conflicting testimony that affected the results of the inquiries into the shooting of Majda and Rayya Hajaj and the attack on the el-Bader flour mill referred to above. Without additional information on when specific investigations actually got under way, the Committee is not in a position to make a definitive finding on the expeditiousness with which Israel conducted the relevant proceedings.

Independence and impartiality

52. In general terms, it appears that Israel’s military justice system has certain built-in mechanisms to preserve its independence. At the heart of the system is the MAG, whose hierarchical independence rests on a number of factors. Specifically, the Minister of Defense, rather than the Chief of General Staff, is responsible for his appointment and decisions of the MAG are subject to review by the Attorney-General and by the Supreme Court sitting as the High Court of Justice, including through petition by individuals and civil society. Israeli jurisprudence illustrates the careful attention paid to ensuring the independent functioning of the MAG within the rule of law.⁶⁸

53. In spite of the structural guarantees of independence built into the military justice system, the dual responsibilities of the MAG, in the specific context of these investigations, raise concerns of a lack of impartiality. The MAG is legal adviser to the Chief of Staff and other military authorities. Yet, at the same time, he is the supervisor of disciplinary law in the military. Although the combination of the advisory and supervisory functions in one office does not automatically lead to a conflict of interest or a lack of impartiality, the situation is complicated in the present case by the fact that many of the allegations of

⁶⁴ Ibid., para. 1819.

⁶⁵ Ibid., para. 1820.

⁶⁶ Ibid., para. 1829.

⁶⁷ Ibid., para. 1831.

⁶⁸ See, e.g., HCJ 4723/96, *Avivit Atiyah v. Attorney-General* 51(3) P.D. 714; HCJ 425/89, *Jamal Abdel Kader Mahmoud v. the Chief Military Prosecutor*, 43(4) P.D. 718; HCJ 372/88, *Fuchs v. the Military Advocate General*, 42(3) P.D. 154; HCJ 425/89, *Zofan v. the Military Advocate General* 43(4) P.D. 718; Cr.A. 6009/94, *Shafran & Ors v. the Chief Military Prosecutor*, 48(5) P.D. 573; HCJ 442/87, *Shaul v. the Military Advocate General*, 42(2) P.D. 749; HCJ 4550/94, *Isha v. the Attorney-General*, 49(5) P.D. 849.

serious violations of IHL and IHRL in the FFM report directly link to the advice he provided.

54. Indeed, Israel publicly stated that the MAG gave legal advice on IHL to commanders at all levels leading up to and during the Gaza conflict and that “the lawyers examined the legality of planned targets, participated in the operational planning process, helped direct humanitarian efforts and took part in situation assessments, exercises and simulations”.⁶⁹ However, as noted above, the Fact-Finding Mission strongly criticized the objectives, strategy and policy underlying the entire Gaza operation.⁷⁰ The link between the advice given and the allegations in the FFM report underlines the importance of the MAG not only acting impartially, but also being seen to act impartially.

55. One way to dispel any suspicion of a lack of impartiality is to examine the results of the investigations. Of the 36 incidents in the FFM report, the Committee notes the following findings: no violation or discontinuation of proceedings for various reasons (20); unclear results (7); disciplinary action taken (3); indictments (1); ongoing criminal investigations (5). Although the Committee does not have access to the full evidence and reasoning behind these decisions, given the seriousness of the allegations, the military investigations thus far appear to have produced very little.

56. The Committee notes that civilian oversight of the MAG decisions provides a commendable mechanism to protect against arbitrariness. However, the Committee is not aware of any requests for judicial review of a decision of the MAG related to investigations connected to the Gaza conflict. While any interested party, including NGOs, can seek a High Court judicial review, even in the course of armed conflict, Palestinians in Gaza face significant hurdles.

Treatment of Palestinian complainants and witnesses

57. Palestinian complainants and their legal representatives stated that they were not systematically informed of the progress of their cases. While the military has a standard practice of acknowledging receipt of a complaint, the vast majority of complainants received no further information whatsoever about the status of their cases. Two organizations which filed complaints on behalf of Palestinians told the Committee that they had learned about the dismissal of their complaints only through the Israeli media.⁷¹ The lack of any standard process of informing complainants about the progress and results of investigations affects the perception of justice. Not surprisingly, the Committee learned that the complainants and witnesses affected by investigations had little confidence in the system.

58. The same lack of transparency was also reported in civil cases. In addition to lodging a complaint with the MAG, complainants can initiate a proceeding to seek compensation with the Ministry of Defense. The claimant must lodge a form within 60 days of incurring damage, followed by a civil claim within two years. The Palestinian Centre for Human Rights (PCHR) submitted 1,028 compensation claims to the Israeli Ministry of Defense, of which, by 11 February 2010, only 7 on behalf of 20 individuals had been acknowledged. The Israeli Military Police notified PCHR that it had opened investigations in 15 cases and summoned 35 witnesses to the Erez crossing. According to PCHR, none of the interviewed witnesses received any information following their appearance before the investigation panel in Erez. In the case of the attack on the al-Daya family residence –

⁶⁹ “The operation in Gaza”, para. 216.

⁷⁰ A/HRC/48/12, para. 1895.

⁷¹ Consultation with Adalah, Amman, 29 July 2010; consultation with the Palestinian Centre for Human Rights, Gaza City, 15 August 2010.

where Israel admitted it had made an operational error leading to the deaths of 23 civilians – PCHR filed the compensation form on 11 February 2009 and a criminal petition on 18 May 2009, only to receive a formal letter acknowledging receipt of its petition on 13 September 2009 and requesting a power of attorney (which PCHR had already filed). PCHR has received no further information on the progress of this compensation claim.⁷² Furthermore, Palestinian witnesses in Gaza are not always granted a permit to travel out of Gaza and so cannot reach courts in Israel, particularly since the closure of the Gaza Strip in June 2007.⁷³ Consequently, access to justice is rarely guaranteed in practice to Palestinian complainants.

59. The experience of victims and witnesses when giving testimony at the border and in accessing Israeli justice more broadly helps to explain why Palestinians have little confidence in the Israeli investigations. The Committee interviewed 28 witnesses, of whom 19 had given evidence at the Erez border. Witnesses had had to wait long hours at the border. One of the witnesses in the al-Samouni case reported having to wait 13 hours and being refused access to sanitary facilities for hours, finally being allowed to use a toilet, but only in the company of soldiers.⁷⁴ Another witness to the Halawa incident had to wait four hours without water or food; the witness was forced to wait an hour and a half to use a toilet.⁷⁵ Another person related to the Abd Rabbo incident had to wait six hours at the border and was sent home without being interviewed.⁷⁶

60. In the view of the Palestinians residing in Gaza, the Israeli military justice system is simply the extension of the same military system that organized and carried out “Operation Cast Lead”. Most distrust its ability to deliver justice. For this reason, many potential witnesses declined to appear in Erez. Perhaps this is not surprising since victims of military operations naturally perceive a deep bias and predisposition towards self-preservation and national interests among those representing the adversary State. However, in the interests of performing effective and impartial investigations, the Committee emphasizes the importance of treating all victims and witnesses, whether Israeli or Palestinian, with dignity and courtesy.

Allegations not investigated

61. The information available suggests that Israel has not investigated all the allegations of serious violations of IHL and IHRL set out in the FFM report.

62. First, Israel has not conducted investigations into the allegations of human rights violations with respect to its actions in the West Bank at the time of the military operations in Gaza.⁷⁷ The allegations of violations of the right to life, as well as claims of torture and unlawful conditions of detention, give rise to the duty to investigate under the International Covenant on Civil and Political Rights and the Convention against Torture. There is no evidence that Israel has met this duty.

63. Furthermore, the information available suggests that Israel has not conducted a general review of the military doctrine regarding legitimate military targets. The Fact-Finding Mission rejected the Israeli viewpoint that the entire governmental infrastructure in

⁷² Discussions with PCHR, Gaza, 15 August 2010.

⁷³ PCHR, “Memorandum for the United Nations Committee of Experts”, annex I, August 2010.

⁷⁴ Interviews, Gaza, 15 August 2010.

⁷⁵ Interviews, Gaza, 16 August 2010.

⁷⁶ Interviews, Gaza, 15 August 2010.

⁷⁷ A/HRC/12/48, paras. 1394–1404 (use of force during demonstrations in the West Bank); paras. 1411–1418 (violence by settlers against Palestinians in the West Bank).

the Gaza Strip, including the Legislative Council building, was a legitimate target, warning that it was incompatible with the principle of distinction.⁷⁸

64. Finally, Israel has not conducted investigations into decisions made at the highest levels about the design and implementation of the Gaza operations.⁷⁹ A core allegation in the FFM report was that the systematic and deliberate nature of the destruction in Gaza left the Mission “in no doubt that responsibility lies in the first place with those who designed, planned, ordered and oversaw the operations”.⁸⁰ Those alleged serious violations go beyond individual criminal responsibility at the level of combatants and even commanders, and include allegations aimed at decision makers higher up the chain of command. The official inquiry must be conducted by a truly independent body, given the obvious conflict inherent in the military’s examining its own role in designing and executing “Operation Cast Lead”.

V. The Palestinian side

A. The Palestinian Authority

65. On 25 January 2010, the Palestinian Authority established a four-member Independent Investigation Commission by Presidential Decree to follow up on the implementation of the recommendations of the FFM report.⁸¹ The Commission was authorized to undertake investigative duties pursuant to that report, work in accordance with the timetable provided in it, and submit its conclusions and recommendations to the relevant authorities.⁸²

66. The Committee received the report of the Independent Investigation Commission (see footnote 3 above) from the High Commissioner for Human Rights on 19 August 2010. It set out in detail the Commission’s methodology and scope of investigations. The Commission’s mandate was to investigate the alleged violations committed by the Palestinian side both before and after the Gaza conflict that were described in the FFM report.⁸³ The Commission had powers to collect information, evidence and data relevant to its activities; to receive complaints of human rights violations falling within its mandate; and to hear testimony from complainants, including victims, witnesses, human rights organizations and official agencies.⁸⁴

⁷⁸ A/HRC/12/48, para. 392.

⁷⁹ In this regard, the FFM report names particular individuals, including the Deputy Prime Minister, Eli Yishai, and the Foreign Minister, Tzipi Livni, as well as Major-General Dan Harel, whose statements during “Operation Cast Lead” support its contentions that the Operation was indeed intended to cause disproportionate destruction and violence against civilians as part of a deliberate policy. The Fact-Finding Mission also charges that Israel’s strategic goals demonstrated a qualitative shift from relatively focused operations to massive and deliberate destruction. See A/HRC/12/48, paras. 1177–1216.

⁸⁰ *Ibid.*, para. 1895.

⁸¹ Issa Abu Sharar, Chair and former Head of the Supreme Court and former President of the Supreme Judicial Council; Judge Zuhair al-Surani, former Head of the Supreme Court and former President of the Supreme Judicial Council; Ghassan Farmand, Professor of Law at Birzeit University; Yasser al-Amuri, Professor of International Law at Birzeit University.

⁸² See Decree concerning the formation of an independent commission to follow up on the Goldstone report, article 2 (A/64/651, annex II, attachment I).

⁸³ A/64/890, annex II, chap. II, para. 60.

⁸⁴ *Ibid.*, para. 62.

67. The Commission sought the expertise of independent international scholars,⁸⁵ human rights organizations and officials in the West Bank. The Commission also collected and analysed data from the reports of national and international human rights organizations. It placed notices in local newspapers in the West Bank and Gaza Strip, organized a press conference to introduce itself to its constituents and encourage individuals to bring complaints before it,⁸⁶ and held public hearings.

68. The Commission made a series of findings, including allegations of torture and ill-treatment by security forces in the West Bank and Gaza; extrajudicial killings by law enforcement agencies and armed groups connected to the de facto Gaza authorities; failure by these Gaza authorities to protect against extrajudicial killings and to prosecute those responsible; and various violations by the West Bank and de facto Gaza authorities in relation to the right to form associations, press freedoms and the right to take part in public affairs.

69. The Commission addressed recommendations to the Palestinian Authority, including the Office of the Public Prosecutor, the Office of the Military Prosecutor, the security services, the Preventive Security Service, the General Intelligence Service and the Military Intelligence Service. In addition, it addressed findings to the de facto Gaza authorities and their security services, as well as to the United Nations.

70. The Committee notes that the Independent Investigation Commission undertook independent and impartial investigations in a comprehensive manner that squarely addressed the allegations in the FFM report.⁸⁷

71. The Commission was established as an independent investigatory body and its members were not directly linked to the Palestinian Authority hierarchy being investigated. Two of the four members were retired judges of high standing in the occupied Palestinian territories; the other two were university professors. The Commission established in its statute the principle of complete independence of its members. It claimed that “no party was allowed to interfere with or influence the course of the investigation”.⁸⁸ The conclusions tend to support this claim, particularly given the Commission’s allegations of violations committed by the Palestinian Authority, including at high levels, as well as by the de facto Gaza authorities. Furthermore, the Commission’s investigatory powers were sufficient to support its investigations and are reflected in its statute.

72. Moreover, its report demonstrates that it was thorough. In the elaboration of its methods of work, the Commission set out in detail the process it had followed to arrive at its conclusions. The fact that the Commission was able to undertake some 100 hearings in relation to each of the alleged violations illustrates the comprehensiveness of its work. The Commission met governmental representatives accused of violations, including high-level officials. The steps taken to protect witnesses and safeguard the information it obtained demonstrate its professionalism.

⁸⁵ Ibid., para. 63.

⁸⁶ Ibid., paras. 68–70.

⁸⁷ The Commission covered allegations in the FFM report as follows: arrest and detention by security forces (A/HRC/12/48, paras. 1555–1558); torture and ill-treatment (paras. 1559–1560); freedom of association (para. 1561); freedom of the press; freedom of expression and opinion (paras. 1564–1570); freedom of assembly (paras. 1571–1575). The Commission also attempted to cover allegations of violations by armed groups and security services in the Gaza Strip including: launching of attacks within civilian areas (paras. 446–460); detention of Gilad Shalit (paras. 1336–1344); killings, torture and other human rights violations (paras. 1345–1372); and rocket and mortar attacks by Palestinian armed groups on Israel (paras. 1594–1691).

⁸⁸ A/64/890, annex II, chap. II, para. 62.

73. The Commission set out the limitations impeding its work, including the fact that it was unable to travel to the Gaza Strip. While these limitations affected the thoroughness of its work, the Commission was able to interview victims, witnesses and representatives of human rights organizations in the Gaza Strip by videoconference.⁸⁹ However, it is unclear to what extent its report will lead to criminal investigations and prosecutions there.

74. The Committee also has some concerns about the promptness of the investigations. The FFM report published allegations of violations in September 2009. Yet the Commission was established only in January 2010, presumably in response to General Assembly resolution 64/10 (para. 4) rather than to the FFM report itself. This delays the start of criminal investigations and prosecutions. That said, the Committee observes that the Commission undertook a task of significant proportions with reasonable expedition so that it was able to submit its results to the Secretary-General in a timely manner.

75. Finally, the Committee emphasizes that investigations are only the first step to achieving accountability for alleged human rights violations and that the prosecution of perpetrators, as well as the provision of an effective remedy to those whose rights have been violated, should follow promptly. At the time of writing, the Committee had not received any information to indicate that criminal investigations or prosecutions were actually under way in the West Bank. On 6 September 2010, the Committee received a copy of a letter sent by the Prime Minister, Mr. Sallam Fayyad, to the Chair of the Commission, Mr. Issa Abu-Sharar, reiterating the commitment of the Council of Ministers “to the full implementation of the recommendations contained [in the Commission’s report] towards respecting and ensuring respect of human rights and public freedoms in Palestine”. The Committee strongly encourages the Palestinian Authority to live up to this commitment through prompt and effective prosecutions where appropriate.

B. The de facto Gaza authorities

76. The de facto Gaza authorities established two committees in response to General Assembly resolution 64/254. The United Nations received the report of the first Committee in January 2010 and the report of the second in August 2010 (see footnote 4 above).

77. The first Committee was an entirely governmental body headed by the Minister of Justice of the de facto Gaza authorities. The other Committee members were members of the Prime Minister’s Legal Council, the Under-Secretary of the Ministry of Foreign Affairs, the Under-Secretary of the Ministry of Justice, the Chair of the Military Jurisdiction Authority, the Public Prosecutor, the Head of the Central Documentation Committee, a Judge of the Court of Appeal, the Director-General of Legal Affairs at the Ministry of Justice, the Director-General of Fatwa and Legislation, the Director-General of the Legislative Council, and the General Controller of the Ministry of the Interior. Its report focused entirely on Israeli Government policy vis-à-vis the Gaza Strip and the conduct of Israeli military troops during the Gaza conflict.

78. It did not carefully consider the violations allegedly perpetrated by the de facto Gaza authorities or associated armed groups. However, in its report, it stated that all claims concerning the conduct of the de facto Gaza authorities and armed groups should be directed to the Office of the Prosecutor-General.

79. The report, while submitted as a response to the FFM report, did not discuss the Fact-Finding Mission’s recommendations in detail, nor did it propose measures to address alleged violations committed by the de facto Gaza authorities or the armed groups under its

⁸⁹ Ibid., para. 66.

control. The report is not an investigative report, but simply a description of what, in the view of the de facto Gaza authorities, the situation currently is in the Gaza Strip. It primarily reiterated the allegations of the FFM report against Israel.

80. However, the report did announce the establishment of a follow-up Independent Legal Committee (hereinafter “second Gaza Committee”), composed of three national and three international experts, to implement the Fact-Finding Mission’s recommendations “in accordance with international standards.”

81. This second Gaza Committee⁹⁰ presented its report to this Committee in Gaza on 15 August 2010. Its national experts were introduced as Gaza-based lawyers with many years’ experience in international law practice. Its three international experts were international lawyers from Egypt and Saudi Arabia. They were unable to enter the Gaza Strip and were limited to communicating with the national members by telephone. The Committee accepts that the de facto Gaza authorities sought to establish an independent body to undertake investigations.

82. The second Gaza Committee made field visits, interviewed victims and officials, and reviewed criminal investigation files. However, its report did not include sufficient information to demonstrate systematically the steps it took to collect and evaluate evidence. More details would have shed light on the thoroughness of its investigations.

83. The second Gaza Committee’s report did give examples of criminal proceedings related to alleged violations of IHL and IHRL, including a case where a number of defendants were convicted and imprisoned, while others were given suspended prison sentences. Some cases were settled out of court between the families involved. While in the Gaza Strip, the Committee requested the Prosecutor-General to provide it with specific information about the number and progress of the investigations his Office had undertaken. His Office subsequently responded in writing, but its submission contained no statistics or other data substantiating the report’s reference to investigations or prosecutions undertaken by the de facto Gaza authorities.

84. The second Gaza Committee’s report stated in addition that all persons detained on political grounds had been released; Palestinian groups had not deliberately violated the principle of distinction; there was no credible testimony to support the charge that Palestinian armed groups had intentionally targeted Israeli civilians when launching rockets against Israeli targets; mosques and civilian buildings had not been used as storage space or bases for weapons; and there was no evidence that Palestinians had used civilians as human shields.

85. The Committee is not in a position to ascertain the veracity of any of these assertions.

86. The Committee also has concerns related to the impartiality of the second Gaza Committee’s investigations. The report did not seriously address the recommendations by the Fact-Finding Mission to the de facto Gaza authorities. This is in stark contrast to the report of the Palestinian Authority’s Commission, which demonstrated a sincere effort on its part to investigate and expose the culpability of the government authorities. Instead, the second Gaza Committee – like the first – addressed recommendations to the United Nations and the international community, while its conclusions concentrated on criticizing Israel’s policies and actions towards Gaza, rather than on addressing those of the de facto Gaza authorities. This gives the impression that the investigations sought to deflect attention from

⁹⁰ Mr. Abdollah Alasha’al (Chair, Egypt); Mr. Basem A’alem (Saudi Arabia); Mr. Mahmood Almobarak (Saudi Arabia); Mr. Muhammad No’mán Elnahhal (Gaza); Mr. Salem Elsaqqa (Gaza); Mr. Nazem Owaida (Gaza).

the alleged violations of IHL and IHRL by the de facto Gaza authorities and raises concerns about their credibility and genuineness.

87. Moreover, some aspects of the report sought to explain away allegations of serious violations of IHL. For example, the second Gaza Committee suggested that the unavailability of modern military technology could not preclude armed groups from defending themselves. This implicitly acknowledges the truth of the allegations in the FFM report that armed groups violated IHL by launching weapons at Israel that were incapable of striking precise targets, while seeking to justify the violation and absolve the perpetrators.

88. The investigations of the second Gaza Committee, which began more than a year after the Gaza conflict, also raise questions as to the promptness of its inquiry. The report set out reasons for the delay, noting the difficulties inherent in undertaking effective investigations in the wake of the destruction caused by the conflict. This Committee understands that the chaos resulting from armed conflict had an impact on the second Gaza Committee's capacity to undertake investigations. In this sense, the strict application of the standard of promptness might not be appropriate.

VI. Conclusions

A. Israel

89. **A lack of cooperation hampered the Committee's assessment of Israel's response to the call by the General Assembly to conduct investigations that are independent, credible and in conformity with international standards into the serious violations of IHL and IHRL reported by the United Nations Fact-Finding Mission on the Gaza Conflict. The Committee's bases of information are insufficient for a definitive assessment. Consequently, the Committee is not in a position to establish whether the investigations carried out by Israel met international standards of independence, impartiality, thoroughness, effectiveness and promptness.**

90. **The Committee acknowledges that there are mechanisms in place within the Israeli legal order to investigate allegations of war crimes. It accepts that military as well as civilian investigative bodies may inquire into such crimes so long as the investigations conform to international standards. Investigations into allegations of violations of either IHL or IHRL should meet the universal criteria of independence, impartiality, thoroughness, effectiveness and promptness, subject to the constraints of armed conflict.**

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

92. **The Israeli investigators did not always undertake steps to inform victims, witnesses and their legal representatives of the progress of their inquiries, nor did they consistently treat victims with dignity and courtesy. Transparency in reporting progress and results of investigations and access to justice for victims are**

requirements for investigations under IHRL, although they are not strictly applicable to investigations under IHL, owing to the differing objectives of investigations under these two bodies of law.

93. Nonetheless, without the full participation of victims and witnesses in investigations, their effectiveness and thoroughness suffer. The Committee notes that international standards are evolving in this area, with ever stronger emphasis on affording access to justice for victims even with respect to investigations into alleged violations of IHL.

94. The Committee does not have any information on whether Israel has undertaken investigations into the allegations raised in the FFM report concerning IHRL violations in the West Bank. In this regard, Israel has not met its duty, under the International Covenant or under the Convention against Torture, to investigate these claims.

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

B. The Palestinian side

1. The Palestinian Authority

96. The Palestinian Authority established an independent commission of investigation, which carried out a careful and detailed inquiry into the allegations addressed to the Palestinian Authority. On the basis of the Commission’s report and its meeting with the Commission’s Chair and members, the Committee concludes that the Commission was not only independent in form, according to its legal statute, but also in fact. Its report alleges that serious violations of IHRL were committed by public officials in the West Bank. The Committee concludes that the investigation conforms with international standards and can be considered credible and genuine.

97. However, the Committee observes that the Commission’s work was hampered by difficulties in accessing the Gaza Strip. While the Commission took all appropriate steps to investigate the allegations of serious violations of IHL and IHRL in Gaza, the Committee concludes that the Commission was unable to do so.

98. The Commission has laid the groundwork for the commencement of proceedings against the perpetrators and other measures suited to provide redress to the victims. Its Chair has received written assurances from the Prime Minister concerning the implementation of all its recommendations, but the Committee is unaware of any criminal proceedings that may have been initiated since the Commission filed its report.

2. The de facto Gaza authorities

99. The de facto authorities in Gaza established two committees of inquiry.

100. The report of the first Committee, made up of officials of the de facto Gaza authorities, makes no serious effort to address the allegations detailed in the FFM report against the de facto authorities in Gaza; it focuses primarily on the allegations directed against Israel.

101. The second report, prepared by three national and three international legal experts, provides some information about the actual measures taken to redress the violations that were alleged, but fails to substantiate assertions that all political prisoners have been released and criminal prosecutions have taken place in response to the FFM report. On the basis of the information before it, the Committee cannot conclude that credible and genuine investigations have been carried out by the de facto authorities in the Gaza Strip.

Palestinian Centre for Human Rights, the Euro-Mediterranean Human Rights Network (EMHRN).

National human rights institutions

The Palestinian Independent Commission for Human Rights

Independent experts

Philip Alston, Professor	Former Special Rapporteur on extrajudicial, arbitrary and summary executions
Abraham Bell, Professor	Bar Llan University Israel
Richard Falk	Special Rapporteur on the Occupied Palestinian Territories
William Fenrick	Schulich School of Law, Dalhousie University, Canada; former Senior Legal Adviser, Office of the Prosecutor, International Criminal Tribunal for the former Yugoslavia
Eugene Fidell	President of the National Institute of Military Justice, United States of America, and Florence Rogatz Lecturer in Law, Yale Law School
Jim Goldston	Open Society Institute – Justice Initiative
Col. Daniel Reisner (ret.)	Former head of the IDF international law department.
Marco Sassoli, Professor	University of Geneva
Michael Schmitt	Professor Durham University and ex-Advocate-General, United States of America
Rupert Skilbeck	Open Society Institute – Justice Initiative
Canadian military law expert	

International organizations

United Nations Special Coordinator Office for the Middle East

Office of the United Nations High Commissioner for Human Rights

International Committee of the Red Cross

Annex II

Table: Incidents in the report of the United Nations Fact-Finding Mission on the Gaza Conflict

Indiscriminate or deliberate killings

Incident	Paragraphs FFM report	Investigation body	Status
1. Killing of Ateya Samouni and his son Ahmad	706-735	Sixth special command investigation; MPCID	Ongoing
2. Attack on the Wa'el al-Samouni house	706-735	Sixth special command investigation; MPCID	Ongoing
3. Al-Fakhura Street massacre/al-Deeb family	653-703	Special command investigation	No violation
4. Shooting of Iyad al-Samouni	736-744	Sixth special command investigation; MPCID	Ongoing
5. Death of Mohammed Hajji and shooting of Shahd Hajji and Ola Masood Arafat	745-754	Unclear	Unclear
6. Shooting of Ibrahim Juha	755-763	MPCID	Ongoing
7. Killing of Majda and Rayya Hajaj	764-769	MPCID; military court	Ongoing but unclear if same case
8. Khalid Abd Rabbo's daughters	770-779	MPCID	No violation
9. Shooting of Rouhiyah al-Najjar	780-787	Command investigation; MPCID	No violation
10. Abu Halima family	788-801	MPCID	Unclear
11. Attack on al-Maqadmah mosque	822-843	Two special command investigations (January 2009 and November 2009)	Disciplinary action
12. Attack on al-Daya family	844-866	Special command investigation	No violation
13. Attack on the Abd al-Dayem condolence tents	867-885	Command investigation; MPCID	No violation

Attacks on government infrastructure

Incident	Paragraphs FFM report	Investigation body	Status
14. Israeli air strikes on the Gaza main prison	366-392	Command investigation	No violation
15. Strikes on the Palestinian Legislative Council building	366-392	Unclear	Unclear
16. Arafat City police HQ	393-438	Command investigation	No violation
17. Deir al-Balah police attacks	393-438	Command investigation	No violation
18. Abbas police station	393-438	Command investigation	No violation
19. Zeytoun police stations	393-438	Command investigation	No violation
20. Al-Shujaeyah and al-Tuffah police station	393-438	Command investigation	No violation

28 **Use of Palestinians as human shields**

Incident	Paragraphs FFM report	Investigation body	Status
21. Abbas Ahmed Ibrahim Halawa	1064-1075	MPCID	No violation
22. Majdi Abd Rabbo	1033-1063	MPCID	Disciplinary action
23. Mahmoud Abd Rabbo al-Ajrani	1076-1085	MPCID	No violation
24. AD/03	1086-1088	MPCID	Discontinued insufficient evidence

Arbitrary detention

Incident	Paragraphs FFM report	Investigation body	Status
25. Al-Atatra incident	1112-1126	Sixth special command investigation	Ongoing
26. AD/02	1127-1142	MPCID	Unclear
27. AD/03	1143-1164	MPCID	Discontinued insufficient evidence
28. AD/06	1107	Unclear	Unclear

Use of harmful weapons

Incident	Paragraphs FFM report	Investigation body	Status
29. Al-Quds hospital	596-629	Special command investigation	Unclear Possible disciplinary action
30. Al-Wafa hospital	630-652	Special command investigation	Unclear Possible disciplinary action
31. UNRWA	543-595	Special command investigation	Apology, disciplinary action, compensation

Attacks on infrastructure and food production

Incident	Paragraphs FFM report	Investigation body	Status
32. El-Bader flour mill	913-941	Command investigation	No violation
33. Sawafeary chicken farm	942-961	Command investigation	No violation
34. Abu Jubba cement company	1012-1017	Command investigation	No violation

Attacks on water and sewage installations

Incident	Paragraphs FFM report	Investigation body	Status
35. Gaza wastewater treatment plant	962-974	Command investigation	No violation
36. Namar wells group	975-986	Command investigation	No violation