

THE GAZA MISSION: IMPLICATIONS FOR INTERNATIONAL HUMANITARIAN LAW AND UN FACT-FINDING

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The Report of the United Nations Fact-Finding Mission on the Gaza Conflict was published more than two years ago. The UN Human Rights Council and the UN General Assembly endorsed the recommendations of the Report and requested both parties to undertake investigations on alleged violations, inter alia, of international humanitarian law. The parties to the conflict and two recent UN expert committees have published follow-up reports to the fact-finding. Nonetheless, in April 2011, the chair of the UN Fact-Finding Mission, Judge Goldstone, 'retracted' from or 'amended', some of the Report's conclusions, in particular the allegations against Israel concerning its 'policy' of deliberate and indiscriminate attacks against Palestinian civilians and their objects. The remaining members of the UN Fact-Finding Mission stood firm on their original findings and conclusions. This article looks at the credibility of this fact-finding process and the wider implications of the whole exercise to civilian immunity and UN fact-finding in light of subsequent developments and the core features of UN fact-finding. It particularly enquires into the doubts raised about the appropriateness and effectiveness of the use of UN fact-finding in such complex and long-standing cases including, in this case, where there is lack of genuine will to act by the parties concerned or a lack of binding mandate from the UN Security Council. It also explores the substantive and institutional implications of the exercise in enhancing and promoting civilian immunity during armed conflict in cases where the parties are unwilling to cooperate fully but may be subject to legal obligations owed to the international community as a whole.

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I INTRODUCTION

There has been much debate and controversy surrounding the extensive *Report of the United Nations Fact-Finding Mission on the Gaza Conflict* ('*Gaza Report*'), that investigated the armed conflict in Gaza of 2008–09.¹ Sponsored by the UN Human Rights Council ('UNHRC') and published in September 2009, the *Gaza Report* concluded that both Israeli and Palestinian armed groups breached their international humanitarian law ('IHL') or *jus in bello* duties, which, amongst other things, amounted to the perpetration of war crimes. The UNHRC and the UN General Assembly ('UNGA') adopted the *Gaza Report* by majority vote and called upon both sides to undertake credible and appropriate investigations concerning the serious allegations made against them.² In January and July 2010 Israel published what it called *Updates* in response to the UNGA's request (but not directly to the UNHRC).³ While some errors and infringements and quite a few incidents of breaches of IHL by the Israel Defence Forces ('IDF') have been admitted, allegations of systematic and deliberate breaches of international law have been categorically denied. The Palestinian authorities (both in Ramallah and Gaza) have, or claim to have, undertaken investigations but the core allegations implicating Hamas armed groups have not been addressed.

Despite the fact that the *Gaza Report* was published more than two years ago, it, along with the UN's various follow-up measures, is still subject to fierce

¹ *Human Rights in Palestine and Other Occupied Arab Territories: Report of the United Nations Fact-Finding Mission on the Gaza Conflict*, Human Rights Council, 12th sess, Agenda Item 7, UN Doc A/HRC/12/48 (25 September 2009) ('*Gaza Report*'). The *Gaza Report* is also commonly referred to as the *Goldstone Report* in other commentaries.

² *The Human Rights Situation in the Occupied Palestinian Territory, Including East Jerusalem*, HRC Res S-12/1, 12th spec sess, UN Doc A/HRC/RES/S-12/1 (21 October 2009); *Follow-Up to the Report of the United Nations Fact-Finding Mission on the Gaza Conflict*, GA Res 64/10, UN GAOR, 64th sess, 39th plen mtg, Agenda Item 64, UN Doc A/RES/64/10 (1 December 2009) ('*UNGA Follow-Up to the Gaza Report*').

³ *Follow-Up to the Report of the United Nations Fact-Finding Mission on the Gaza Conflict — Report of the Secretary-General*, 64th sess, Agenda Item 64, UN Doc A/64/651 (4 February 2010) annex I ('*Gaza Operation Investigations: An Update*') ('*First Update*'); *Second Follow-Up to the Report of the United Nations Fact-Finding Mission on the Gaza Conflict — Report of the Secretary-General*, 64th sess, Agenda Item 64, UN Doc A/64/890 (11 August 2010) annex I ('*Gaza Operation Investigation: Second Update*') ('*Second Update*') (collectively, '*Updates*').

political and diplomatic controversy.⁴ The extensive academic commentary on the *Gaza Report* has also been sharply divided.⁵ Nonetheless, it remains legally and intellectually invaluable, as it poses crucial substantive, procedural and institutional questions which need to be debated and addressed. This article follows a different approach to previous literature and seeks to widen the debate by inquiring into:

- 1 the wider issues of the *role* of UN fact-finding as related to *jus in bello* civilian immunity;
- 2 the *credibility and contributions* of the UN fact-finding Mission on the Conflict in Gaza's ('Mission') factual and legal findings; and
- 3 the *implications* of this controversial exercise for UN fact-finding and IHL.

These will be examined in light of the salient features of UN fact-finding or inquiry, the legal duties of Israeli and Palestinian authorities (including Hamas) and their responses to the findings of the Mission and the UN follow-up reports, and the March 2011 rift among members of the Mission over the credibility of the *Gaza Report*. In addition, attention will be drawn to the approaches of other fact-finding processes such as the Darfur and Georgia–Russia inquiries and to relevant academic commentaries. The international law focus adopted means that there will be no attempt, however, to investigate and evaluate domestic criminal systems and processes. In brief, the following analysis is focused on the worthiness and input of (imposed) fact-finding in regards to the protection and promotion of civilian immunity, which is of *erga omnes* character, and the tension it may create between the parties and others. The aim is to identify the lessons which may be learnt for developing more effective fact-finding in the future.

With this in mind, Part II provides a background discussion about the notion of fact-finding, as an institution or method of international law, to help resolve disputes or tensions. The purpose here is to identify and apply the salient features of fact-finding to the *Gaza Report*. Building on Part II, Part III addresses the mandate and applicable law by focusing on *Additional Protocol I to the Geneva*

⁴ See, eg, 'Britain Pledges Continued Support for Goldstone Report against Israel, Even as Goldstone Retracts Allegations', *The Commentator* (online), 4 April 2011 <http://www.thecommentator.com/article/33/britain_pledges_continued_support_for_goldstone_report_against_israel_even_as_goldstone_retracts_allegations>. In contrast, the United States Senate called for the full withdrawal of the *Gaza Report* by the United Nations Human Rights Council ('UNHRC'): see Yitzhak Benhorin, 'US Senate Urges UN to Revoke Goldstone Report', *Ynetnews* (online), 4 April 2011 <<http://www.ynetnews.com/articles/0,7340,L-4057246,00.html>>.

⁵ For a publication which sympathised with the findings of the *Gaza Report*, see, eg, Adam Horowitz, Lizzy Ratner and Philip Weiss (eds), *The Goldstone Report: The Legacy of the Landmark Investigation of the Gaza Conflict* (Nation Books, 2010). For a critical account of the *Gaza Report*, see, eg, Peter Berkowitz, 'The Goldstone Report and International Law: The March of Politics under the Banner of Law' [2010] 162 *Policy Review* 13. See also Tom Farer et al., 'The Goldstone Report on the Gaza Conflict: An Agora' (2010) 16 *Global Governance* 139. On the application of IHL specifically, see Laurie R Blank, 'The Application of IHL in the Goldstone Report: A Critical Commentary' [2009] 12 *Yearbook of International Humanitarian Law* 347; Jean-Philippe Kot, 'Israeli Civilians versus Palestinian Combatants? Reading the Goldstone Report in light of the Israeli Conception of the Principle of Distinction' (2011) 24 *Leiden Journal of International Law* 961.

Conventions 1977 ('*Additional Protocol I*')⁶ in particular, and also addresses questions of impartiality and procedural fairness. Part IV is the core of the analysis and enquires into the details of the most important and controversial allegations of deliberate, indiscriminate and reckless attacks against civilians by both sides. This section of the analysis is undertaken in view of authoritative sources, other relevant practices on the application of the law, the formal and informal responses of the parties to the conflict and the September 2010 and May 2011 follow-up reports authored by UN follow-up expert committees.⁷ The objective here is to review the events surrounding the *Gaza Report* and its main legal findings and provide a broader insight into the extent to which the law has been objectively, consistently and innovatively applied to the facts. Finally, Part V examines the credibility and contributions of the *Gaza Report* to the Gaza conflict and its wider implications for UN fact-finding on IHL issues in light of the core purposes and characteristics of fact-finding.

II FACT-FINDING IN GENERAL: KEY FEATURES AND EXCEPTIONS

Fact-finding (or inquiry), as a method of settling international disputes and tensions, can be traced back to the *Hague Convention for the Pacific Settlement of International Disputes 1907* ('*Hague Convention*').⁸ Article 9 of the *Hague Convention* describes fact-finding's function as facilitating 'a [re]solution of ... disputes by elucidating the facts by means of an impartial and conscientious investigation'. In contrast, the *UN Resolution and Declaration on Fact-Finding of 1991* ('*UN Declaration on Fact-Finding*'),⁹ which is of particular relevance to this article, defines fact-finding as 'any activity designed to obtain detailed

⁶ *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts*, opened for signature 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978) arts 85–6 ('*Additional Protocol I*').

⁷ See *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*, 15th sess, Agenda Item 7, UN Doc A/HRC/15/50 (23 September 2010) ('*Tomuschat Report*'); *Report of the Committee of Independent Experts in International Humanitarian and Human Rights Law Established pursuant to Council Resolution 13/9*, 16th sess, Agenda Item 7, UN Doc A/HRC/16/24 (5 May 2011) ('*McGowan Davis Report*').

⁸ *Convention for the Pacific Settlement of International Disputes*, opened for signature 18 October 1907, [1907] ATS 6 (entered into force 26 January 1910) ('*Hague Convention*'). This Convention replaced the 1899 *Hague Convention for the Pacific Settlement of International Disputes*, opened for signature 29 July 1899, [1901] ATS 130 (entered into force 4 September 1900). See generally J G Merrills, *International Dispute Settlement* (Cambridge University Press, 4th ed, 2005) 45–63.

⁹ *Declaration on Fact-Finding by the United Nations in the field of the Maintenance of International Peace and Security*, GA Res 46/59, UN GAOR, 46th sess, 67th plen mtg, UN Doc A/RES/46/59 (9 December 1991) ('*UN Declaration on Fact-Finding*').

knowledge of the relevant facts of any dispute or situation',¹⁰ thereby broadening the scope of the definition.

The key characteristics of fact-finding include instituting and conducting an inquiry based upon consent (of states), examining factual rather than legal questions, the making of non-binding (or binding) findings and recommendations, and the objectivity and impartiality of those who are charged with such duties.¹¹ These have remained the basic tenets of fact-finding, although there may be some departures from or qualifications to them depending on the legal basis and their specific mandates. The first qualification is that competent international bodies, such as the UN Security Council ('UNSC') using its Chapter VII powers, may impose fact-finding missions upon states and others.¹² The UNSC did so, for instance, on Iraq to inspect its weapons programme in 1991, on Yugoslavia in 1992 and on Israel in 2002, as will be discussed later. Nonetheless, there are 'considerable practical and legal difficulties if the territorial State refuses to co-operate'.¹³ Whilst the refusing state may be able to impede the activities of fact-finding and such a move may not be without legal or political repercussions for that state, it is less likely that a 'highly satisfactory outcome' will be achieved when the consent of the target state of an inquiry is absent.¹⁴

¹⁰ *UN Declaration on Fact-Finding*, UN Doc A/RES/46/59 (9 December 1991) annex para 2; Axel Berg notes, however: 'Activities such as observation of cease-fires in the framework of peacekeeping operations or verification of the implementation of existing agreements would, however, not fall under that definition': Axel Berg, 'The 1991 Declaration on Fact-Finding by the United Nations' (1993) 4 *European Journal of International Law* 107, 108. For an excellent account of the history of UN fact-finding, see Sydney D Bailey, 'UN Fact-Finding and Human Rights Complaints' (1972) 48 *International Affairs* 250. See also *An Agenda for Peace: Preventative Diplomacy, Peacemaking and Peace-Keeping — Report of the Secretary-General pursuant to the Statement Adopted by the Summit Meeting of the Security Council on 21 January 1992*, UN GAOR 47th sess, Agenda Item 10; UN SCOR 47th sess, Agenda Item 124, UN Doc A/47/277 and S/24111 (17 June 1992).

¹¹ *Hague Convention*, arts 9–14. See also *UN Declaration on Fact-Finding*, UN Doc A/RES/46/59, annex paras 3, 6; Merrills, *International Dispute Settlement*, above n 8, 46, 63; John Merrills, 'The Means of Dispute Settlement' in Malcolm D Evans (ed), *International Law* (Oxford University Press, 3rd ed, 2010) 559, 566; Bailey, above n 10, 264, noting that art 12 of the rules of procedure of the 1963 UN Mission to South Vietnam adopted these characteristics as guiding principles.

¹² See *UN Declaration on Fact-Finding*, UN Doc A/RES/46/59, annex para 7, which empowers the UN Security Council ('UNSC'), the UN General Assembly ('UNGA') and the UN Secretary-General ('UNSG') to undertake fact-finding 'in the context of their respective responsibilities for the maintenance of international peace and security in accordance with the Charter'. See also Merrills, *International Dispute Settlement*, above n 8, 59–63; John Collier and Vaughan Lowe, *The Settlement of Disputes in International Law* (Oxford University Press, 1999) 27; SC Res 1564, UN SCOR, 59th sess, UN Doc S/RES/1564 (18 September 2004) ('*UNSC Resolution Establishing the Fact-Finding Mission for Darfur*').

¹³ Collier and Lowe, above n 12, 27.

¹⁴ See Merrills, 'The Means of Dispute Settlement', above n 11, 566.

The second qualification is that fact-finding, in its institutional (as opposed to operational)¹⁵ sense, may be extended to the determination of legal questions, liabilities and even remedies¹⁶ and thus go beyond fact elucidation. Given that most contemporary fact-finding missions deal with both facts and legal issues, it is not clear whether such a broad mandate is still an exception rather than the norm.¹⁷ Finally, as opposed to the traditional perceptions of fact-finding exemplified in the *Hague Convention*, the subject of inquiry may include non-state actors or even individuals, depending on a lawful mandate and authorisation.¹⁸

Thus, the purpose, legal bases and actors of fact-finding may vary depending on the legal framework and authority applied to it. For instance, the *Hague Convention* intends, at least on paper, to resolve disagreements ‘by investigating disputed facts’ but ‘involving neither honour nor vital interests’¹⁹ of the parties concerned. The *Hague Convention* also empowers disputing states parties to the Convention to establish ‘International Commissions of Inquiry’ through ‘special agreement’.²⁰ In contrast, the *UN Declaration on Fact-Finding* refers to ‘Principles of International Law’ as its basis and emphasises ‘that the ability of the United Nations to maintain international peace and security depends ... on its acquiring detailed knowledge about the factual circumstances of any dispute or situation’.²¹ The *UN Declaration on Fact-Finding* also refers to ‘competent United Nations organs’ as capable of using and instituting fact-finding ‘in order to exercise effectively their functions in relation to’ peace and security.²² In particular it refers to the UNGA, the UN Secretary-General (‘UNSG’) and the UNSC as competent organs of the UN.²³

The purpose (and aspiration) of UN fact-finding appears to be broader than other treaty-based arrangements of inquiry in terms of the norms and institutions invoked and involved respectively. Despite the fact that the *UN Declaration on*

¹⁵ Ibid 564–5: while the operational dimension ‘refers to the process performed whenever a court or other body attempts to resolve a disputed issue of fact’, the institutional dimension sees fact-finding as ‘a specific arrangement which may be selected instead of arbitration or other techniques to establish facts’. See also Anne Peters, ‘International Dispute Settlement: A Network of Cooperational Duties’ (2003) 14 *European Journal of International Law* 1, pointing out that the World Trade Organization Dispute Settlement panel procedure incorporates fact-finding as a main component of the interim report stage to be formulated in collaboration with the parties to a dispute, in accordance with *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 2 (‘*Understanding on Rules and Procedures Governing the Settlement of Disputes*’) arts 15, 18. For a discussion of the International Court of Justice’s (‘ICJ’) use of fact-finding as part of its judicial activity, see Richard B Lillich, *Fact-Finding before International Tribunals* (Transnational, 1992).

¹⁶ Merrills, ‘The Means of Dispute Settlement’, above n 11, 565, noting that ‘[i]nquiry is clearly a very flexible method having been used both for “pure” fact-finding, as in some of early cases, and for situations where legal questions were prominent as in *Leterier and Moffitt*’.

¹⁷ *UN Declaration on Fact-Finding*, UN Doc A/RES/46/59, annex para 17, states that ‘[t]he report [of fact-finding] should be limited to a presentation of findings of a factual nature’.

¹⁸ See Merrills, *International Dispute Settlement*, above n 8.

¹⁹ See *Hague Convention* art 9. See also at art 1 which sets out the general objective of ‘obviating ... recourse to force in the relations between States’.

²⁰ Ibid arts 9, 10.

²¹ *UN Declaration on Fact-Finding*, UN Doc A/RES/46/59, annex para 2.

²² Ibid.

²³ Ibid annex para 7.

Fact-Finding explicitly refers to some principal organs of the UN as competent organs, in practice a number of UN organs and specialised agencies, other than the aforementioned three, have been conducting fact-finding in line with their functions and responsibilities,²⁴ as further considered later in Part III.

The subject matter of fact-finding has been mainly and traditionally concerned with incidents involving the use of military force at sea (eg, the *Dogger Bank* incident of 1904, the *Carthage* and *Manouba* cases of 1913 and the *Tavignano* incident of 1917) and arresting or intercepting fishing and other vessels at sea (eg, the *Red Crusader* incident of 1961).²⁵ Later cases of fact-finding have dealt with aircraft incidents (eg, the *KE 007* incident of 1983) and the murder of people in foreign territory (eg, the *Letelier* and *Moffitt* cases of 1992).²⁶ Most of these inquiries (with the exception of the *KE 007* incident which was authorised by the International Civil Aviation Organization) were instituted by the parties involved in the incidents and thus were based on their consent.

Post-Cold War practice has gone beyond the traditional scope of fact-finding, with or without acquiring the consent of concerned parties, including the carrying out of fact-finding activities on disarmament issues,²⁷ and most significantly, on matters of international human rights²⁸ and IHL.²⁹ The expansion of international fact-finding to the latter is particularly significant for a number of reasons. Compared to other areas of international law such as human rights (as overseen by the UNHRC, universal treaty bodies and regional human rights systems), the law governing the use of military force (as overseen by the UNSC) or international trade (as represented by the World Trade Organization and others), IHL has not yet enjoyed an international and permanent institutional framework for its implementation and enforcement. This means that IHL primarily relies on the duty of warring parties not only to be bound by the laws and customs of war but also to respond to violations, including the duty to carry

²⁴ Merrills, *International Dispute Settlement*, above n 8, 60–3.

²⁵ For an excellent summary and history of these cases, see *ibid* 46–63.

²⁶ *Ibid*.

²⁷ See, eg, SC Res 715, UN SCOR, 46th sess, 3012th mtg, UN Doc S/RES/715 (11 October 1991) authorising weapons inspection in Iraq in 1991. See also United Nations Department for Disarmament Affairs, 'Report on the Fact-Finding Mission to the Kingdom of Cambodia, 13–20 June 2002' (Report, United Nations, 2002).

²⁸ See, eg, *Situation of Human Rights in the Libyan Arab Jamahiriya*, HRC Res S-15/2, 15th sess, 2nd mtg, UN Doc A/HRC/RES/S-15/1 (3 March 2011); *Report of the Fact-Finding Mission to Lebanon Inquiring into the Causes, Circumstances and Consequences of the Assassination of Former Prime Minister Rafik Hariri — Report of the Secretary-General*, 60th sess, UN Doc S/2005/203 (24 March 2005). See also Spokesperson for UN Secretary-General, 'Secretary-General Dispatches Fact-Finding Mission to Fiji' (Press Release, UN Doc SG/SM/10955, 20 April 2007); Anna Kajumulo Tibaijuka, 'Report of the Fact-Finding Mission to Zimbabwe to Assess the Scope and Impact of Operation Murambatsvina' (Report, UN Special Envoy on Human Settlements Issues in Zimbabwe, 18 July 2005).

²⁹ As discussed below, the Yugoslavia (1992), Darfur (2004), Gaza (2008) and Libya (2011) conflicts each led to the establishment of UN inquiries on suspected *jus in bello* violations.

out investigations.³⁰ This is the case despite the establishment by states parties to *Additional Protocol I* of ‘an International Fact-Finding Commission ... consisting of fifteen members of high moral standing’ with the competence to lodge an inquiry on allegations of grave breaches.³¹ This is notwithstanding, first, the obligation of (state) warring parties to appoint a protecting (third) power for purposes of monitoring and overseeing compliance with their humanitarian law duties,³² and secondly, the duty to allow humanitarian activities and help for victims of armed conflict.³³ These two important duties, although subject to the consent of warring parties, entail the carrying out of fact-finding in its ordinary and operational sense (such as the registration of prisoners of war and other victims), but not fact-finding per se in its institutional sense.

Nonetheless, breaches of IHL by parties to armed conflict have been the subject of international third-party inquiry, including by the International Committee of the Red Cross (‘ICRC’), primarily in its role as the guardian of the *Geneva Conventions* of 1949,³⁴ regional organisations such as the European Union³⁵ and the UN.³⁶ Examples of fact-finding by the UN on IHL issues

³⁰ For the codification of the duties on warring parties to respond to violations, see, eg, *Additional Protocol I* arts 85–6; *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) arts 146–7 (‘*Geneva Convention IV*’). Article 149 of the latter also imposes the duty to institute an enquiry to investigate ‘any alleged violation of the Convention’ but ‘[a]t the request of a Party to the conflict’ and subject to agreement ‘between the interested Parties’. See also *Strengthening Legal Protection for Victims of Armed Conflict* (Report No 31/C/11/5.1.1, 31st International Conference of the Red Cross and Red Crescent, Geneva, 28 November – 1 December 2011) 13 (‘*ICRC Draft Resolution and Report*’), noting that ‘one of the main weaknesses of current international humanitarian law ... is that it lacks appropriate means for halting violations when they occur’.

³¹ See *Additional Protocol I* arts 90(1)(a), (2)(c). This has been accompanied by internal regulations on how to conduct fact-finding, however, ‘[t]he Commission ... has never been called upon to act, although it has been operational since 1991’: *ICRC Draft Resolution and Report*, above n 30, 13. See also ‘International Humanitarian Fact-Finding Commission (Article 90 of Protocol I)’ [1998] 325 *International Review of the Red Cross* 742; Erich Kussbach, ‘The International Humanitarian Fact-Finding Commission’ (1994) 43 *International and Comparative Law Quarterly* 174, 175.

³² *Additional Protocol I* art 5.

³³ See, eg, *Geneva Convention IV* art 143.

³⁴ The International Committee of the Red Cross (‘ICRC’) is the most important guardian of the *Geneva Conventions* but its reports (on breaches or compliance) are largely and usually confidential. For some interesting discussion on the role of the ICRC as a non-governmental institution of fact-finding, see Michael Bothe, ‘Fact-Finding as a Means of Ensuring Respect for International Humanitarian Law’ in Wolff Heintschel von Heinegg and Volker Epping (eds), *International Humanitarian Law — Facing New Challenges* (Springer, 2007) 249, 259–60. See also ICRC, ‘Action by the International Committee of the Red Cross in the Event of Violations of International Humanitarian Law or of other Fundamental Rules Protecting Persons in Situations of Violence’ [2005] 858 *International Review of the Red Cross* 393; *Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, opened for signature 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950) art 9 (‘*Geneva Convention I*’); *Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, opened for signature 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950) art 9 (‘*Geneva Convention II*’); *Convention relative to the Treatment of Prisoners of War*, opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) (‘*Geneva Convention III*’) arts 9, 126; *Geneva Convention IV* art 10 (collectively, ‘*Geneva Conventions*’). See also *Additional Protocol I* art 81(1).

³⁵ See, eg, Heidi Tagliavini, *Independent International Fact-Finding Mission on the Conflict in Georgia* (Report, Council of the European Union, 30 September 2009) vol II, ch 7 <<http://www.ceiig.ch/Report.html>> (‘*Fact-Finding on Georgia–Russia*’).

include the *Kalshoven Commission* in Yugoslavia (1992)³⁷ and the *International Inquiry on Darfur* (2005), both of which were authorised by the UNSC; as well as the UNHRC sponsored fact-finding on the Gaza conflict (2008–09) and on ‘the Israeli attacks on the flotilla of ships carrying humanitarian assistance’ (2010).³⁸ These practices have to be read in light of the obligation to cooperate owed by states involved in armed conflict to repress breaches of IHL. *Additional Protocol I* articulates this duty by stating that

in situations of serious violations of the [*Geneva*] *Conventions* or of this *Protocol*, the High Contracting Parties undertake to act, jointly or individually, in cooperation with the United Nations and in conformity with the United Nation’s *Charter*.³⁹

This treaty commitment is only applicable to those states which are party to the Protocol, and not to non-state actors. It is a specific obligation which exists along with the general duty of states and others to cooperate with the UN even when there is no Chapter VII measure.

This poses the question of why and when UN fact-finding regarding IHL violations would be necessary. Whilst fact-finding is often instituted when grave breaches of IHL are allegedly committed and those who are accused of such breaches do not take concrete action, their final outcome will vary depending on the circumstances and political dynamics of each case. The ultimate objective of fact-finding in general and UN practices in particular will depend on the mandate and nature of the fact-finding and the follow-up action (or inaction) taken to implement the recommendations by a mission or commission. This means that while some reports (eg, the UN fact-finding reports concerning the conflicts in Yugoslavia, Lebanon and Darfur) have led to criminal indictments, others such as the UNSC fact-finding on Israel with respect to the incident in Jenin City in 2002 and the EU sponsored inquiry on the Georgia–Russia war lead to virtually nothing.

However, even in the absence of concrete international action based upon fact-finding, there may still be some benefits to be gained from it. At the very least, every report of a fact-finding will name and shame and create public awareness about alleged illegal behaviour. On a more optimistic perspective, those ‘responsible’ members of the international community may also take decisive national action in response to fact-finding reports, with or without fully acknowledging or denying the UN inquiries. At some level therefore, fact-finding can serve as a means to ‘ensure compliance’, thereby improving the

³⁶ Bothe, above n 34, 250. For interstate cases, see, eg, ‘Incident in the North Sea (Great Britain v Russia)’ (1908) 2 *American Journal of International Law* 931 (also known as the *Dogger Bank Case*); *Red Crusader (Denmark v United Kingdom)* (1962) 35 ILR 485.

³⁷ SC Res 780, UN SCOR, 47th sess, 31 19th mtg, UN Doc S/RES/780 (1992) (6 October 1992). This inquiry led to the establishment of the International Criminal Tribunal for the Former Yugoslavia (‘ICTY’).

³⁸ *Report of the International Fact-Finding Mission to Investigate Violations of International Law, including International Humanitarian Law and Human Rights Law, Resulting from Israeli Attacks on the Flotilla of Ships Carrying Humanitarian Assistance*, 15th sess, Agenda Item 1, UN Doc A/HRC/15/21 (27 September 2010) 232.

³⁹ See *Additional Protocol I* art 89. Yet, this only applies to the parties to the *Protocol* and is less likely to have attained customary status.

implementation of IHL,⁴⁰ although this may not be true in all cases as examined later in Part IV.

The *Gaza Report*, its context and aftermath offer an invaluable opportunity to examine the role of fact-finding in practice, and to reflect on the effectiveness of the exercise and the lessons that can be learnt from it. The next Part therefore examines the core features of the Mission focusing on its mandate, applicable law, and questions of consent, impartiality and procedural fairness.

III CORE FEATURES OF THE GAZA FACT-FINDING MISSION

Between 27 December 2008 and 18 January 2009, the IDF and Palestinian armed groups fought a fierce armed conflict in Gaza, in which more than 1400 Palestinians and 13 Israelis lost their lives ‘in just three weeks’ and dozens of families, especially women and children, were seriously affected.⁴¹ Civilian homes and infrastructure, hospitals, mosques and even a UN facility were among the most affected. Following the ‘end’ of active hostilities there, the UNHRC established the Mission⁴² which led to the production of the *Gaza Report*.⁴³ It is a long and detailed document, comprising 452 pages in its final version and consisting of 5 parts and 31 chapters. The analysis here will focus, for the purposes of this Part, on some background issues such as procedural justice, the direct or indirect contributions of the parties to the process, the applicable law and the (in)validity of the mandate of the Mission.

A *Mandate, Applicable Law, Scope and Parties to the Conflict*

The Mission’s mandate was

to investigate all violations of international human rights law and international humanitarian law that might have been committed at any time in the context of the military operations that were conducted in Gaza during the period from 27 December 2008 and 18 January 2009, whether before, during or after [the operations].⁴⁴

Although the *Gaza Report* emphasised IHL violations and the protection of civilians during the December – January active hostilities in Gaza, the Mission was of the view that the conflict could not be examined in isolation and that it was thus necessary to link it with the issue of occupation and the situation in the

⁴⁰ Bothe, above n 34, 260.

⁴¹ *Gaza Report*, UN Doc A/HRC/12/48, [1885].

⁴² The United Nations Fact-Finding Mission on the Conflict in Gaza (‘Mission’) was established by the President of the UNHRC on 3 April 2009 on the basis of *The Grave Violations of Human Rights in the Occupied Palestinian Territory, Particularly Due to the Recent Israeli Military Attacks against the Occupied Gaza Strip*, HRC Res S-9/1, 9th spec sess, UN Doc A/HRC/S-9/L.1 (12 January 2009) para 14 (‘*UNHRC Authorisation for Fact-Finding in Gaza*’). Judge Richard Goldstone, former judge of the Constitutional Court of South Africa and former Prosecutor of the ICTY and International Criminal Tribunal for Rwanda was appointed as its head. The other members were Christine Chinkin of the London School of Economics and Political Science; Hina Jilani, Advocate of the Supreme Court of Pakistan and former Special Representative of the Secretary-General on the Situation of Human Rights Defenders; and Desmond Travers, a former officer in Ireland’s Defence Forces and member of the Board of Directors of the Institute for International Criminal Investigations.

⁴³ *Gaza Report*, UN Doc A/HRC/12/48.

⁴⁴ See *ibid* [151].

entire Palestinian and Israeli territories before (and after) the conflict. The Mission reflected this approach by examining issues such as the legality of land confiscation and settlement expansion in the West Bank and the control of Jerusalem, ultimately declaring that these actions were in violation of international law.⁴⁵ The US and some European countries (excluding the UK and France) criticised the Mission for extending the inquiry into such long-standing areas on the basis that these elements were to be left for diplomatic negotiations between the parties. However, the majority of countries, including China and Russia, supported it.⁴⁶

In the *Gaza Report*, the Mission identified (and to some extent extended) the legal basis for its inquiry as being general international law (which comprises the principle of self-determination), the *Charter of the United Nations* ('*UN Charter*'), international criminal law, IHL and international human rights law. The latter two were specifically emphasised.⁴⁷ There is no doubt that all these are relevant to the Israel–Palestine conflict,⁴⁸ and can be relied upon as 'principles of international law' as explicitly referred to in the *UN Declaration on Fact-Finding*. What is also clear is that the Mission's mandate went beyond the mere elucidation of facts. This broad mandate raises the question of whether the inquiry can be justified as a necessary measure for the 'effective exercise of the functions' of the UNHRC.⁴⁹ From a wider security perspective and given the complexity of the situation, it may be argued that authorising such an inquiry primarily suits the functions and authority of the UNSC, which has the primary responsibility to maintain peace and security, and the UNGA and the UNSG who have important roles to play in the sphere of maintaining peace.⁵⁰ This argument may be reinforced by the fact that one of the parties to the conflict, Israel, was very critical of the UNHRC's action as biased and partial, a view that will be further discussed below.

⁴⁵ See *ibid* chs xx–xxi, [198]. This article does not consider questions of occupation or settlement merely in the interests of economy of space.

⁴⁶ See Neil MacFarquhar, 'UN Council Endorses Gaza Report', *The New York Times* (New York), 17 October 2009, A4.

⁴⁷ *Gaza Mission Report*, UN Doc A/HRC/12/48, [15], [268]–[310].

⁴⁸ See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 136 ('*Wall Advisory Opinion*'). See also Zera Yihdego, *The Arms Trade and International Law* (Hart, 2007) ch 6.

⁴⁹ See *UN Declaration on Fact-Finding*, UN Doc A/RES/46/59, annex para 2.

⁵⁰ See, respectively, *Charter of the United Nations* arts 24, 92 ('*UN Charter*'). See also the UNSC-established fact-finding mission for Lebanon: SC Res 1595, UN SCOR, 60th sess, 5160th mtg, UN Doc S/RES/1595 (7 April 2005) ('*UNSC Resolution Establishing the Fact-Finding Mission for Lebanon*'); *UNSC Resolution Establishing the Fact-Finding Mission for Darfur*, UN Doc S/RES/1564. The UNSG has also established fact-finding upon the recommendation of the UNSC with respect to the Djibouti–Eritrea crisis in 2008: *Report of the United Nations Fact-Finding Mission on the Djibouti–Eritrea Crisis — Report of the Secretary-General*, 63rd sess, UN Doc S/2008/602 (9 September 2008) ('*Djibouti–Eritrea Report*'). See also European Centre for Constitutional and Human Rights, *United Nations Fact-Finding Mechanisms: ECCHR Paper on Possible Next Steps on Accountability in Sri Lanka within the United Nations System* (December 2010) <<http://www.ecchr.de/index.php/sri-lanka.404/articles/the-jagath-dias-case.html>>. See also A Walter Dorn, 'Keeping Watch for Peace: Fact-Finding by the United Nations Secretary-General' in Eric Fawcett and Hanna Newcombe (eds), *United Nations Reform: Looking Ahead after Fifty Years* (Science for Peace, 1995) 138.

From a human rights perspective, the UNHRC is fully and specifically, if not exclusively, mandated to investigate such allegations to carry out its functions.⁵¹ The parties to the Gaza conflict, including Israel, have not questioned the UNHRC's competence to do so. There is no doubt that the UNSC was the most preferred and powerful organ to investigate, or instruct the investigation of, the allegations at issue, as it did with respect to Darfur in 2004 and Lebanon in 2005.⁵² But when the UNSC is unwilling or unable to initiate and sponsor or endorse necessary investigations for various legal or political reasons, it appears to be an entitlement, perhaps a duty of other UN organs including the UNHRC, to look into serious allegations of human rights violations.⁵³ It can even be argued that the UNHRC is a specialised organ on matters of human rights and thus competent to take such measures with or without the UNSC's authorisation or any other form of involvement.

Even so, the mandate and the works of the UNHRC may be questioned on the basis that it is only entrusted with human rights matters.⁵⁴ The UNHRC did not only explicitly mention IHL as an applicable regime in its *Resolution* establishing the Mission but it has also endorsed the Mission's *Gaza Report* as correct in its application of IHL.⁵⁵ The explanation for this, which sounds persuasive, may be found in both the UNHRC *Resolution* and the *Gaza Report* itself. The UNHRC underlined that 'international human rights law and international humanitarian law are complementary and mutually reinforcing'.⁵⁶

⁵¹ The UNGA has decided that 'the [Human Rights] Council shall be responsible for promoting universal respect for the protection of all human rights' and that 'the Council should address situations of violations of human rights, including gross and systematic violations, and make recommendations thereon': *Human Rights Council*, GA Res 60/251, UN GAOR, 60th sess, 72nd plen mtg, Agenda Items 46 and 120, UN Doc A/RES/60/251 (3 April 2006) [2]–[3] ('*UNGA Resolution Establishing the Human Rights Council*'). For related historical accounts, see Bailey, above n 10, 250–6.

⁵² See *UNSC Resolution Establishing the Fact-Finding Mission for Darfur*, UN Doc S/RES/1564; *UNSC Resolution Establishing the Fact-Finding Mission for Lebanon*, UN Doc S/RES/1595.

⁵³ The initiative of the UNHRC was expressly supported in the *UNGA Follow-Up to the Gaza Report*, UN Doc A/RES/64/10 and the *Follow-Up to the Report of the United Nations Fact-Finding Mission on the Gaza Conflict (II)*, GA Res 64/254, UN GAOR, 64th sess, Agenda Item 64, UN Doc A/RES/64/254 (25 March 2010) ('*UNGA Follow-up to the Gaza Report II*'). See also *Uniting for Peace*, GA Res 377 (V), UN GAOR, 5th sess, 302nd plen mtg, UN Doc A/RES/377(V) (3 November 1950). Part A of the *Uniting for Peace Resolution* states:

if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security, ... the General Assembly shall consider the matter immediately with a view to making appropriate recommendations.

⁵⁴ *UNGA Resolution Establishing the Human Rights Council*, A/RES/60/251: paras 5 and 6 establish the mandate of the UNHRC however there is no reference to IHL either in these paragraphs or in other parts of the Resolution.

⁵⁵ See *UNHRC Authorisation for Fact-Finding in Gaza*, UN Doc A/HRC/S-9/L.1, para 14; *Follow-Up to the Report of the United Nations Independent International Fact-Finding Mission on the Gaza Conflict*, 13th sess, 42nd mtg, Agenda Item 7, UN Doc A/HRC/RES/13/9 (14 April 2010) ('*UNHRC Follow-Up to the Gaza Report*'); *Follow-Up to the Report of the Committee of Independent Experts in International Humanitarian and Human Rights Law Established pursuant to Council Resolution 13/9*, 15th sess, 30th mtg, Agenda Item 7, UN Doc A/HRC/RES/15/6 (6 October 2010) ('*UNHRC Follow-Up to the Report of the Committee of Independent Experts*').

⁵⁶ See *UNHRC Authorisation for Fact-Finding in Gaza*, UN Doc A/HRC/S-9/L.1, Preamble.

The Mission's panel members ('Panel') further noted that 'a convergence between human rights protections and humanitarian law protections is also in operation',⁵⁷ taking into account the duties of the warring parties to protect 'a series of fundamental guarantees and protections' during armed conflict, as enshrined in Common Article 3 of the *Geneva Conventions* and art 75 of *Additional Protocol I*, which reflect 'customary law'.⁵⁸ The *Gaza Report* further articulated that

IHL is *lex specialis* in relation to human rights. It is today commonly understood that human rights law would continue to apply as long as it is not modified or set aside by IHL. In any case, the general rule of human rights law does not lose its effectiveness and will remain in the background to inform the application and interpretation of the relevant humanitarian law rule.⁵⁹

This seems to be why the fact-finding focused on IHL, but was propped up by international human rights law. The *Geneva Conventions* (in particular *Geneva Convention IV*) and the *Additional Protocol I* as well as the *Hague Convention* have all been referred to as applicable treaty and customary norms.⁶⁰ The details of the *Gaza Report* emphasised arts 10, 51, 54 and 57 of *Additional Protocol I* to which Israel is not a party. Nonetheless, the Panel observed that '[t]he Government of Israel accepts that, although it is not a party to the *Additional Protocol I*, some of its provisions accurately reflect customary international law',⁶¹ the particulars of which will be considered later. Furthermore, the application of these norms and the investigation carried out unequivocally treated Israel as an occupying power and the conflict between the IDF and Palestinian

⁵⁷ *Gaza Report*, UN Doc A/HRC/12/48, [284].

⁵⁸ *Ibid* [271], noting that 'Israel is a party to the four *Geneva Conventions* of 12 August 1949, but has not ratified their *Additional Protocols I or II* on the protection of victims of armed conflict'. See also Jean-Marie Henckaerts, 'Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict' [2005] 857 *International Review of the Red Cross* 175; Heike Krieger, 'A Conflict of Norms: The Relationship between Humanitarian Law and Human Rights Law in the ICRC Customary Law Study' (2006) 11 *Journal of Conflict and Security Law* 265.

⁵⁹ *Gaza Report*, UN Doc A/HRC/12/48, [296]. The same approach was taken in the *Fact-Finding on Georgia–Russia*, above n 35, 323. For further discussion on the relationship between IHL and international human rights law, see René Provost, *International Human Rights and Humanitarian Law* (Cambridge University Press, 2005); Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law Volume I: Rules* (Cambridge University Press, 2009) ch 32; Louise Doswald-Beck and Sylvain Vité, 'International Humanitarian Law and Human Rights Law' [1993] 293 *International Review of the Red Cross* 94; Theodor Meron, 'The Humanization of Humanitarian Law' (2000) 94 *American Journal of International Law* 239; Anthony E Cassimatis, 'International Humanitarian Law, International Human Rights Law, and Fragmentation of International Law' (2007) 56 *International and Comparative Law Quarterly* 623; Krieger, above n 58.

⁶⁰ *Gaza Report*, UN Doc A/HRC/12/48, [270]–[285].

⁶¹ *Ibid* [272] (emphasis added). See also Michael N Schmitt, 'The Law of Targeting' in Elizabeth Wilmshurst and Susan Breau (eds), *Perspectives on the ICRC Study on Customary International Humanitarian Law* (Cambridge University Press, 2007) 131, 134, noting that 'the study does accurately and comprehensively "codify" the "received" textual content of the broad customary targeting principles'.

armed groups as an international armed conflict.⁶² The status of the Hamas Government as a belligerent participant in the armed violence is not entirely clear, as discussed below.

Two further points merit some consideration at this stage. First, in spite of the *Gaza Report*'s main title: *Human Rights in Palestine and Other Occupied Territories*, IHL is the dominant thread of the Report. Parts II (comprising 14 chapters) and III (comprising 3 chapters) of the *Gaza Report* deal with IHL issues, although international human rights law was used to supplement the sections on normative analysis. The topics covered include: the blockade imposed by Israel on Gaza;⁶³ attacks on Hamas Government buildings and police;⁶⁴ the obligations of Palestinian armed groups and the IDF to take precautions;⁶⁵ indiscriminate and deliberate attacks against civilians;⁶⁶ the use of certain weapons;⁶⁷ attacks on the foundation of civilian life in Gaza;⁶⁸ the objectives and strategy of Israel in Gaza;⁶⁹ the detention of an Israeli soldier;⁷⁰ treatment of Palestinians in the West Bank;⁷¹ and the impact on civilians of rocket and mortar attacks by Palestinian groups on southern Israel.⁷²

Secondly, this *international* armed conflict⁷³ was fought between the IDF, including the navy, air force and ground forces who participated in 'Operation Cast Lead'⁷⁴ on the one hand, and the Palestinian armed groups including Hamas' military wing, Izz ad-Din al-Qassam Brigades, the al-Aqsa Martyrs' Brigades, the Islamic Jihad, the Abu Ali Mustafa Brigades and al-Naser Salah ad-Din Brigades, who have claimed responsibility for attacking Israel, on the other hand.⁷⁵ The *Gaza Report* also notes 'that Hamas is an organisation with distinct political, military and social welfare components',⁷⁶ which appears to suggest that it was not entirely a belligerent party to the conflict.

⁶² *Gaza Report*, UN Doc A/HRC/12/48, [277]–[282]. Referring to the ICJ case, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICJ Rep 14 ('*Nicaragua*'), the Mission also stated at [283] that '[t]he rules contained in article 3 common to the four *Geneva Conventions*, regarded as customary international law, are the baseline rules applicable to all conflicts'. The follow-up reports endorsed the application of IHL and this characterisation of the conflict: see, eg, *Tomuschat Report*, UN Doc A/HRC/15/50, [18].

⁶³ *Gaza Report*, UN Doc A/HRC/12/48, ch v.

⁶⁴ *Ibid* ch vi.

⁶⁵ *Ibid* chs viii, ix, respectively.

⁶⁶ *Ibid* chs x, xi, respectively.

⁶⁷ *Ibid* ch xii.

⁶⁸ *Ibid* ch xiii.

⁶⁹ *Ibid* ch xvi.

⁷⁰ *Ibid* ch xviii.

⁷¹ *Ibid* ch xx.

⁷² *Ibid* ch xxiv.

⁷³ *Ibid* [308]. See also *Prosecutor v Lubanga (Judgment)* (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06, 14 March 2012) [542], where it was stated that international armed conflict includes 'military occupation'.

⁷⁴ *Gaza Report*, UN Doc A/HRC/12/48, [328].

⁷⁵ *Ibid* [332].

⁷⁶ *Ibid* [382]. The *Gaza Report* is straightforward that the law of occupation is applicable from the date of occupation, in 1967: see at [177], [273]. However, it appears to suggest that active hostilities began to take place from the moment Israel began to launch air strikes on 27 December up until the 'end of the conflict' on 18 January: see at [282], [285], [333]–[351], [439].

Whilst the Mission rightly and clearly identified applicable laws and parties to the conflict at issue, its work does raise questions of consent, impartiality and fairness which need to be considered in detail.

B *Consent, Impartiality and Procedural Fairness*

The nature of the fact-finding in Gaza involved probing the behaviour of both sides, conducting ‘an independent and impartial analysis’, and adopting ‘an inclusive approach in gathering information’ such as interviews, reports, field visits, public hearings and video records from both sides, various UN bodies and non-governmental organisations (‘NGOs’).⁷⁷ While the Palestinian authorities fully (but not necessarily satisfactorily) cooperated with the inquiry, Israel, despite the repeated calls by Judge Goldstone, refused to cooperate with the Panel on the grounds that the Mission’s mandate, derived from UNHRC *Resolution S-9/1*⁷⁸ of January 2009, lacked impartiality.⁷⁹ This meant that the Mission was not able to meet with Israeli officials, or with Israeli and Palestinian civilians and victims within Israel. As a result, its findings relating to southern Israel, the West Bank and other areas were mainly based on secondary sources. Nevertheless, certain essential documents and eyewitness accounts were supplied to the Mission by some Israeli NGOs, such as the group Breaking the Silence (which was established by Israeli soldiers who participated in Operation Cast Lead), as well as by Israeli and Palestinian victims. The Mission understandably examined only a limited number of cases, 36 in all, and not every incident which occurred during the conflict.

Despite such selectivity and other limitations, the five and a half month long investigation dealt with several factual issues and their legal implications.⁸⁰ Relevant international and domestic case law, scholarly works and other international inquiries were consulted in order to identify and apply specific IHL rules to the situation, including: the UN Darfur Inquiry,⁸¹ the works of A P V Rogers,⁸² the ICRC *Customary International Humanitarian Law* study⁸³ and jurisprudence of the ICJ⁸⁴ and the ICTY.⁸⁵

However, this raises three important questions relating to the imposition of the fact-finding, its impartiality and the fairness of some of the procedures followed, which will be addressed in turn. The first regards whether it was

⁷⁷ Ibid [156]–[167].

⁷⁸ *The Grave Violations of Human Rights in the Occupied Palestinian Territory, Particularly Due to the Recent Israeli Military Attacks against the Occupied Gaza Strip*, HRC Res S-9/1, 9th spec sess, 3rd mtg, UN Doc A/HRC/RES/S-9/1 (12 January 2009).

⁷⁹ Ibid [20]. In contrast, the EU inquiry on the Georgia–Russia war secured full cooperation from both Russia and Georgia: see *Fact-Finding on Georgia Russia*, above n 35, vol III. For a general discussion of the importance of impartiality in fact-finding, see Théo Boutruche, ‘Credible Fact-Finding and Allegations of International Humanitarian Law Violations: Challenges in Theory and Practice’ (2011) 16 *Journal of Conflict and Security Law* 105.

⁸⁰ Cf *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General*, UN Doc S/2005/60 (1 February 2005), which was only conducted for three months and had produced a 176 page document.

⁸¹ Ibid.

⁸² See *Gaza Report*, UN Doc A/HRC/12/48, [387].

⁸³ See Henckaerts and Doswald-Beck, above n 59.

⁸⁴ See, eg, *Nicaragua* [1986] ICJ Rep 14; *Wall Advisory Opinion* [2004] ICJ Rep 136.

⁸⁵ See *Gaza Report*, UN Doc A/HRC/12/48, [1686].

appropriate to institute and proceed with the inquiry whilst Israel expressly rejected the Mission (in effect the UNHRC). In principle, as stated in art 6 of the *UN Declaration on Fact-Finding*, ‘the sending of a United Nations fact-finding mission to the territory of any state requires the prior consent of that state’; this is notwithstanding the relevant *UN Charter* provisions including the powers of the UNSC ‘to investigate any dispute, or situation which might lead to international friction or dispute’.⁸⁶ Whilst the *UN Charter* and the *UN Declaration on Fact-Finding* concern matters of peace and security, later developments have encompassed concerns of humanitarian principles whether related to peace and security or not.

Clearly, Israel, as a sovereign state, was entitled to either reject or endorse the Mission which was instituted by the UNHRC⁸⁷ (and not by the UNSC based upon its Chapter VII powers). Yet, the *UN Declaration on Fact-Finding* encourages states ‘to follow a policy of admitting United Nations fact-finding missions to their territory’⁸⁸ and to ‘cooperate’ with them by providing ‘within the limits of their capabilities, the full and prompt assistance necessary for the exercise of their functions and the fulfilment of their mandate’.⁸⁹ The fact that the UNGA in its follow-up resolutions of 2009 and 2010 fully supported the findings of the *Gaza Report* and called upon the parties to take action to implement its recommendations⁹⁰ may well indicate (although not to the same extent as UNSC decisions) a general duty to cooperate with UN efforts to uncover the events of the conflict, and thereby comply with UN commitments. This appears to suggest that the international community accepts the imposition of fact-finding outside the remit of the UNSC even if a state is unwilling to cooperate with such an important UN mission.⁹¹ It must also be noted that Israel cooperated and complied with the requests by the UNGA in undertaking investigations, as discussed below in Part III(C). However, regrettably, although

⁸⁶ *UN Charter* art 34. For instance, the UNSG, upon the recommendation of the UNSC and without the consent of the parties concerned deployed fact-finding mission to Djibouti–Eritrea in 2008: *Djibouti–Eritrea Report*, UN Doc S/2008/602.

⁸⁷ For the political and legally non-binding nature of the mandate of the Mission, see Chatham House Meeting, ‘Report of an Expert Meeting which Assessed Procedural Criticisms Made of the UN Fact-Finding Mission on the Gaza Conflict (The Goldstone Report)’ (Meeting Summary, Chatham House, 27 November, 2009) 4 <<http://www.chathamhouse.org/sites/default/files/public/Research/International%20Law/il271109summary.pdf>>. See also N D White, ‘The UN Security Council and the Settlement of Disputes’ on *Plane Truth* <<http://plane-truth.com/Aoude/geocities/unsdisp.html/>>, arguing that in the context of the Israel–Palestine conflict and other cases that ‘the UN’s respect for the sovereignty of its members undermines the proper institutionalisation of fact finding’.

⁸⁸ *UN Declaration on Fact-Finding*, UN Doc A/RES/46/59, annex para 21.

⁸⁹ *Ibid* annex para 22.

⁹⁰ See *UNGA Follow-Up to the Gaza Report*, UN Doc A/RES/64/10; *UNGA Follow-Up to the Gaza Report II*, UN Doc A/RES/64/254.

⁹¹ It is not clear whether the *UN Declaration on Fact-Finding* and the principles therein have attained customary status or are only guidelines based upon general understanding of UN member States. What is clear is that the *UN Declaration on Fact-Finding* was drafted by the Special Committee on the Charter of the UN and that it was expected by the UN that it ‘becomes generally known and fully implemented’: *UN Declaration on Fact-Finding*, UN Doc A/RES/46/59, para 4. Moreover, not only was the *UN Declaration on Fact-Finding* cited by the UNGA in support of the Gaza Fact-Finding Mission but it was also referred to by Israel in invoking the requirement of impartiality for fact-finding missions: see *Gaza Report*, UN Doc A/HRC/12/48, annex II 447.

perhaps justifiably, they refused to cooperate with the initial or follow-up investigations undertaken by independent experts of the UNHRC.

What follows from this is the second question, of whether the Mission (and the UNHRC) was impartial. The expression of unequivocal commitment to impartiality as the Mission's guiding principle and approach in the *Gaza Report* was correct and in line with one of the corner-stones of fact-finding, as considered above. Israel justified its non-cooperation with the Mission as being because of UNHRC *Resolution S-9/1*, which established the Mission and its 'inflammatory and prejudicial language' rather than because of the 'personalities' involved in the undertaking. The Israeli Ambassador to the UN in Geneva, Leslimo Yaar, stated that 'this grossly politicised resolution prejudices the issue at hand, determining at the outset that Israel has perpetrated grave violations of human rights'.⁹² He also added, again referring to *Resolution S-9/1*, that 'the mandate of the Mission is limited to investigating "violations" by "the occupying Power", Israel against the Palestinian people'.⁹³

Judge Goldstone responded to such a claim by then reiterating the mandate of the Mission (authorised or clarified by the President of the Council), which was 'to investigate all violations' of human rights and IHL and reaffirmed the Mission's commitment to the mandate and impartiality.⁹⁴ Although *Resolution S-9/1* condemned 'all forms of violence against civilians' relating to the situation, it was unfortunate that it didn't refer either to the duty of Palestinian armed groups or the need to protect Israeli civilians. This may well justify the claim that the UNHRC was not impartial,⁹⁵ although an emphasis on Israeli behaviour may also be justified by the high number of civilian casualties and infrastructure destruction on the Palestinian side. It is of note, as shown in other cases such as the Darfur crisis,⁹⁶ that the making of general statements and condemnation by UN organs, including by the UNSC, against warring parties before or during despatching fact-finding, is not unusual, and should be neither an obstacle for, nor a pre-judgment on, fact-finding. Although the UNSC may well establish fact-finding with criminalising breaches of international law in mind, as witnessed in the Former Yugoslavia.⁹⁷ Regardless, the integrity and impartiality of the personalities involved (along the Mission's terms of reference and work) was not an issue (despite Israel's doubt on the neutrality of one member of the Mission and despite later disagreement among members of the Panel, as discussed in III(C), below). Thus, it would have been 'in the interest of ... Israel and of Israeli victims to cooperate with the Mission' to have 'their

⁹² See *Gaza Report*, UN Doc A/HRC/12/48, annex II 436.

⁹³ Ibid annex II 446. Indeed, *UNHRC Authorisation for Fact-finding in Gaza*, UN Doc A/HRC/S-9/L.1, singles out Israel.

⁹⁴ *Gaza Report*, UN Doc A/HRC/12/48, annex II 438.

⁹⁵ See Chatham House Meeting, above n 87, 4.

⁹⁶ See *UNSC Resolution Establishing the Fact-Finding Mission for Darfur*, UN Doc S/RES/1564 (in which the UNSC declared that the Government of Sudan had not met its commitments under international law but established a fact-finding Mission to investigate violations).

⁹⁷ See SC Res 1019, UN SCOR, 50th sess, 3591st mtg, UN Doc S/RES/1019 (9 November 1995).

views, concerns and submissions' heard and 'reflected in the outcome of the Mission's work'.⁹⁸

The Mission's report, which considered Israeli investigations and statements, concluded, inter alia, that a catalogue of war crimes (and grave breaches) had been perpetrated by both Israel and Palestinian groups, largely by the former due to its deliberate policy of undertaking collective punishment,⁹⁹ and it recommended a series of actions including carrying out further investigations into the allegations.¹⁰⁰ The *Gaza Report* triggered divergent global responses; some considered it as being 'deeply flawed' and heavy-handed on Israel,¹⁰¹ while others praised it as being fair and proper.¹⁰² The UNHRC¹⁰³ and the UNGA¹⁰⁴ endorsed the *Gaza Report*, the details of which are later considered. Israel admitted 'some instances of intelligence and operational errors' and 'some instances where IDF soldiers and officers violated the rules of engagement',¹⁰⁵ but steadfastly denied any systematic and widespread infringements of the law, as discussed below.

Finally, these conclusions and findings by the Mission raise the question of whether the procedures and methods of this fact-finding were generally in conformity with procedural fairness.¹⁰⁶ The 1991 *UN Declaration on Fact-Finding* contains, inter alia, two relevant principles of procedural fairness (in addition to the ones already considered above including the commitment to impartiality). The first principle is that the adoption and application of 'appropriate rules of procedure' may be necessary to 'ensure' the 'fairness' of the 'hearings' of fact-finding,¹⁰⁷ and the second principle is that concerned states

⁹⁸ See Letter from Judge Goldstone to the Prime Minister of Israel, 4 May, 2009, cited in *Gaza Report*, UN Doc A/HRC/12/48, annex II 442. This position was confirmed by ex-Israeli intelligence official, Avi Dichter: see Ben Birnbaum, 'Netanyahu Wants UN to Repeal Gaza Report', *The Washington Times* (online), 2 April 2011 <<http://www.washingtontimes.com/news/2011/apr/2/netanyahu-un-throw-out-goldstone-report/>>.

⁹⁹ *Gaza Report*, UN Doc A/HRC/12/48, ch xxix.

¹⁰⁰ *Ibid* ch xxx.

¹⁰¹ See, eg, 'Opportunity Missed', *The Economist* (New York) 17 September 2009 15. However, the article also pointed out 'the danger of double standards' by saying that 'American and European forces in Iraq, Afghanistan and Kosovo also caused thousands of civilian deaths, without attracting a Goldstone'.

¹⁰² Antonio Cassese, 'We Must Stand behind the UN Report on Gaza', *Financial Times* (online), 14 October 2009 <<http://www.ft.com/cms/s/0/aaaf309e8-b859-11de-8ca9-00144feab49a.html#axzz1rWZWsJ56>>; Maximilien Le Roy (ed), *Gaza Décembre 2008 — Janvier 2009: Un pavé dans la mer* (La Boîte à Bulles, 2009).

¹⁰³ *Report of the Human Rights Council on its Twelfth Special Session*, Human Rights Council, 12th spec sess, UN Doc A/HRC/S-12/1 (21 October 2009).

¹⁰⁴ *UNGA Follow-Up to the Gaza Report*, UN Doc A/RES/64/10. See also *By Recorded Vote, General Assembly Urges Israel, Palestinians to Conduct Credible, Independent Investigations into Alleged War Crimes in Gaza*, UN GAOR, 64th sess, 38th and 39th mtgs, UN Doc GA/10883 (5 November 2009) ('*UNGA Press Release 2009*').

¹⁰⁵ *First Update*, UN Doc A/64/651, [99]–[100].

¹⁰⁶ The expectations of procedural fairness include, but are by no means limited to, ensuring voice (of concerned parties), neutrality, respectful treatment, trustworthy authorities: see Kevin Burke, 'Understanding the International Rule of Law as a Commitment to Procedural Fairness' (2009) 18 *Minnesota Journal of International Law* 369; Thomas M Franck, *Fairness in International Law and Institutions* (Clarendon Press, 1995). For theoretical and critical perspectives on procedural fairness also referred to as legitimacy, see also John Tasioulas, 'International Law and the Limits of Fairness' (2002) 13 *European Journal of International Law* 993, 1006–9.

¹⁰⁷ *UN Declaration on Fact-Finding*, UN Doc A/RES/46/59, para 27.

must be given the ‘opportunity ... to express their views’ on facts relevant to fact-finding, and this has to be the case at all stages of inquiry.¹⁰⁸ The Mission consulted, or tried to consult with both parties, Palestinian and Israeli, through direct or indirect means.¹⁰⁹ Most importantly, the *Gaza Report* contained quite comprehensive procedures to be followed by the Mission to ensure the participation of both sides (through invitation, physical meetings, document reviews, etc), civil societies, UN agencies, professionals (such as doctors, military personnel and forensic scientists), and victims from Palestine and Israel. As a result, ‘the Mission conducted 188 individual interviews. It reviewed more than 300 reports ... amounting to more than 10 000 pages, over 30 videos and 1200 photographs’.¹¹⁰ Whilst evidence was gathered and heard from witnesses and victims on a confidential basis, there were two public and televised hearings held in Geneva and Gaza.¹¹¹ These were generally (but not in absolute terms) commended by legal experts.¹¹²

Nonetheless, Israel considered the holding of live public hearing in Gaza as ‘an orchestrated political campaign’ in which ‘all the witnesses were pre-screened and selected’ to testify against Israel (and not Hamas).¹¹³ The Mission justified its decision to do so, on the basis that it would

enable victims, witnesses and experts from all sides to the conflict to speak directly to as many people as possible in the region as well as in the international community. The Mission is of the view that no written word can replace the voice of victims.¹¹⁴

It added that the witnesses and participants in the hearing had been identified in the course of the inquiry and ‘had either first-hand experience or information or specialised knowledge of the issues under investigation and analysis’.¹¹⁵ Some legal experts endorsed this method on the ground that it may help the exchange of experiences of people from both Israel and Palestine, and that it ‘could aid the further discovery of information’.¹¹⁶ But they also rightly pointed out that ‘while all witnesses would have felt able to talk freely about alleged Israeli abuses, it is true that some witnesses would have felt unable to criticise, or speak openly of alleged abuses by Hamas’.¹¹⁷ It is of note that the Mission was not able to interview and meet some Palestinian witnesses who were under Israeli travel bans.¹¹⁸

Despite the controversies over the fairness of some methods used and some of the impediments recorded, the *Gaza Report* was generally comprehensive and attempted to be inclusive of all parties to the conflict and others. As a result, it

¹⁰⁸ Ibid para 26.

¹⁰⁹ *Gaza Report*, UN Doc A/HRC/12/48, [173].

¹¹⁰ Ibid [19].

¹¹¹ Ibid [159].

¹¹² See Chatham House Meeting, above n 87, 7–8.

¹¹³ Israeli Ministry of Foreign Affairs, *Initial Response to Report of the Fact Finding Mission on Gaza Established pursuant to Resolution S-9/1 of the Human Rights Council* (24 September 2009) [6], [17] <<http://www.mfa.gov.il/>>.

¹¹⁴ *Gaza Report*, UN Doc A/HRC/12/48, [166].

¹¹⁵ Ibid [167].

¹¹⁶ See Chatham House Meeting, above n 87, 8.

¹¹⁷ Ibid 9.

¹¹⁸ *Gaza Report*, UN Doc A/HRC/12/48, [165].

has triggered continuous debate and questions not only between the parties involved and the international community but also among members of the Mission.

C Follow-Up Investigations and Controversies

Following the publication by the Mission of the *Gaza Report*, the most important developments can be grouped into four categories. First, the *Gaza Report* and its recommendations were adopted by the UNHRC and the UNGA¹¹⁹ but not by the UNSC. Secondly, on the basis of the request made by the UNGA to conduct credible investigations, both sides of the conflict have carried out investigations or explained their positions on alleged crimes in their respective reports which were submitted to the UN in January 2010.¹²⁰ Israel also published its *Gaza Operation Investigation: Second Update* ('*Second Update*') in July 2010.¹²¹ Thirdly, in June 2010 the UNHRC established a follow-up Committee of International Independent Experts to monitor the 'independence, effectiveness [and] genuineness' of the investigations undertaken by 'both the Government of Israel and the Palestinian side'.¹²² The Committee of Experts submitted two reports. The first report, prepared under the chairmanship of Professor Christian Tomuschat, was 28 pages long and was submitted in September 2010 ('*Tomuschat Report*') and the second report, prepared under the chairmanship of Judge Mary McGowan Davis, was 27 pages long and was submitted in March 2011 ('*McGowan Davis Report*').¹²³

The *McGowan Davis Report*, for example, praised Israel for dedicating 'significant resources' to probe hundreds of allegations and commended the investigations carried out by the Palestinian Authority as being 'credible and genuine'¹²⁴ but expressed concern over the absence of any 'indication that Israel ha[d] opened investigations into the actions of those who designed, planned,

¹¹⁹ See *UNGA Follow-Up to the Gaza Report*, UN Doc A/RES/64/10; *UNGA Follow-Up to the Gaza Report II*, UN Doc A/RES/64/254. Both resolutions demanded credible investigations into allegations of violations of IHL and human rights by both sides.

¹²⁰ See *First Update*, UN Doc A/64/651, annex I (a 62 page report from Israel); *Follow-Up to the Report of the United Nations Fact-Finding Mission on the Gaza Conflict — Report of the Secretary-General*, 64th sess, Agenda Item 64, UN Doc A/64/651 (4 February 2010) annex II ('*Letter Dated 29 January 2010 from the Permanent Observer of Palestine to the United Nations Addressed to the Secretary-General*') (a four page document); *Second Update*, UN Doc A/64/890, annex I.

¹²¹ See *Second Update*, UN Doc A/64/890, annex I. While the *First Update* focused on explaining the Israeli criminal justice system the *Second Update* emphasised the serious allegations contained in the *Gaza Report*.

¹²² See *Tomuschat Report*, UN Doc A/HRC/15/50. The Committee was initially established pursuant to *UNHRC Follow-up to the Gaza Report*, UN Doc A/HRC/RES/13/9, but its mandate was to review all documents submitted to the UNGA pursuant to *UNGA Follow-Up to the Gaza Report II*, UN Doc A/RES/64/254. Its members included Professor Christian Tomuschat, Professor Emeritus at Humboldt University Berlin who chaired the first phase/report of the Committee's work, Judge Mary McGowan Davis, former Justice of the Supreme Court of New York who chaired the second phase/report, and Mr Param Kumaraswamy, jurist and former Special Rapporteur of the Commission on Human Rights on the Independence of Judges and Lawyers. The Committee's mandate was renewed by the *McGowan Davis Report*, UN Doc A/HRC/16/24.

¹²³ The *Tomuschat Report* was requested pursuant to *UNHRC Follow-Up to the Gaza Report*, UN Doc A/HRC/RES/13/9, and reported back on 21 September 2011.

¹²⁴ *McGowan Davis Report*, UN Doc A/HRC/16/24, [77], [84].

ordered and oversaw Operation Cast Lead¹²⁵ and that the Gaza de facto authorities ‘have not conducted an investigation into the launching of rockets and mortar attacks against Israel’,¹²⁶ the details and relevant aspects of which shall later be discussed in Parts III and IV.

Fourthly, and unprecedentedly, in response to the words of members of the Mission, Judge Goldstone, the chair of the Mission, wrote in April 2011 in *The Washington Post* that, ‘if I had known then what I know now, the Goldstone Report would have been a different document’.¹²⁷ Relying on some of the statements mentioned above in the *McGowan Davis Report*, Judge Goldstone praised Israel ‘for dedicating significant resources’ to investigations while expressing disappointment with the Gaza de facto authorities for doing nothing to investigate rocket attacks against Israel. Nonetheless, the other three members of the Mission not only stood firm by their conclusions and the credibility and impartiality of their report but also rejected the call for reconsideration, stating that, ‘there is no UN procedure or precedent to that effect’ and that ‘the report of the Mission is now an official UN Document and all actions taken pursuant to its findings ... fall solely within the purview of the United Nations general assembly’.¹²⁸ This ‘reconsideration’ of, or ‘retraction’ from, some of the core conclusions of the *Gaza Report* and the ‘rift’ created between members of the Mission has arguably damaged UN fact-finding in general and the Mission in particular. Yet, this also gives cause for thought about the substantive and procedural implications of such division to the UN fact-finding regime, as further elaborated in Part IV.

In short, this Part has illuminated the basic features of the Mission and the controversies therein with emphasis on the mandate, applicable laws, and requirements of consent, impartiality, procedural fairness and the divergence or unity in perspectives of the members of the Mission. Given the scale, nature and complexity of the problem, the Mission accomplished its mandate (as given by the President of the UNSC) by identifying relevant laws, adopting appropriate methods of gathering evidence and sifting through the sheer number of interviews, documents and audio and video records covered during the undertaking of this inquiry. The Mission appears to have made real efforts to have all the parties, including Israel, on board and to assure them of its neutrality. All these are in line with the requirements of the *UN Declaration on Fact-Finding*.

Israel pursued a policy of non-cooperation with the Mission and its follow-up inquiries partly because of the ‘one-sided’ UNHRC resolution. Perhaps it did not see the benefits of participation from its national security perspective, risking damaging criticisms by the UN bodies and others. It is notable that Israel adopted the same policy when the UNSG established a fact-finding mission (which was also endorsed by the UNSC) in 2002 to investigate, inter alia, IHL violations in

¹²⁵ Ibid [79].

¹²⁶ Ibid [90].

¹²⁷ Richard Goldstone, ‘Reconsidering the Goldstone Report on Israel and War Crimes’, *The Washington Post* (Washington DC), 2 April 2011, 21.

¹²⁸ Hina Jilani, Christine Chinkin and Desmond Travers, ‘Comment: We Stand by Our Report: Calls to Reconsider the UN’s Goldstone Report on the Gaza War, Which We Co-Wrote, are Unfounded’, *The Guardian* (London), 15 April 2011, 29.

the Palestinian city of Jenin.¹²⁹ Moreover, while the televised hearing of witnesses and experts may be commended as a transparent and educational means of gathering evidence, it was neither relevant to the mandate nor has it signalled a constructive message of impartiality.¹³⁰ Nevertheless, the follow-up measures taken by the parties to the conflict (especially Israel and the Palestinian Authority), the UNGA and the UNHRC were all implicit or explicit responses to the *Gaza Report* as will be shown in subsequent sections. The ‘war of words’ between members of the Mission may well raise procedural, institutional and substantive questions as related to the Mission more specifically and/or the UN fact-finding regime more generally.

In this context, and bearing in mind the potential implications of the aforementioned issues on the actual fact-finding, Part IV will attempt to address substantive details of certain core IHL issues raised by the Gaza armed conflict — the concerns relating to deliberate and indiscriminate attacks, the duty to take precautions and the use (or misuse) of weapons are examined in light of the aforementioned follow-up reports and relevant legal and academic authority.

IV THE SUBSTANTIVE FINDINGS OF THE REPORT: REFLECTIONS ON SOME IHL ISSUES

The main focus of this Part is twofold. First, to examine the comprehensiveness or otherwise of the Mission’s factual findings and, secondly, to consider how and why the Mission applied relevant IHL rules to the facts, in light of the main features of fact-finding, well-established IHL rules (on civilian protection) and practices, subsequent investigations and follow-up reports and, when appropriate, other similar cases of fact-finding.

A *Deliberate Attacks*

IHL provides protection for both civilians and civilian objects during armed conflict. A deliberate attack against civilians is therefore totally banned,¹³¹ provided that they refrain from taking a *direct* part in armed hostilities.¹³² The *Gaza Report* focuses primarily on Israel’s deliberate conduct during the conflict. This section will examine four important areas or clusters of alleged deliberate violations: targeting of government buildings, the police, civilians and civilian targets, considering in depth the latter two.

¹²⁹ SC Res 1405, UN SCOR, 57th sess, 4516th mtg, UN Doc S/RES/1405 (19 April 2002). See also Bothe, above n 34, 258.

¹³⁰ For example the 1963 UN Mission to South Vietnam’s terms of reference emphasised that ‘the Mission shall proceed in private session to examine petitions’: reproduced in Bailey, above n 10, 264.

¹³¹ See generally A P V Rogers, *Law on the Battlefield* (Juris, 2004) chs 1, 3; Henckaerts and Doswald-Beck, above n 59, chs 1, 2. See also Zeray Yihdego, ‘Darfur and Humanitarian Law: The Protection of Civilians and Civilian Objects’ (2009) 16 *Journal of Conflict and Security Law* 37.

¹³² For recent developments on civilian direct participation in armed conflict, see Nils Melzer, ‘Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law’ [2008] 872 *International Review of the Red Cross* 991. See also Dapo Akande, ‘Clearing the Fog of War? The ICRC’s Interpretative Guidance on Direct Participation in Hostilities’ (2010) 59 *International and Comparative Law Quarterly* 180.

1 Targeting Government Buildings

The Mission enquired into the legality of the Israeli air strikes against Gaza's government buildings, including the Ministry of Justice, the Palestinian Legislative Council and the main prison where 'between 200 and 300 prisoners were held' at the time of the strikes.¹³³ Israel does not deny these attacks, justifying them on the basis that such sites 'serve as a critical component of the terrorist groups' infrastructure in Gaza' and 'constitute part of Hamas' mechanism of control'.¹³⁴ The question before the Mission was therefore: whether these sites were indeed military objectives. Considering the fact that Hamas is an elected civilian administration in Gaza, and that the buildings and the prison were civilian institutions and not 'war ministries', the Mission rejected Israel's characterisation of the sites as promoting Hamas' 'terrorist activity'.¹³⁵ Referring to the rule of *distinction* and the prohibition of attacking civilian objects as a customary IHL norm 'enshrined in art 52 of *Additional Protocol I* ("General Protection of civilian objects")',¹³⁶ it categorically rejected that the sites had made an 'effective contribution to military action'. It was also noted that 'no reference is made to any "definite military advantage" that their destruction would offer'.¹³⁷ Yet, some targets may be of 'dual-use' such as telecommunications, power-generating stations or bridges, which may be targeted if used by both militaries and civilians (subject to the rules, inter alia, of proportionality and of military necessity).¹³⁸ Nevertheless, no allegation was made that the sites were dual-use. *The Gaza Report* concluded that 'the attacks on these buildings constituted deliberate attacks on civilian objects in violation of the rule of customary international humanitarian law whereby attacks must be strictly limited to military objectives'.¹³⁹

While the report submitted by Israel in January 2010, entitled *Gaza Operation Investigations: An Update ('First Update')*, is silent on this issue, Israel's *Second Update*, submitted in July 2010, reinforced the aforementioned position of Israel but explained the accidental damage inflicted on the prison while the IDF conducted a legitimate military operation against a nearby building where Hamas' internal security forces were stationed, and thus, there was no *jus in bello* violation.¹⁴⁰ The *Tomuschat Report* expressly criticised Israel for not conducting investigations regarding the allegation that targeting 'the entire governmental infrastructure in the Gaza strip, including the Legislative Council buildings' was 'incompatible with the principle of distinction'.¹⁴¹ The *McGowan Davis Report* only reiterated, although with caution, the absence of clear

¹³³ *Gaza Report*, UN Doc A/HRC/12/48, [364]–[369].

¹³⁴ *Ibid* [374]. See also Israel Ministry of Foreign Affairs, *The Operation in Gaza — Factual and Legal Aspects* (29 July 2009) <<http://www.mfa.gov.il/>>.

¹³⁵ *Gaza Report*, UN Doc A/HRC/12/48, [32], [1209]–[1216].

¹³⁶ *Ibid* [385]. Reference was also made to Henckaerts and Doswald-Beck, above n 59, 25–34.

¹³⁷ *Gaza Report*, UN Doc A/HRC/12/48, [386].

¹³⁸ *Ibid* [388].

¹³⁹ *Ibid* [389].

¹⁴⁰ *Second Update*, UN Doc A/64/890, annex I [81], [90]–[91].

¹⁴¹ *Tomuschat Report*, UN Doc A/HRC/15/50, [63].

evidence that Israel had ‘conducted a general review of doctrine regarding military targets’.¹⁴²

Addressing the question of distinction more thoroughly and from an academic perspective, Laurie Blank agreed with the Mission on the dangers of Israel adopting a broad definition of military targets and on the fact that that Hamas ‘has no “war ministry”’, but nevertheless argued that ‘[g]iven the nature of Hamas’ infrastructure’ with ‘multiple armed entities engaged in operations against Israel ... a number of its buildings qualify’¹⁴³ as military objectives. She gives the example of ‘the Interior Ministry’ which ‘oversees Hamas-controlled government forces in Gaza’,¹⁴⁴ a claim with which Hamas authorities do not concur.

It may generally be queried ‘whether government buildings are excluded under any clear rule of law from enemy attack’.¹⁴⁵ However, if they are used by combatants, thereby becoming lawful military targets the requirements of military necessity (and objective), distinction and precaution must be adhered to in targeting such sites.¹⁴⁶ The assertion by the Mission that such bombardments were ‘deliberate attacks against civilians’¹⁴⁷ may be criticised on the basis that the relationship between the Gaza de facto authorities and the resistance groups seems to be blurred and that the allegation was not founded on solid and ‘relevant intelligence information’ available to commanders or military planners who were charged at the time to ‘reasonably’ determine whether the buildings were making a direct contribution to the military efforts of Palestinian armed groups. Although whether such attacks were ‘deliberate’ as opposed to ‘indiscriminate’ may be questioned, the scale and magnitude of these attacks at the beginning of the conflict seem to have led the Mission to infer the intention of Israel. Unreserved Israeli cooperation with the Mission could have given them a voice to either refute or reinforce the Mission’s assertion on this issue.

2 Targeting Police

The second controversial issue regards the attacks on ‘the Arafat City police headquarters and three of the five police stations’. In these attacks 248 police personnel (which amounted to 75 per cent of the force) had allegedly been killed. Most of them had been killed during the initial Israeli strikes¹⁴⁸ and 99 of them were killed within the headquarters.¹⁴⁹ There were also civilian casualties. The Israeli Government considered these forces as ‘internal security forces’ with ‘military functions’ and ‘were also members of the al-Qassam Brigades’¹⁵⁰ during the Gaza operation and therefore legitimate targets of combat. Gaza authorities, on the other hand, ‘describe the police as a law-enforcement

¹⁴² *McGowan Davis Report*, UN Doc A/HRC/16/24, [47].

¹⁴³ Blank, above n 5, 359.

¹⁴⁴ *Ibid.*

¹⁴⁵ Ingrid Detter, *The Law of War* (Cambridge University Press, 2nd ed, 2000) 294.

¹⁴⁶ See, eg, *Fact-Finding on Georgia Russia*, above n 35, 327–8.

¹⁴⁷ See Detter, above n 145, 294.

¹⁴⁸ *Gaza Report*, UN Doc A/HRC/12/48, [396], [424].

¹⁴⁹ *Ibid* [424].

¹⁵⁰ *Ibid* [408].

agency'.¹⁵¹ The Mission's assessment of this issue is quite detailed and interesting. The *Gaza Report* makes a distinction between the Gaza National Security Force, which is empowered to protect 'the state from any aggression' and thus is a legitimate military target, and the Gaza Police which 'performs police duties' such as dealing with 'drug dealers and lawless residents'.¹⁵² While it was indicated that members of the police may be 'religious, and are resistance fighters'¹⁵³ and that some joined the force from 'armed groups', nonetheless, it was found that the police 'as an organized force' did not take part in the hostilities and that integrating 'former members of armed groups' into police forces 'would not be unique to Gaza'.¹⁵⁴

Indeed, this is not unique to Gaza. The *UN Commission of Inquiry on Darfur* considered the Darfur police as a civilian institution in principle; the fact that the *Janjaweed* were incorporated into the police (and armed) forces and that they were actively taking part in hostilities there, led to a question about the civilian status of the Darfur police.¹⁵⁵ It is not clear whether the same would apply to the Gaza police. The *Gaza Report* underlined the absence of evidence that 'the Gaza police as a whole had been "incorporated" into the armed forces of the Gaza authorities'.¹⁵⁶ Similarly, the Mission 'could not verify the allegations of membership of armed groups of policemen'.¹⁵⁷

Again, the legal analysis on this matter relied upon the principle of distinction and the rule that 'law-enforcement agencies are considered part of the civilian population'; this is notwithstanding their combatant status when, and if, such agencies are 'incorporated into the armed forces'.¹⁵⁸ Individual members of such agencies are both law enforcers and 'members of an armed group' when they take a direct part in hostilities.¹⁵⁹ The Gaza police (and its members), according to the Mission, do not fall under these exceptions and therefore are not military objectives. The attacks against them contravene the rules of distinction and proportionality. It was particularly stressed that 'the deliberate killing of 99 members of the police at the police headquarters and three police stations during the first minutes of military operations, while they were engaged in civilian tasks

¹⁵¹ Ibid [410].

¹⁵² Ibid [413]–[415].

¹⁵³ Ibid [413].

¹⁵⁴ Ibid [417]–[418].

¹⁵⁵ *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General*, UN Doc S/2005/60, [422]. See also Yihdego, 'Darfur and Humanitarian Law: The Protection of Civilians and Civilian Objects', above n 131, 66–7. For an excellent account on combatant status and the notion of direct participation, see, eg, Anthony Rogers, 'Combatant Status' in Elizabeth Wilmshurst and Susan Breau (eds), *Perspectives on the ICRC Study on Customary International Humanitarian Law* (Cambridge University Press, 2007) 101.

¹⁵⁶ *Gaza Report*, UN Doc A/HRC/12/48, [427].

¹⁵⁷ Ibid [428].

¹⁵⁸ Ibid [430].

¹⁵⁹ Ibid [431].

inside civilian facilities’, did not offer any military advantage and thus was not justified.¹⁶⁰

Even if one accepts the Israeli argument and the possibility that Palestinian police forces were taking a direct part (or could have taken a direct part) in the fight against the IDF, the intensity and level of the raids against them (which resulted in their death) raises questions of proportionality and necessity,¹⁶¹ as further discussed below. It is worth mentioning that the incidents involving the police and government buildings are not referred to in the Israeli *First Update*.¹⁶² However, the *Second Update* has dealt with this issue. Based on further reviews conducted, it reinforced the initial position of Israel but expressed regret for the four collateral civilian casualties, concluding that ‘it will be studied as part of the operational “lessons learned” analysis, in order to consider measures to minimise danger to civilians in future military actions’.¹⁶³ The *Tomuschat Report* and the *McGowan Davis Report* have not specifically referred to the attacks against the Gaza police, despite their general criticism that Israel has not investigated all allegations of violations by the Mission.

3 Targeting Civilians

The third relevant cluster of inquiry concerns allegations of 11 incidents of ‘deliberate attacks’ against the civilian population.¹⁶⁴ The Mission investigated each of these cases in-depth, although the degree to which varied from case-to-case. Testimonies of victims, ambulance drivers, and Israeli soldiers who took part in Operation Cast Lead (in an organised campaign known as Breaking the Silence) were considered. For example, in the killing of Majda and Ravva Hajaj, the *Gaza Report* finds that these two women civilians ‘were part of a group of civilians moving with white flags through an area in which there was, at the time, no combat’; yet Israeli soldiers ‘shot them from a distance of 100 meters’.¹⁶⁵ The Mission, considering the circumstances of the incident, found the killing to be ‘a deliberate act on the part of the Israeli soldiers’.¹⁶⁶ The *McGowan*

¹⁶⁰ Ibid [437]. See also at [432]–[436]. For a detailed discussion on proportionality; for an excellent (but spontaneous) debate on the subject, see Dapo Akande et al, ‘Israeli Raids in Gaza: Proportionality and the Status of Hamas Policemen’ on *EJIL:Talk!* (29 December 2008) <<http://www.ejiltalk.org/israeli-raids-in-gaza-proportionality-and-the-status-of-hamas-policemen/>>.

¹⁶¹ See *Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grams Weight*, opened for signature 29 November 1868, [1901] ATS 125 (entered into force 11 December 1868), which states that ‘the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy ... for this purpose it is sufficient to disable the greatest possible number of men’. See also Melzer, above n 132, 78–85; Akande, above n 132, 191. For excellent accounts of proportionality, see, eg, Leslie C Green, *The Contemporary Law of Armed Conflict* (Manchester University Press, 3rd ed, 2008) 391; Michael N Schmitt, ‘Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance’ (2010) 50 *Virginia Journal of International Law* 795. For an interesting discussion on *jus in bello* proportionality, see Blank, above n 5, 365–78.

¹⁶² *First Update*, UN Doc A/64/651, annex [10], which indicated that more than 150 incidents are under investigation. Nonetheless, it is not meant to serve as a comprehensive response to *Gaza Report*.

¹⁶³ *Second Update*, UN Doc A/64/890, annex [79]–[88].

¹⁶⁴ *Gaza Report*, UN Doc A/HRC/12/48, [705].

¹⁶⁵ Ibid [769].

¹⁶⁶ Ibid.

Davis Report indicated that ‘a soldier was indicted before a military court on charges of manslaughter in relation to the deliberate targeting of an individual waving a white flag’ but is not clear whether it was indeed about the two victims referred to in the *Gaza Report*.¹⁶⁷

Conversely, in respect of the shelling with white phosphorous (‘WP’) of the Abu Halima family in which ‘five family members died immediately’ and another five sustained ‘various degrees of burns’, the Mission found it difficult to make a ‘determination’ as to whether the shelling of the house ‘was a direct attack against a civilian objective, an indiscriminate attack or a justifiable part of the broader military operation’.¹⁶⁸ However, two members of this family who were trying to take the wounded to hospital were called to by Israeli soldiers and shot from a different direction in their ‘chest and abdomen respectively, [which] indicates that the intention was to kill them’.¹⁶⁹ The *McGowan Davis Report* ascertained ‘significant changes in the status of’ these two cases. The first concerns a completed Israeli investigation on the killing of those who were heading to hospital, which concluded that the IDF ‘acted lawfully in light of a perceived threat’.¹⁷⁰ The *McGowan Davis Report* also noted ‘discrepancies in testimonies’ with respect to this case but applauded ‘the extensive investigation’ conducted on the shelling of the house, despite highlighting a recent Israeli determination of the case that found ‘it was unclear what ammunition had hit the house and who had launched it’.¹⁷¹

The Israeli investigations on these (and other similar) cases, as reported by the McGowan Davis committee, do not appear either to convincingly refute or openly endorse the conclusions of the Mission with respect to attacking civilians,¹⁷² in violations of art 51(2) of *Additional Protocol I* and art 27 of *Geneva Convention IV*, which prohibit targeting civilians. These ‘constitute grave breaches of the *Fourth Geneva Convention*’, which prohibits ‘wilful killings and wilfully causing great suffering to protected persons’.¹⁷³ Obstructing the works of humanitarian organisations (and emergency ambulances) is also referred to as a violation of art 10(2) of *Additional Protocol I*, which obliges parties to a conflict to provide care and humane treatment to the wounded and victims of armed conflict.

Israel is not a party to *Additional Protocol I* but the ICRC *Customary International Humanitarian Law* study of 2005 explicitly considered art 51(2) of *Additional Protocol I* (concerning the rule of distinction) as a codification of customary international law, ‘to which no reservations have been made’.¹⁷⁴

¹⁶⁷ *McGowan Davis Report*, UN Doc A/HRC/16/24, [26].

¹⁶⁸ *Gaza Report*, UN Doc A/HRC/12/48, [792], [799].

¹⁶⁹ *Ibid* [800].

¹⁷⁰ See *UNHRC Follow-Up to the Gaza Report*, UN Doc A/HRC/RES/13/9, [25].

¹⁷¹ *McGowan Davis Report*, UN Doc A/HRC/16/24, [25].

¹⁷² *Gaza Report*, UN Doc A/HRC/12/48, [812]. See also *ibid* [82]; *Second Update*, UN Doc A/64/890, annex [98].

¹⁷³ *Gaza Report*, UN Doc A/HRC/12/48, [815]. For academic work in support of the Mission’s assertion, see Kot, above n 5. For more details on the law, see, eg, Robert Kolb and Richard Hyde, *An Introduction to the International Law of Armed Conflict* (Hart, 2008) 221–6.

¹⁷⁴ Henckaerts and Doswald-Beck, above n 59, 4. See also Schmitt, ‘The Law of Targeting’, above n 61, 136–9, observing in relation to the rules of targeting that

Likewise, the duty ‘to take *all possible measures* to search for, collect and evacuate the wounded’ which ‘includes permitting humanitarian organizations to assist in their search and collection’¹⁷⁵ constitutes customary IHL as codified in art 10(2) of *Additional Protocol I*. In practice, the work of humanitarian organisations is subject to state permission, but arbitrary denial of their involvement is not acceptable.¹⁷⁶ The problem with these factual (and legal) findings by the Mission is that they do not tell the tale of the other side (Israel) regarding some of the incidents. The *First Update* by Israel appears to talk about these (11 incidents) as ‘on-going criminal investigations’ two of which have been concluded ‘with no suspicion for criminal behaviour’,¹⁷⁷ although it may well be that more cases have been investigated and acted upon since.

4 Targeting Civilian Objects

The fourth cluster of events investigated in the *Gaza Report* concerns the ‘attacks on the foundations of civilian life in Gaza’,¹⁷⁸ which include the destruction of ‘the el-Bader flour mill’, ‘the Sawafeary chicken farms’, ‘the water and sewage installation’, the ‘Namar wells group’ water production and storage facility, and ‘the destruction of housing’.¹⁷⁹ Due to the similarity of the legal issues attached to the incidents (and in the interest of economy), the first and the last items in the list will now be considered. ‘The flour mill was hit by an air strike’ and according to the *Gaza Report*, ‘the strikes ... were intentional and precise’.¹⁸⁰ The consequence of this was not only the loss of 50 Palestinian jobs but also that ‘the most basic staple ingredient of the local diet has been greatly diminished’.¹⁸¹ This and the other targets listed above were not military targets and their attacks violated arts 52 and 54(2) of *Additional Protocol I*.¹⁸² In this regard, art 54(1) of *Additional Protocol I*, which represents ‘customary international law’, states that ‘starvation of civilians as a method of warfare is prohibited’; and art 54(2) states that destroying, removing or attacking ‘objects

[s]tates are apt to accept most targeting rules as set forth. Some commentators have criticized the heavy mirroring of the *Additional Protocol I* text as a not-so-subtle ICRC effort to impose the *Protocol* on recalcitrant non-Party States. Such criticism should not bear on the targeting rules, for most policy makers, commentators, practitioners, an academics recognize the *Protocol* targeting provisions as in great part reflecting customary law, often including them in national articulations of targeting norms.

See also *Prosecutor v Kupreškić (Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-95-16-T, 14 January 2000) [527], in which the Chamber observed that reprisals against civilians are absolutely forbidden in any situation, including with regard to civilians located in combat zones.

¹⁷⁵ Henckaerts and Doswald-Beck, above n 59, 396, r 109 (emphasis original).

¹⁷⁶ *Ibid* 398. See also at r 55.

¹⁷⁷ *First Update*, UN Doc A/64/651, [140].

¹⁷⁸ *Gaza Report*, UN Doc A/HRC/12/48, ch xiii.

¹⁷⁹ *Ibid* [1009], stating that ‘324 factories have been destroyed during the Israeli military operations at a cost of 40 000 jobs’. See also at [1010], stating that ‘eleven of the 324 premises struck by the Israeli armed forces were linked to the food industry and the losses incurred amount to some US\$37 million; the construction sector suffered 69 of the 324 strikes, this represented just under 30 per cent of the total damage’.

¹⁸⁰ *Ibid* [919], [927].

¹⁸¹ *Ibid* [924].

¹⁸² *Ibid* [937].

indispensable to the survival of the civilian population such as foodstuffs, crops, livestock, drinking water installations ... whatever the motive'¹⁸³ is banned. Article 147 of *Geneva Convention IV* also lists such acts as grave breaches. The *Gaza Report* concluded that Israel destroyed the mill to deny 'sustenance to the civilian population' in Gaza, which 'may constitute a war crime'.¹⁸⁴

In the published *Updates*, Israel concluded that the flour mill (and its vicinity) was 'a legitimate military target' and the purpose of the attack was to 'neutralize immediate threats to IDF forces'.¹⁸⁵ Some of the reasons provided for included that 'the immediate area in which the flour mill was located was used by enemy armed forces as a defensive zone' and that 'IDF troops came under intense fire from different Hamas positions in the vicinity of the flour mill'.¹⁸⁶ Moreover, the *First Update* refuted the claim that the objective of the attack was to deprive the civilian population of food'.¹⁸⁷ It was noted that the IDF coordinated the efforts to extinguish the flames at the flour mill after the incident.

The *McGowan Davis Report* does not specifically refer to this case but the *Tomuschat Report* affirmed the reopening of 'the investigation upon receiving new evidence' which reinforced the previous position of Israel that the 'mill had not been intentionally targeted'. The *Tomuschat Report* commended Israel on this case (unlike other cases) for compiling 'a good deal of information' which 'illustrates a serious attempt on the part of Israeli investigators to explain what happened at the flour mill'.¹⁸⁸ This case not only underlines the crucial role of target states (or non-state actors) in ascertaining the truth and thereby complementing the task of UN fact-finding, but it also challenges, if not overturns, the Mission's finding that the targeting of the mill was deliberate and that it was designed to starve the Palestinian population.

Nonetheless, in the destruction of the Sawafeary chicken farms (on which the *First Update* and the two UN follow-up reports are silent), the Mission submitted that 'the motive for denying sustenance need not be to starve the civilian population, indeed the motive is irrelevant'.¹⁸⁹ As a legal hypothesis this description and interpretation of art 54(2) of *Additional Protocol I* is correct in the light of the ICRC *Customary International Humanitarian Law* study,¹⁹⁰ which considered the provision as customary IHL. The IDF might well argue that their actions were meant to deny sustenance for the armed groups engaged in combat but they would have to justify that 'the objects [were] used as sustenance solely' for such groups and that the objects were 'in direct support of military action'.¹⁹¹ Most importantly, the IDF would have to justify that their actions would not have affected the civilian population's need for adequate food or

¹⁸³ Ibid [926].

¹⁸⁴ Ibid [936].

¹⁸⁵ *First Update*, UN Doc A/64/651, I [171].

¹⁸⁶ Ibid [41]–[44]. See also *Second Update*, UN Doc A/64/890, [141]–[145].

¹⁸⁷ *First Update*, UN Doc A/64/651, annex I [172].

¹⁸⁸ *Tomuschat Report*, UN Doc A/HRC/15/50, [46]. It is notable that this positive comment has been listed under a section titled 'lack of cooperation'. See also *Second Update*, UN Doc A/64/890, annex I [143]–[145].

¹⁸⁹ *Gaza Report*, UN Doc A/HRC/12/48, [934].

¹⁹⁰ Henckaerts and Doswald-Beck, above n 59, vol I, 189–93.

¹⁹¹ See *Additional Protocol I* art 54(3).

water.¹⁹² While the *Gaza Report* repeatedly refers to art 54(1), it is not entirely clear that it invoked this violation. If its interpretation of art 54(2) is extended to art 54(1), some may find it difficult to accept that the act of starving civilians constitutes a breach of IHL, even in the absence of the intent to do so.¹⁹³

The Mission also found ‘extensive destruction’ of residential houses ‘caused by [Israeli] air strikes, mortar and artillery shelling, missile strikes, the operation of bulldozers and demolition charges’.¹⁹⁴ The nature of this damage was divided into three categories. First, some houses that were attacked ‘arguably related to the conduct of military operations against Palestinian combatants’;¹⁹⁵ secondly, many others ‘were in the general path of the advancing Israeli ground troops’;¹⁹⁶ and thirdly, others were ‘destroyed without their having a direct link to combat operations’.¹⁹⁷ The Mission gave a detailed account of residences of the third category type including ‘the deliberate demolition of residential housing’.¹⁹⁸ From the testimonies and other evidences gathered, it was affirmed that ‘during the last three days, aware of their imminent withdrawal, the Israeli armed forces engaged in another wave of systematic destruction of civilian buildings’.¹⁹⁹ It gave cases of five family houses which ‘were subjected to direct attacks in spite of their unmistakably civilian nature’, in contravention of ‘the principle of distinction’.²⁰⁰ In respect of these cases, the Mission went further, stating that the IDF’s conduct ‘amounted to the grave breach of “extensive destruction ... of property, not justified by military necessity and carried out unlawfully and wantonly” under art 147 of the Fourth Geneva Convention’.²⁰¹

The Israeli *First Update* concurred with the *Gaza Report*’s legal position that private or civilian property must not be destroyed or demolished ‘unless justified by military necessity’.²⁰² While it was said that ‘the extent of destruction (of houses), by itself, cannot establish a violation’ of IHL,²⁰³ it indicated that ‘specific incidents’ involving civilian houses were under investigation. The *First*

¹⁹² See Green, above n 161, 168–9. See also Henckaerts, above n 58, 192.

¹⁹³ For further discussion, see, eg, Yihdego, ‘Darfur and Humanitarian Law: The Protection of Civilians and Civilian Objects’, above n 131, 53.

¹⁹⁴ *Gaza Report*, UN Doc A/HRC/12/48, [990]. At [1003], it is noted that

[i]n al-Samouni (of Gaza), out of 114 severely damaged or completely destroyed buildings, 60 were destroyed between 27 December 2008 and 10 January 2009 (ie the air phase and the advance of the ground invasion), only 4 between 10 and 16 January and 50 between 16 and 19 January 2009. Similarly, in al-Atatra, out of 94 severely damaged or completely destroyed buildings, 36 were destroyed between 27 December 2008 and 10 January 2009, only 6 between 10 and 16 January, and 52 between 16 and 19 January 2009.

At [1004] the *Report* continues: ‘[t]hese figures confirm that a first phase of extensive destruction of housing for the “operational necessity” of the advancing Israeli forces in these areas was followed by a period of relative idleness on the part of the Israeli bulldozers and explosives engineers’.

¹⁹⁵ *Ibid* [992].

¹⁹⁶ *Ibid* [993].

¹⁹⁷ *Ibid* [994].

¹⁹⁸ *Ibid* [993]–[997].

¹⁹⁹ *Ibid* [1004].

²⁰⁰ *Ibid* [1005].

²⁰¹ *Ibid* [1006]. See also Green, above n 161, 327–30.

²⁰² *First Update*, UN Doc A/64/651, annex I [114].

²⁰³ *Ibid* [113]–[116]. This point was rightly echoed by Blank, above n 5, 364–5.

Update submitted, rather ambiguously, that the IDF have ‘clear regulations and orders, as well as clear combat doctrine, regarding the demolition of structures and infrastructure’,²⁰⁴ without detailing what these were, their compatibility with the law and their practicality on the ground. The *Second Update* essentially reiterated the arguments made by Israel but it declared the formulation of a ‘New Order Regulating the Destruction of Private Property for Military Purposes’²⁰⁵ the details of which are not known. The *Tomuschat Report* of 2010 and the *McGowan Davis Report* of 2011, although not specifically mentioning the case of demolishing residential houses and acknowledging Israel’s efforts and dedication with respect to investigating several allegations, appeared to indicate that Israel failed to investigate the alleged ‘systemic and deliberate nature of the destruction in Gaza’, by failing to investigate ‘those who designed, planned, ordered and oversaw the operations’.²⁰⁶ Interestingly, Judge Goldstone’s later statement of ‘regret’ interpreted some of the findings of the follow-up missions (and Israeli investigations) as implying ‘that civilians were not intentionally targeted as a matter of policy’ by Israel.²⁰⁷ In contrast, the other three members of the Mission rejected ‘any impression that subsequent developments have rendered any part of the mission’s report unsubstantiated, erroneous or inaccurate’.²⁰⁸

This and the rest of the cases alleged, along with subsequent developments, provide evidence of a number of points. First, the UN Mission and Expert Follow-Up Committees have considered and attempted to elucidate serious and complex factual (and intent) issues, which normally constitute one of the core tasks of fact-finding. The follow-up committees identified the failings and the positive actions taken by Israel relating to deliberate attacks, with a focus on the alleged attacks against human beings, and civilian infrastructure. Nonetheless, Israel’s non-cooperation meant that the Mission and subsequent expert committees faced challenges to determine some alleged cases and subsequent actions due to a lack of detailed information and intelligence. Secondly, despite Israel’s non-recognition of fact-finding and its furious rejection of and challenges to the Mission and these allegations, it has taken various measures, including convicting its soldiers for manslaughter. To some extent, therefore, the recommendations of the fact-finding and subsequent demand by the UN for the conducting of investigations have been positively met. What is unique about this fact-finding compared to other similar cases (eg, on Darfur and Georgia–Russia) is that whilst Israel refused to cooperate with the Mission and its follow-up committees, it implicitly but strongly challenged the credibility of the findings relating to deliberate attacks (as seen in relation to the flour mill). The follow-up expert missions rightly commend the investigations carried out by Israel, although there is uncertainty regarding several cases of deliberate targeting of civilians and their premises. What is interesting, and may be damaging to the credibility of UN fact-finding, is that the authors of the Report have later been

²⁰⁴ *First Update*, UN Doc A/64/651, annex I [13]–[21].

²⁰⁵ *Second Update*, UN Doc A/64/890, annex I [154]–[155], [118]–[136].

²⁰⁶ *Tomuschat Report*, UN Doc A/HRC/15/50, [64]. See also *McGowan Davis Report*, UN Doc A/HRC/16/24, [47].

²⁰⁷ Goldstone, above n 127, [4].

²⁰⁸ Jilani, Chinkin and Travers, above n 128.

divided on this very core issue: the deliberate nature of the harm inflicted upon Palestinian civilians. The wider implications of such a split and the absence (or presence) of implied consent from concerned parties to UN fact-finding are further considered below in Part IV.

Thirdly, however, the fact-finding appears to have become ‘law-finding’ in contrast to some other cases of fact-finding which have had a more limited mandate.²⁰⁹ It has dedicated a great deal of discussion to the invocation and application of customary rules of IHL, including the rules of distinction, civilian immunity and most controversially, the prohibition of starving civilians as a means of warfare as codified in *Additional Protocol I*, to the Gaza armed conflict. While this was based upon a clear and solid mandate from the UNHRC and most of the rules have been reasonably invoked and applied, the extent to which the application of law was discussed in relation to each incident could have been reduced and the reference to the law governing the prohibition of starving civilians was ambiguous, as discussed above.

The issues explored in this section suggest that although Israel has taken some measures to investigate and hold those responsible to account, there are still questions to be answered concerning the purposeful targeting of civilians and civilian objects in Gaza, in violation of customary rules of IHL.²¹⁰ This section, furthermore, highlights the difficulty of probing such serious allegations without having full access to information held by Israel, which is vital to establishing or rejecting the intent element of the charges. This is just one side of the coin — whether the other (Palestinian) side committed similar ‘deliberate’ breaches and how they have been reacting to the UN reports and demands may be discussed in the context of their alleged indiscriminate actions, as considered next.

B Indiscriminate Attacks

1 By Palestinian Armed Groups

From the outset the Mission noted that ‘since April 2001, Palestinian armed groups have launched more than 8000 rockets and mortars from Gaza into southern Israel’.²¹¹ During the Gaza conflict alone up to 800 rockets and mortars were fired and ‘a total of 918 civilians were wounded by rocket attacks. This figure includes 27 critically wounded, 62 moderately wounded and 829 lightly wounded’.²¹² While such attacks ‘have caused relatively few fatalities and physical injuries’, partly because of the Government of Israel’s effective warning system to the population, the ‘psychological trauma’ they have caused was said to be ‘widespread’.²¹³ For example, ‘[t]here were ... 1595 people inside Israel

²⁰⁹ See, eg, *Fact-Finding on Georgia Russia*, above n 35, vol I, 2, which stressed that ‘the Fact-Finding Mission is strictly limited to establishing facts’. Cf at vol II, 298–319, which, despite discussing relevant IHL rules in general, also carefully tried to relate the alleged facts to the law at 320–75.

²¹⁰ See, eg, Kenneth Roth, ‘Gaza: The Stain Remains on Israel’s War Record’, *The Guardian* (London), 5 April 2011, 28.

²¹¹ *Gaza Report*, UN Doc A/HRC/12/48, [1597]. Cf *First Update*, UN Doc A/64/651, annex I [2], which estimates about 12 000 rocket shells.

²¹² *Gaza Report*, UN Doc A/HRC/12/48, [1652].

²¹³ *Ibid* [1633].

treated for stress-related injuries²¹⁴ during the December – January conflict. The *Gaza Report* examined the harsh impact of the rockets on the people of Israel in all respects — security, education, health and economy.²¹⁵

The Palestinian armed groups mentioned earlier claimed responsibility for such conduct, their justification being ‘resistance to occupation’ and the ‘crimes’ committed against Palestinians including the shelling of ‘everyone in Gaza’.²¹⁶ Whilst Khaled Mashal, Chairman of the Hamas Political Bureau, wrote in an open letter (during the period of active hostilities) that the demand to stop the Palestinian resistance was ‘absurd ... our modest home made-rockets are our cry of protest to the world’,²¹⁷ the Hamas authorities gave the Mission two contradictory responses regarding the attacks on southern Israel; first, that the rockets were targeted at the IDF; and secondly that they had ‘nothing to do, directly or indirectly, with al-Qassam or other resistance factions’.²¹⁸

Praising Israel’s introduction of an early warning system in southern Israel (although it raised questions of discrimination between Israeli and Palestinian communities/villages there),²¹⁹ the *Gaza Report* made a number of observations. The Panel found that customary (and treaty) rules of distinction and the duty to respect and protect civilians, the prohibitions of indiscriminate attacks,²²⁰ reprisals and terrorising civilians as explicitly enshrined in arts 51(2), (4) and (6) of *Additional Protocol I*²²¹ were respectively identified as applicable customary law duties of the parties to the conflict. The *Gaza Report* rightly held that: ‘there is no justification in international law for the launching of rockets and mortars that cannot be directed at specific military targets into areas where civilian populations are located’ and that ‘Palestinian armed groups, among them Hamas, have publicly expressed their intention to target Israeli civilians’.²²² The fact that they ‘are aware of the consequences to civilians indicates an intent to target civilians’.²²³ The *Gaza Report* goes on, in the same paragraph, to state that the ‘launching of unguided rockets and mortars breaches’ the rule of distinction and constitutes ‘a deliberate attack’ against civilians. Furthermore, the *Gaza Report* states that ‘it is plausible that one of the primary purposes of these continued attacks is to spread terror prohibited under international humanitarian law’²²⁴ which they succeeded in doing in ‘the affected communities of southern Israel

²¹⁴ Ibid [1606].

²¹⁵ Ibid [1647]–[1681].

²¹⁶ Ibid [1629]–[1630], [1632]. See also [269], [308] where the Mission reaffirmed the entitlement of the right to self-determination of the Palestinian people including the right to resist occupation, but also noted that ‘any action of resistance pursuant to the right to self-determination should be exercised with full respect of ... IHL’.

²¹⁷ Ibid [1631].

²¹⁸ Ibid [1634]–[1636].

²¹⁹ See *ibid* [1637], [1671]–[1681] for the disparity of treatment.

²²⁰ Indiscriminate attacks are those which: a) ‘are not directed at a specific military objective’; or b) ‘which employ a method or means of conduct which cannot be directed at a specific military objective’, see Henckaerts and Doswald-Beck, above n 59, 40, r 12.

²²¹ *Gaza Report*, UN Doc A/HRC/12/48 refers to the ICRC Study, which characterises the prohibition of terrorising the civilian population as customary law: *ibid* 8, r 2. See also Rogers, above n 131, 23–6; Schmitt, ‘The Law of Targeting’, above n 61, 151–3.

²²² *Gaza Report*, UN Doc A/HRC/12/48, [1687].

²²³ Ibid [1688].

²²⁴ Ibid [1689]. See also Schmitt, ‘The Law of Targeting’, above n 61, 139–44.

and in Israel as a whole'.²²⁵ The Panel aptly indicated that the indiscriminate (and deliberate) attacks against the communities in southern Israel constituted 'a war crime'.

Nonetheless, the August 2010 *Follow-Up to the Report of the United Nations Fact-Finding Mission on the Gaza Conflict (II)*²²⁶ established by the Hamas de facto authorities expressed the position that

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.²²⁷

The Report went on to suggest that 'the unavailability of modern military technology could not preclude armed groups from defending themselves',²²⁸ a position which resembles the statements given by Hamas political figures during the conflict as mentioned above. The Tomuschat Committee rightly questioned the credibility and impartiality of the Report and considered this position as an implicit acknowledgement of 'the truth of the allegations' made against Palestinian armed groups and as an attempt to 'justify the violation and absolve the perpetrators'.²²⁹ On the contrary, the Hamas authorities told the 2011 UN Expert Committee that they 'did not have access' to those who launched the rockets or to Israeli victims or sites.²³⁰ The Committee expressed concern that the authorities conducted no investigations 'into the launching of rockets against Israel' and called upon them to 'make genuine efforts to conduct criminal inquiries' against those who were 'engaged in serious violations of international humanitarian law by firing these rockets'.²³¹

Judge Goldstone's statement of reconsideration has three relevant points here. First, the reconsideration states that while the rockets of Hamas 'were purposefully and indiscriminately aimed at civilian targets'; in contrast 'the allegations of intentionality by Israel were based on the deaths of and injuries to civilians in situations where our fact-finding mission had no evidence on which to draw any other reasonable conclusion'.²³² The two expert committees and the rest of the members of the original Mission shared the first part of this point, although the 'retraction' regarding Israeli deliberate violations was rejected, as discussed above. Secondly, Judge Goldstone regretted not only the inaction by Hamas to investigate war crimes but also the 'asking of Hamas to investigate' as being 'a mistaken enterprise' — as Hamas has 'a policy to destroy the state of Israel' and is continuing its targeting and killing of Israeli civilians.²³³ The 2011 UN Expert Committee has also reported the continuity of the attacks by Hamas as a serious concern. Goldstone's regret over the failure of Hamas to take action

²²⁵ *Gaza Report*, UN Doc A/HRC/12/48, [1689].

²²⁶ This was established in response to the *UNGA Follow-up to the Gaza Report II*, UN Doc A/RES/64/254, as indicated in the *Tomuschat Report*, UN Doc A/HRC/15/50, [84].

²²⁷ See *Tomuschat Report*, UN Doc A/HRC/15/50, [84].

²²⁸ *Ibid* [87].

²²⁹ *Ibid*.

²³⁰ *McGowan Davis Report*, UN Doc A/HRC/16/24, [60].

²³¹ *Ibid* [62].

²³² Goldstone, above n 127, [3]–[4].

²³³ *Ibid* [10]–[11].

as per the Mission's recommendations has been unreservedly echoed by his other colleagues of the Mission but they indicated the necessity of conducting investigations by both sides 'until justice is done and respect for ... humanitarian law by everyone is ensured'.²³⁴ Finally, he rightly noted that the respect for IHL by non-state actors including the need to investigate their violations remains 'as one of the most significant challenges facing' this field of law.²³⁵ This is particularly true with non-state actors like Hamas militants. Nonetheless, both Follow-Up Expert Committees confirmed the credibility and genuine nature of the investigations carried out by the Palestinian Independent Investigation Commission,²³⁶ which was established by the Ramallah authorities to investigate the shelling of rockets into Israel, but did not succeed due to lack of access to Gaza and Israeli witnesses, victims and territories.²³⁷

The UN Fact-Finding Mission and its Follow-Up Expert Committees (including Judge Goldstone and the rest of members of the Mission) agree that Hamas was not only engaged in deliberate attacks and the terrorising of Israeli civilians but also failed to carry out proper and genuine investigations as required by the UNGA. I shall return to the latter point but it is worth pointing out that the Gaza de facto authorities and their Commission gave a mixed and confused account on this issue. It appears that they unjustifiably saw the indiscriminate firing on and terrorising of civilians as legitimate self-defence against Israeli occupation or Israeli attacks against Palestinians.

Yet, it may be said (although hypothetically) that the people of southern Israel are subject to Israeli national military service, and therefore, are a legitimate military target, as 'reservist soldiers'.²³⁸ Without entering into the polemics of the combatant status of 'reservist soldiers' who have not joined their armed forces or at least not been re-called and kept in military camps for deployment, two points easily defeat the validity of this argument. The first is that it is evident that not everyone in southern Israel was or is a reservist. Certainly the children and elderly of southern Israel are not. Even if one finds the presence of some reservists there who may supposedly be considered as part of the IDF, the law, as enshrined in art 50(3) of *Additional Protocol I*, is clear, in that 'the presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character'. Of course, the civilians there may have lost their civilian status if, and only if, they were directly engaged in hostilities, which was not the case. Thus, the

²³⁴ Jilani, Chinkin and Travers, above n 128.

²³⁵ Goldstone, above n 127, [13].

²³⁶ It was a four-member Commission established on 25 January 2010 by a Presidential Decree to follow-up on the implementation of the recommendations of the *Gaza Report*, as called upon by the *UNGA Follow-Up to the Gaza Report II*, UN Doc A/RES/64/254, [4].

²³⁷ See *McGowan Davis Report*, UN Doc A/HRC/16/24, [49], [53]. See also *Tomuschat Report*, UN Doc A/HRC/15/50, [65]–[75].

²³⁸ See, eg, Barak Ravid, 'Israel Okays Call-Up of Tens of Thousands of IDF Reservists', *Haaretz* (online), 3 January 2009 <www.haaretz.com/news/israel-okays-call-up-of-tens-of-thousands-of-idf-reservists-1.267366>.

indiscriminate firing by Palestinian groups against the people of southern Israel is inexcusable and a flagrant breach of IHL.²³⁹

In fact, the Panel could have considered this as a grave breach pursuant, for example, to art 85(3) of *Additional Protocol I*; but this provision requires an intention to act indiscriminately ‘to cause excessive loss of life’.²⁴⁰ It may well be argued, considering the incapability of their rockets to cause ‘excessive’ human loss and damage (as indicated in the *Gaza Report*) and as their main purpose is to terrorise rather than kill, that they do not satisfy the threshold for a grave breach. Nonetheless, excessive loss of life is a relative concept, which must be weighed against the military advantage of an attack — the attacks at issue did not seem to have any military objective which adds to their severity as breaches.

Notably, referring to the *Trail Smelter Arbitration* of 1905,²⁴¹ the *Gaza Report* highlighted ‘the obligation of the Gaza authorities to respect international law’, which requires ‘the prevention and prosecution of violations’²⁴² of the law — this appears to include IHL. Though generally correct, it may, at the very least, raise questions in respect of IHL. The Mission distinguished the Hamas authorities and their premises from that of the militants for the purposes of applying the law.²⁴³ In this sense, this proposition is either a contradiction in terms or a new development in the law which obliges non-state entities to uphold IHL norms against groups who operate from, and within, their territories, even if they don’t have effective or general control over their conduct.²⁴⁴

A threefold observation will be made here. First, the investigation of the attacks against Israeli civilians by Palestinian armed groups appears to be relatively straightforward from a factual point of view. Palestinian armed groups were also implicated in deliberate attacks against non-combatants; the difference

²³⁹ See, eg, *Prosecutor v Kupreškić (Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-95-16-T, 14 January 2000) [13]; the Chamber emphasised that ‘widespread and indiscriminate attacks’ are unjustifiable and illegal.

²⁴⁰ See Green, above n 161, 328–9. Cf Rogers, above n 131, 109–11, indicating that art 57(2)(a)(iii) may be relied upon to establish grave breaches relating to failing to take feasible precautions, but this also requires the aforementioned intent.

²⁴¹ *Trail Smelter Case (United States of America v Canada) (Awards)* (1938/1941) 3 RIAA 1905, 1965:

no state has the right to use or permit the use of its territory in such a manner as to cause injury [by fumes] in or to the territory or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.

Nonetheless, as noted in *Home Frontier and Foreign Missionary Society of the United Brethren in Christ (United States v Great Britain)* (1920) 6 RIAA 42, 44:

It is a well-established principle of international law that no government can be held responsible for the act of rebellious bodies of men committed in violation of its authority, where it is itself guilty of no breach of good faith, or of no negligence in suppressing the insurrection.

²⁴² *Gaza Report*, UN Doc A/HRC/12/48, [1682].

²⁴³ *Ibid* ch vii.

²⁴⁴ For an excellent account of the requirements of ‘effective control’ and ‘general control’, see, eg, Antonio Cassese, ‘The *Nicaragua* and *Tadić* Tests Revisited in light of the ICJ Judgment on Genocide in Bosnia’ (2007) 18 *European Journal of International Law* 649. Similar questions of degree of control also arose in the 2009 Georgia–Russia war: *Fact-Finding on Georgia Russia*, above n 35, vol II, 306–17.

between ‘deliberate’ and ‘indiscriminate’ attacks is, hence, blurred or irrelevant in this sense. Secondly, the Panel invoked the law correctly, although it was not brave enough to invoke grave breaches of IHL against Palestinian groups. Its reference to the responsibility of the Gaza de facto authorities is either an innovation or an obvious confusion in applying the law. Thirdly, although the Gaza authorities welcomed and consented to the deployment of the Mission to Gaza and maintained a good working relationship with the Mission and the Follow-Up Expert Committees, they have failed, or lacked the ability, to:

- 1 provide a clear and honest account of the allegations; and
- 2 undertake credible and prompt investigations for their part.

This highlights the challenge of holding non-state actors to account, despite consenting to UN inquiries. This can be, nonetheless, a misleading observation, as there are non-state actors who genuinely and responsibly undertake their duty to investigate or to be investigated by UN fact-finding. The Palestinian Authority is one, but certainly not the only non-state actor, of such a character.²⁴⁵ Finally yet importantly, while resolving a dispute or a tension is among the core objectives of UN fact-finding, this outcome has not been achieved in this instance. The ‘current situation in Israel and ... Gaza remains tense’ partly because rockets and mortars are still indiscriminately ‘launched against southern Israel’.²⁴⁶

2 *By the IDF*

Similarly, the 6 January shelling with ‘at least’ four mortars nearby the UN Relief and Works Agency (‘UNRWA’) run school in northern Gaza raised the question of indiscriminate attacks by the IDF;²⁴⁷ the UNRWA had sheltered 1368 Palestinians in the school since the previous day, a fact of which Israel was aware.²⁴⁸ The attacked street near the school was busy and about 150 people were allegedly present at the time. One of the shells ‘landed in the al-Deeb [family house] courtyard’ where 11 members of the family were killed;²⁴⁹ the other three shells killed ‘at least a further 24 people and injured as many as 40’.²⁵⁰ Israel justified the shelling as a response to ‘mortar attacks by Hamas operatives’ from nearby the school. The Mission agreed that ‘the attacks may have been in response to a mortar attack from an armed Palestinian group’ but found Israel’s justification of the incident as being full of ‘inconsistencies and factual inaccuracies’.²⁵¹ Referring to *Additional Protocol I*, arts 50 (which broadly provides the definition of a civilian) and arts 57(2)(a)(ii) and (iii)

²⁴⁵ *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General*, UN Doc S/2005/60, [37]–[39]. The report concluded that the Justice and Equality Movement and the Sudan Liberation Movement and Army ‘cooperated with the Commission’. For voluntary surrendering before the ICC of rebel leaders, see also ‘Darfur Rebel Appears before ICC’, *BBC News* (online), 18 May 2009 <<http://news.bbc.co.uk/1/hi/world/africa/8054455.stm>>.

²⁴⁶ *McGowan Davis Report*, UN Doc A/HRC/16/24, [64].

²⁴⁷ *Gaza Report*, UN Doc A/HRC/12/48, [42], ch x.

²⁴⁸ *Ibid.*

²⁴⁹ *Ibid* [688].

²⁵⁰ *Ibid* [689].

²⁵¹ *Ibid* [690].

(concerning the duty of precautions and proportionality), the Mission reached the conclusion that

the deployment of at least four mortar shells to attempt to kill a small number of specified individuals in a setting where large numbers of civilians were going about their daily business and 1368 people were sheltering nearby cannot meet the test of what a reasonable commander would have determined to be an acceptable loss of civilian life for the military advantage sought.²⁵²

Subsequent (Israeli and UN) reports have not expressly referred to this incident but the Israeli *Second Update* dedicated six paragraphs to this issue and concluded that

the attack was directed against a legitimate military target and did not violate the principle of proportionality under the 'reasonable military commander' test ... Hamas mortar rounds fired by Hamas over the course of an hour landed in a very close proximity to Israeli forces. Only a day before, a mortar attack of a similar nature led to the wounding of 30 IDF soldiers.²⁵³

Moreover, Laurie Blank, in her thorough and insightful analysis of the law as applied in the *Gaza Report*, disagrees with what she describes as the 'mathematical formula' arguably applied by the Mission to interpreting the principle of proportionality (as opposed to an interpretation based on the actual circumstances known and understood by military commanders to exist at the time of an operation) and thus criticised 'the erroneous premise [of the Mission] that the very existence of civilian deaths creates prima facie evidence of a disproportionate attack'.²⁵⁴ Judge Goldstone's subsequent reassessment, as considered earlier in Part III(A), seems to accommodate and admit this criticism, although there is no apparent evidence either in the Report or the views of the other three members of the Mission which affirms that their findings were solely based upon the number of civilian casualties as automatic evidence for establishing illegal conduct. Indeed, civilian deaths alone do not necessarily imply an IHL violation, however, 'the circumstances in which people [are] killed do matter'.²⁵⁵ More controversially, Blank seems to argue and emphasise the fact that the school and vicinity at issue had been used by Hamas fighters, meaning that they had lost 'their civilian status' and thus had become legitimate military targets.²⁵⁶ 'This would, however, not relieve the attacker of certain obligations under IHL (eg, precautions, proportionality)', as accurately articulated, for example, by the EU sponsored fact-finding into the Georgia–Russia war.²⁵⁷ As a general rule therefore, '[i]n situations where the assessment of proportionality is complex and it is open to debate whether or not the attack is proportionate, the

²⁵² Ibid [703].

²⁵³ *Second Update*, UN Doc A/64/890, annex I [62].

²⁵⁴ Blank, above n 5, 367.

²⁵⁵ *Fact-Finding on Georgia Russia*, above n 35, vol II, 320: this was stated in relation to the urban warfare waged in Tskhinvali and Gori in general and the attacks on administrative and similar buildings more specifically.

²⁵⁶ Blank, above n 5, 362.

²⁵⁷ See *Fact-Finding on Georgia Russia*, above n 35, vol II, 328.

interests of the civilian population should be given a high priority'.²⁵⁸ This and the Mission's legal analysis and conclusion are generally consistent with case law,²⁵⁹ scholarly opinion²⁶⁰ and other fact-finding reports.

The *Gaza Report* also criticised the choice of weapon in the UNRWA incident. The use of mortars was considered to be a reckless choice, as they are 'incapable of distinguishing between combatants and civilians'.²⁶¹ The *Second Update* rejected this, claiming that 'the Keshet mortar (used in the incident) contains advanced target acquisition and navigation systems and was the most precise weapon available to Israeli forces at that time' but also expressed regret for the 'loss of civilian lives'.²⁶² Arguably, however the use of mortars in an urban and civilian area justifies the criticism put forward by the Mission: according to the principal of distinction, in such contexts mortars are not like a Kalashnikov with which you can single-out and target a combatant. For these reasons, the *Gaza Report* invoked a violation of art 57(2) of *Additional Protocol I* by the IDF, the contents of which are considered below. However, unlike the shelling by Palestinian armed groups in southern Israel (and the deliberate attacks by the IDF as considered above), some of the shelling in this case was said not to have been meant to kill civilians.²⁶³ This suggests that not every 'indiscriminate' attack will necessarily be 'a deliberate' act. This proposition is problematic. Whether or not civilians were the target, a deployment of weapons in an area filled with civilians shows at least some intention, or preparedness, to incur civilian harm by the IDF.

The *Gaza Report's* interpretation and application of the *jus in bello* proportionality rule to this urban warfare, which took into account the presence of a large number of civilians and civilian objects in the area and the nature of the weapon used to execute the operation, could be justified as a good practice of fact-finding. The *Gaza Report's* statement and invocation of the proportionality rule relating to the school and its vicinity, based upon the information available to them, may also arguably be justified and commended, and at the least, has contributed to the debate over the application of the rule to such complex armed conflict. Nonetheless, the fact that it was not informed by full intelligence and

²⁵⁸ Kolb and Hyde, above n 173. However, this doesn't suggest that the risks to soldiers and lives of combatants must not be taken into account when assessing proportionality: see, eg, Reuven Ziegler and Shai Otzari, 'Do Soldiers' Lives Matter? A View from Proportionality' (2012) 45 *Israel Law Review* 53.

²⁵⁹ See, eg, *Prosecutor v Kupreškić (Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-95-16-T, 14 January 2000).

²⁶⁰ See, eg, Green, above n 139, 182, who, using the example of the Israel-Hezbollah war, submitted that a commander 'must abandon or suspend the attack if it should become apparent that it may cause civilian damage excessive to the military advantage anticipated'. For further discussion on refraining from attacks in 'densely populated areas', see also Rogers, above n 131, 123. The ICRC Study considered this as a rule of customary law: see Henckaerts and Doswald-Beck, above n 55, 46. Cf Justus Weiner and Avi Bell, 'The Gaza War of 2009: Applying International Humanitarian Law to Israel and Hamas' (2009) 11 *San Diego International Law Journal* 5.

²⁶¹ *Gaza Report*, UN Doc A/HRC/12/48, [699].

²⁶² *Second Update*, UN Doc A/64/890, annex I [63], [66]. It is of note that while the investigation concluded that there were no IHL violations relating to this case, it advised that the IDF 'formulate more stringent definitions in military orders to govern the use of mortars in populated areas and in close proximity to sensitive facilities'.

²⁶³ *Gaza Report*, UN Doc A/HRC/12/48, [687].

evidence from the IDF and that Hamas fighters were operating from and within the area, even if in ‘small numbers’ (although the level of risk they posed to the IDF was neither identified nor discussed) raises the question of whether the main features of the alleged violation was that of the duty to take precaution, as examined below.

C Failure to Take Precaution (and the Use of Human Shields)

The tactics of both Palestinian armed groups²⁶⁴ and the IDF²⁶⁵ have been examined in the light of their duty ‘to take constant care to minimize the risk of harm to the civilian population’.²⁶⁶ The conduct of the former has also been considered in the context of Israel’s persistent claim that ‘Hamas abused the protection accorded’ to civilians and civilian targets which is to be blamed for civilian losses.²⁶⁷ These include:

- (i) ‘launching attacks from within civilian areas and from within or in the immediate vicinity of protected sites’;
- (ii) the ‘booby-trapping of civilian houses’;
- (iii) the ‘use of mosques to launch attacks against the Israeli armed forces or to store weapons’;
- (iv) ‘misuse of medical facilities and ambulances’; and
- (v) the use of human shields.²⁶⁸

The *Gaza Report* controversially, and maybe unnecessarily, rejected most of these allegations for lack of ‘direct evidence’ and or credibility.²⁶⁹ The attacks on the al-Fakhura Street (near the UNRWA school, discussed above) and the ‘UNRWA compound’ in the Gaza city centre (by the IDF, as discussed later) could not, thus, be justified by the conduct of the armed groups.²⁷⁰ The Second Gaza Committee of Hamas later reinforced this defence by stating that ‘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’;²⁷¹ although the Tomuschat Committee was not ‘in a position to ascertain the veracity of any of the assertions’.²⁷² In fact, the *Gaza Report* alleged the use of involuntary Palestinian ‘human shields’ by the IDF and therefore the commission of ‘a war crime under Art 8(2)(b)(xxiii) of the Rome Statute’;²⁷³ which was strongly denied by Israel from the outset.²⁷⁴ The Israeli

²⁶⁴ Ibid ch viii.

²⁶⁵ Ibid ch ix.

²⁶⁶ Ibid [439].

²⁶⁷ Ibid [464].

²⁶⁸ Ibid ch viii. For details of Israel’s claims, see Israel Ministry of Foreign Affairs, *The Operation in Gaza — Factual and Legal Aspects*, above n 134.

²⁶⁹ Ibid [439]–[498].

²⁷⁰ Ibid [482]–[488].

²⁷¹ See *Tomuschat Report*, UN Doc A/HRC/15/50, [84].

²⁷² Ibid [84]–[85].

²⁷³ *Gaza Report*, UN Doc A/HRC/12/48, [1105]. Four cases have been investigated in which the IDF have been implicated in this violation. For detailed account of the use of human shields, see at ch xiv.

First Update indicated that ‘17 incidents [which are under investigation] involved allegations of using human shields’ by members of the IDF.²⁷⁵ The *Second Update*, moreover, reported the conviction of two soldiers for forcing ‘a boy to search bags suspected of being booby trapped’ and the referral of a Lieutenant Colonel who ‘authorized a unit to allow’ a Palestinian civilian to enter his house with the intent to communicate with armed men for a disciplinary proceeding — for doing so put the civilian at risk contrary to ‘IDF operational orders prohibiting any such use of civilians for military operations’.²⁷⁶ The UN Follow-Up Expert Committees have not specifically referred to this particular allegation against the IDF but the *McGowan Davis Report* made a general note of these developments.²⁷⁷

The *Gaza Report*, nevertheless acknowledged the possibility that protected sites and/or their vicinity may have been used by Hamas fighters during the hostilities, that the armed groups ‘were not always dressed in a way that distinguished them from civilians’, and ‘that there are indications that ... [they] launched rockets from urban areas’.²⁷⁸ However, referring to customary IHL, arts 51(1) and 57 of *Additional Protocol I* (concerning the duty to take precaution),²⁷⁹ and art 51(7) of *Additional Protocol I* and art 28 of *Geneva Convention IV* (which prohibit the use of human shields) — whilst emphasising the requirement of ‘intention to use the civilian population in order to shield an area from military attack’ for establishing a violation of the latter duty — the Mission ‘found *no* evidence that members of the ... groups engaged in combat in civilian dress’ (and so had committed no ‘violation of the obligation not to endanger the civilian population’) and that they had not used human shields.²⁸⁰ Fighting in ‘built-up areas’ and the failure to use ‘distinctive signs’ are not, of themselves, violations of the duty of precaution.²⁸¹ However, the *Gaza Report* indicates the use of civilian clothes, homes and civilian sites by the militants, which may well affirm the Israeli claim that Hamas armed groups were using Palestinian human shields to gain an advantage over the IDF.²⁸² Even if this may have been a difficult conclusion to make for the Mission, it should have perhaps refrained from making any conclusive remarks on such doubtful cases as was the with the approach taken by the Tomuschat Committee, a sensible strategy which

²⁷⁴ Ibid [1089]: Israel categorically denied these allegations, stating that ‘the IDF troops were instructed unequivocally not to make use of the civilian population within the combat framework for any purpose whatsoever, certainly not as “human shields”’. For further details on this subject, see at [1032]–[1106].

²⁷⁵ *First Update*, UN Doc A/64/651, annex I [135].

²⁷⁶ *Second Update*, UN Doc A/64/890, annex I [44]–[46].

²⁷⁷ *McGowan Davis Report*, UN Doc A/HRC/16/24, [30], noting that the soldiers ‘were demoted and received suspended sentences of three months each’.

²⁷⁸ *Gaza Report*, UN Doc A/HRC/12/48, [482]–[483].

²⁷⁹ For a detailed account on the duty of precautions, see Rogers, above n 131, 96; Green, above n 161, 181; Schmitt, ‘The Law of Targeting’, above n 61, 161–5.

²⁸⁰ *Gaza Report*, UN Doc A/HRC/12/48, [494]–[495] (emphasis added).

²⁸¹ Ibid [495]–[496].

²⁸² See, eg, Blank, above n 5, 362–4. Blank also criticised the Mission for not considering a breach of the prohibition of perfidy.

appears to have been adopted in the *Georgia–Russia Fact-Finding*.²⁸³ However, even if the allegations made against Palestinian groups were all true, the legality of the nature of the Israeli response may be questioned. The duty of precaution is not dependent upon the conduct of the opposition armed groups, a point which is supported by scholars²⁸⁴ and tribunals.²⁸⁵

That being said, the launching of attacks ‘at the population of southern Israel or at the Israeli armed forces inside Gaza — close to civilian or protected buildings constitutes a failure to take all feasible precautions’.²⁸⁶ Besides, the Mission ‘could not exclude that ... the groups engaged in combat activities in the vicinity’ of hospitals and UN facilities and it emphasised that these were ‘serious violations’ of the duty to take precaution to spare civilians. As such, the duty of the Gaza authorities ‘to prevent the ... groups from endangering’²⁸⁷ civilians was acknowledged by the Mission.

In contrast, the investigations into the IDF strikes on the UNRWA compound and the al-Quds and al-Wafa hospitals led to some concrete findings of fact and of violations. The UN facility and the al-Quds hospital were struck on 15 January by WP, while the al-Wafa hospital was attacked by ‘tank shells’ and WP on 5 and 6 January. Israel, while not expressly commenting on the hospital incidents, regretted (although with contradictory statements) the shelling of the UN compound in Gaza City.²⁸⁸ In all three cases, the Panel found Israel in breach of the duty to take precaution. In respect of the attacks on the UN premises for

²⁸³ *Fact-Finding on Georgia Russia*, above n 35, vol II, 336. While the Fact-Finding Mission on Georgia–Russia took about nine months (as opposed to the five months of the Gaza Mission), with full consent from, and cooperation of, the main warring parties, the inquiry concluded that ‘more information is needed in order to assess both the extent of the damage and the facts relating to the circumstances of the military operations’ with respect to the damages caused to cultural property.

²⁸⁴ See, eg, Rogers, above n 131, 127–8 (referring to the responsibility of both a defender and an attacker to protect the civilian population, where he answers in the negative the question of whether an attacker ‘is relieved of their responsibilities because of the failure of the defenders to comply with their obligations’).

²⁸⁵ See, eg, *Prosecutor v Kupreškić (Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-95-16-T, 14 January 2000) [527]. The Tribunal stated, at [125], that ‘the fact that the adversary [Muslim forces] engages in unlawful behaviour and persecutes or kills [Croatian] civilians cannot be a justification for similar and reciprocal conduct’. It also indicated, at [524], that collateral damage may be illegal, by stating that

in the case of attacks on military objectives causing damage to civilians, international law contains a general principle prescribing that reasonable care must be taken in attacking military objectives so that civilians are not needlessly injured through carelessness.

Indeed, the protection of civilians represents the cornerstone of humanitarian law. Consequently, with regard to collateral damage, although single attacks might not per se be illegal, their cumulative effect might render them so as clearly spelt out by the Tribunal, at [526], stating that

in case of repeated attacks, all or most of them falling within the grey area between indisputable legality and unlawfulness, it might be warranted to conclude that the cumulative effect of such acts entails that they may not be in keeping with international law. Indeed, this pattern of military conduct may turn out to jeopardise excessively the lives and assets of civilians, contrary to the demands of humanity.

²⁸⁶ *Gaza Report*, UN Doc A/HRC/12/48, [496].

²⁸⁷ *Ibid* [498].

²⁸⁸ See *Second Update*, UN Doc A/64/890, annex I [92]–[97].

instance, it concluded that ‘the [IDF] commanders ... did not take all feasible precautions in the choice of methods and means of warfare with a view to avoiding ... or minimizing incidental civilian casualties’;²⁸⁹ this was found to be a breach of customary and treaty obligations, in particular art 57(2)(a)(ii) of *Additional Protocol I*. Israel reported to the UN that two senior military officers (a Brigadier General and a Colonel) had been disciplined for authorising ‘several artillery shells in violation of the rules of engagement prohibiting use of such artillery near populated areas’ and ‘for exceeding their authority in a manner that jeopardized the lives of others’.²⁹⁰ Furthermore, Israel reported that ‘all financial issues relating to these incidents had been satisfactorily concluded’.²⁹¹ This is an important endorsement (if not fully) of the UN Mission’s findings.

Furthermore, the attacks on the hospitals breached arts 18 and 19 of *Geneva Convention IV* (regarding the immunity of hospitals and protected persons) as reflected in arts 57(2)(b) and (c) of *Additional Protocol I*. Despite the concern of some states, such as the UK and Switzerland, over ‘the practical possibility to cancel or suspend’ attacks by soldiers (as opposed to commanders) to uphold the duty of precaution as enshrined in art 57(2), the latter provision is considered as an expression of customary law.²⁹² It is of note that the *McGowan Davis Report* of 2011 ‘discovered no information’ regarding the attacks against the aforementioned hospitals.²⁹³ On a positive note, however, the *Gaza Report* acknowledged the efforts made ‘to issue warnings’ by the IDF such as radio-broadcasts, prerecorded generic telephone calls, distribution of leaflets warning shots delivered to roofs, although it seriously questioned ‘whether [these] can be considered as sufficiently effective in the circumstances to constitute compliance with article 57(2)(c)’ of *Additional Protocol I*.²⁹⁴ It was noted that some of the efforts were misleading, generic and improper (eg, firing missiles as a warning).²⁹⁵

In short, both the IDF and Palestinian groups allegedly failed to comply with their duty to take precautionary measures, which are required to avoid or mitigate collateral damage to both Palestinian and Israeli civilians. The Mission’s findings and legal analysis concerning the rule of precaution (which also encompasses the requirement of proportionality) is persuasive and well balanced. However, the automatic rejection of the serious allegations made regarding the use of human shields by Palestinian groups while accusing Israel of doing so without demonstrating clear intent to that effect may well be criticised as biased or unhelpful and thus not consistent with one of the core features of fact-finding: impartiality. Considering the time and evidence constraints on the Mission, making such a bold assertion of blame or vindication does not do justice to the issues raised, throwing into question the fairness of this fact-finding operation. Indeed, Israel, unlike the Gaza authorities, has taken some measures,

²⁸⁹ Ibid [589].

²⁹⁰ *First Update*, UN Doc A/64/651, annex I [108].

²⁹¹ Ibid [110].

²⁹² See Henckaerts and Doswald-Beck, above n 59, 54.

²⁹³ *McGowan Davis Report*, UN Doc A/HRC/16/24, [29].

²⁹⁴ *Gaza Report*, UN Doc A/HRC/12/48, [537]. For the contents of the law on warnings, see Rogers, above n 131, 99–100.

²⁹⁵ *Gaza Report*, UN Doc A/HRC/12/48, [531]–[536].

including punishing some of the perpetrators, irrespective of the leniency or harshness of the penalties imposed. Yet Israel either appears to have failed to investigate the attacks on the hospitals or is still carrying out further inquiries on them.

D *The Use of Certain Weapons*

Chapter XII of the *Gaza Report* briefly considers ‘the use (or abuse) of white phosphorous, the use of flechette missiles, the use of so-called dense inert metal explosive ... munitions, and the use of depleted uranium’.²⁹⁶ While the first three areas were examined in some detail, the allegation of the use of depleted uranium was not investigated due to time constraints. As a current humanitarian concern,²⁹⁷ the use of WP rightly attracted priority attention of the Mission. Israel did not deny its use of WP during the Gaza war stating that it was ‘used throughout the ground phase of the operations’.²⁹⁸ Its use ‘is not proscribed under current international law’, even in ‘urban areas’, and it may be useful as an ‘obscurant’ during military operations.²⁹⁹ Nevertheless, the Mission said that the IDF ‘were systematically reckless in determining to use [WP] in built-up areas ... in and around areas of particular importance to civilian health and safety’.³⁰⁰ Their use against the UN premises, hospitals, and civilian houses were particularly condemned. The Panel was also ‘impressed by the severity and sometimes untreatable nature of the burns caused by the substance’.³⁰¹ After conducting a special investigation on the use of WP however, Israel reiterated in its *Second Update*, that its policy of the use of WP was ‘consistent with Israel’s obligations’³⁰² under IHL, in spite of the fact that the harm caused by these munitions (for example, on the UN compound) ‘was more extensive than the IDF had anticipated’.³⁰³

Nonetheless, the *Gaza Report* rightly suggested that ‘the use of white phosphorus in built-up areas’ should be banned.³⁰⁴ The Tomuschat Committee noted ‘the establishment of a clear doctrine and strict orders on the use of munitions containing white phosphorous’ by Israel as a positive development.³⁰⁵ More specifically, the *Second Update* refers to the prohibition of using WP ‘near sensitive sites (including the requirement of a several hundred meters buffer zone)’.³⁰⁶ This position seems consistent with, for example, the UK practice but the latter went to the extent of expressly banning their direct use against

²⁹⁶ Ibid [886]. For a discussion of similar issues, but excluding white phosphorous, see *Fact-Finding on Georgia Russia*, above n 35, vol II, 345–50.

²⁹⁷ See Human Rights Watch, *Rain of Fire: Israel’s Unlawful Use of White Phosphorus in Gaza* (Report, 25 March 2009) <<http://www.hrw.org/sites/default/files/reports/iopt0309web.pdf>>.

²⁹⁸ *Gaza Report*, UN Doc A/HRC/12/48, [887]. See also *First Update*, UN Doc A/64/651, annex I [117]–[120].

²⁹⁹ *Gaza Report*, UN Doc A/HRC/12/48, [901].

³⁰⁰ Ibid [894]. See also *Second Update*, UN Doc A/64/890, annex I [95].

³⁰¹ *Gaza Report*, UN Doc A/HRC/12/48, [895].

³⁰² *Second Update*, UN Doc A/64/890, annex I [97].

³⁰³ Ibid [96].

³⁰⁴ *Gaza Report*, UN Doc A/HRC/12/48, [901].

³⁰⁵ *Tomuschat Report*, UN Doc A/HRC/15/50, [42].

³⁰⁶ *Second Update*, UN Doc A/64/890, annex I [96].

‘personnel’.³⁰⁷ The question, however, is whether WP causes ‘untreatable burns’ as witnessed in the Gaza conflict (and other conflicts like Iraq), why is it not possible to consider them as illegal weaponry and a true candidate for a complete ban?³⁰⁸

Similarly, the Mission submitted that ‘the rockets manufactured in the Gaza Strip are fashioned from rudimentary materials, such as hollow metal pipes. They are relatively unsophisticated weapons and lack a guidance system, and so cannot be aimed at specific targets’,³⁰⁹ and therefore are an illegal means of warfare deployed by Palestinian armed groups.

In short, the Mission’s observation concerning the inability to treat wounds inflicted by WP is an important addition to the debate over the legality/illegality of the use of WP. The idea of establishing permanent restrictions on ‘their use in urban areas’³¹⁰ seems to be an implied endorsement of the Mission’s recommendation. However, the Mission did also underline concerns over the deployment of indiscriminate but unsophisticated weaponry by Hamas fighters as an apparent violation of the law. The credibility and implications of this and previous assertions of the Mission (on deliberate and indiscriminate attacks, and the duty of precaution) to civilian protection and UN fact-finding will now be assessed in the light of the core features of fact-finding (as considered above in Part I).

V CREDIBILITY AND IMPLICATIONS

A *Credibility*

The credibility of the *Gaza Report* has been challenged in three particularly important ways: consent of the parties, impartiality and the consistency of the exercise.

1 *Consent*

One of the unique features of the Mission (compared to the Darfur and Georgia war inquiries) was that it was conducted without securing the will of one of the parties to the conflict, Israel. Moreover, the findings and conclusions were justifiably, or in some few cases unjustifiably, focused on Israel and not on Hamas’ armed groups. While it was a risky move to establish and deploy a fact-finding mission to this complex situation in the absence of genuine consent from

³⁰⁷ William H Boothby, *Weapons and the Law of Armed Conflict* (Oxford University Press, 2009) 244–6.

³⁰⁸ For a comprehensive account and novel perspective on the use and legality of white phosphorous, see Mark Cantora, ‘Israel and White Phosphorus during Operation Cast Lead: A Case Study in Adherence to Inadequate Humanitarian Laws’ (2009) 13(1) *Gonzaga Journal of International Law* 2 <<http://www.gonzagajil.org>>. See also Roman Reyhani, ‘The Legality of the Use of White Phosphorous by the United States Military during the 2004 Fallujah Assaults’ (2007) 10 *Journal of Law and Social Change* 1. For general rules on the use of weaponry, see Henckaerts and Doswald-Beck, above n 59, ch 20; Green, above n 161, 221–3; Ian J MacLeod and Anthony P V Rogers, ‘The Use of White Phosphorous and the Law of War’ (2007) 10 *Yearbook of International Humanitarian Law* 75.

³⁰⁹ *Gaza Report*, UN Doc A/HRC/12/48, [1618].

³¹⁰ *Second Update*, UN Doc A/64/890, annex I [97].

both sides or a binding UNSC resolution, the imposition of the inquiry by the UNHRC, endorsed by the UNGA, was justified by the fact that the norms at issue are not reciprocal duties but are owed to the international community as a whole, as rightly noted by the Mission citing the ICJ's *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* ('*Wall Advisory Opinion*').³¹¹ The *erga omnes* factor may well distinguish traditional fact-finding from that of contemporary fact-finding in cases where IHL or grave violations of human rights are involved.³¹² Yet the lack of consent resulted in two rather contradictory responses from the parties to this conflict. Israel formally refused to cooperate with the Mission (and its follow-up committees) which created a serious impediment to their work. Israel's decision may be justified on the basis that the UNHRC resolution which led to the establishment of the Mission was 'biased'; yet, given that the mandate of the Mission was clearly to probe the actions or omissions of both sides, and that the Mission gave Israel assurances of impartiality, the Israeli refusal may not be entirely convincing. Despite its refusal to recognise the Mission, however, Israel carried out several inquiries, some of which led to criminal or disciplinary action. This must be commended, although if Israel had engaged with the Mission, by cooperating with it and even challenging it, the quality of the process and its outcomes might have been improved.³¹³ It should be noted however, that even though the Palestinian side (Hamas) consented to the Mission and 'cooperated' with it, the Palestinian side nonetheless failed, or was unable, to conduct credible investigations as required. This demonstrates that securing consent, although a crucial prerequisite for UN fact-finding, does not necessarily guarantee full and genuine engagement by concerned parties, especially by non-state actors. This is notwithstanding the efforts made by the Palestinian authorities to genuinely and responsibly investigate, inter alia, alleged violations of IHL. Nonetheless, the giving of consent must help rather than hinder the work of fact-finding.

2 Fairness and Impartiality

Israel disputed the focus on their acts and the blame laid on them in the *Gaza Report*. It also argued that some of the procedural methods used by the Mission, such as the televised hearing held in Gaza, were evidence of partiality and unfairness. Judge Goldstone's 'retraction' on the core findings of the Mission tends to reinforce this criticism. Indeed, the Mission could have been more cautious about its conclusions and more forthcoming about its failings, including the bold vindication of Hamas armed groups from the allegations of using and abusing civilian areas as shields and the failure to invoke grave breaches against them, and some of the conclusive remarks made against Israel, such as the violation of the proportionality rule without having regard or access to IDF

³¹¹ *Wall Advisory Opinion* [2004] ICJ Rep 136, cited in *Gaza Report*, UN Doc A/HRC/12/48, [1934].

³¹² *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, 17th spec sess, UN Doc A/HRC/S-17/2/Add.1 (23 November 2011). The inquiry that was mandated by the UNHRC revealed the commission of crimes against humanity perpetrated by the Syrian regime against its people.

³¹³ See, eg. *Fact-Finding on Georgia Russia*, above n 35, vol III, where the inquiry was given access to documents and other evidences possessed by Georgia and Russia which lead to an informed assessment of the situation the allegations therein.

intelligence and information. Interestingly, some commentators have criticised the Mission for focusing on Hamas' violations of IHL and for 'unfairly' comparing 'war crimes by Palestinians to those of Israel'.³¹⁴

More generally, those who opposed the *Gaza Report*, particularly the US, based their argument on its 'flaws' of 'singling out Israel' and including a section on matters of 'settlement and the control of Jerusalem'.³¹⁵ Such an expansion of the inquiry beyond the actual conflict to include a long standing issue underlying it may well be a reasonable ground to challenge its fairness and impartiality.³¹⁶ However, it remains a controversial point as conducting a fact-finding mission on a specific conflict may well necessitate looking at the broader context of that conflict. To ignore context is to create an artificially narrow scope which necessarily leads to skewed conclusions that conflict with the direct experiences of those involved, thus damaging the status of the Mission in the eyes of those affected by the conflict on both sides. This may well be the reason why the majority in the UNHRC and in the UNGA endorsed the *Gaza Report* as fair and proper.³¹⁷

In the context of media commentary however, academics have expressed more divergent views. Professor Avi Bell considered the *Gaza Report* to be a 'cocktail of lies and distortions',³¹⁸ while Professor Antonio Cassese thought that the Mission 'has carefully established the details of attacks and deaths and injuries of civilians, and has systematically analysed facts in the light of applicable international standards'.³¹⁹ Despite its claimed deficiencies, it appears that the Mission did make a serious attempt to elucidate the facts arising from the behaviour of both sides and to relate them to the law. At the same time, the extensive legal analysis and reference made, inter alia, to IHL raises the issue of whether the exercise was really fact-finding as opposed to 'law-finding'. The Mission was mandated not only to investigate the alleged facts but also examine them in the light, inter alia, of IHL (as discussed in Part II). Thus, while some of its legal analysis (eg, on the starvation of the civilian population) may be criticised, discussing and applying the relevant IHL rules to facts was based on its mandate. Neither was it unique to this Mission.³²⁰ It may generally be said that more emphasis should have been placed on facts rather than the law, an

³¹⁴ See, eg, Richard Falk, 'Goldstone Breathes New Life into Gaza Report', *Al Jazeera* (online), 20 April 2011 <<http://www.aljazeera.com/indepth/opinion/2011/04/2011417115920432106.html>>.

³¹⁵ MacFarquhar, above n 46, [12].

³¹⁶ See, eg, Yoram Elron, 'UN's Goldstone Report Gives Comfort to Terrorists: It Undermines Efforts to Forge a Lasting Peace with Moderate Palestinians', *Montreal Gazette* (Montreal), 18 October 2009, A15.

³¹⁷ See *UNGA Press Release 2009*, UN Doc GA/10883.

³¹⁸ Avi Bell, 'Richard Goldstone's Legacy', *The Jerusalem Post* (online), 4 March 2011 <<http://www.jpost.com/Opinion/Op-EdContributors/Article.aspx?id=214992>>.

³¹⁹ Antonio Cassese, above n 102. See also Joseph H H Weiler, 'Gaza — From Warfare to Lawfare' (2009) *20 European Journal of International Law* 259, 261:

the messy factual matrix should not mean that we throw up our hands in despair. There can and should be, and there are indications that, indeed, there will be a credible and impartial fact-finding inquiry. Once credible facts are established the time for judging will be ripe.

³²⁰ The Darfur, Georgia–Russia, Libya and Syria inquiries all involved extensive legal analysis, although the degree varies from report to report.

approach which was clearly opted for in the fact-finding mission on the Georgia–Russia war.

3 Consistency

The 2011 ‘rift’ created between the Chair and the other three members, which was unique and unprecedented, may well raise questions of credibility and impartiality of the *Gaza Report*. Based upon Israeli investigations into the conduct of individual soldiers and Hamas’ failure to conduct inquiries, Judge Goldstone reversed his earlier position and concluded that ‘the allegations of intentionality by Israel were based on the deaths of and injuries to civilians in situations where our fact-finding mission had no evidence on which to draw any other reasonable conclusion’.³²¹ This was positively received by the US Senate and others but the rest of the members of the Mission strongly defended their conclusions, which were made ‘after diligent, independent and objective consideration of the information related to the events within our mandate and careful assessment of its reliability and credibility’.³²² Countries such as the UK stood by the original report. Notably, the three other members added that reconsideration was unjustified ‘as nothing of substance has appeared that would in any way change the context, findings or conclusions of that report’ and that it was for the UN ‘to take cognisance of any evidence subsequently gathered’ as the *Gaza Report* is ‘an official UN document’ which is endorsed and overseen by the UNGA and the UNHRC.³²³

Such an unfortunate but intriguing ‘rift’ among Mission members raises not only the issue of ensuring the impartiality and objectivity of a fact-finding mission before, during and after publishing their report, but also the need for a clear UN procedure by which subsequent concerns of members and those who are directly impacted by a fact-finding report can be accommodated. The problem here is how to protect the integrity of a UN fact-finding report when there are revelations of new evidence at a later stage, leading to pressure to modify assertions made in it.

In summary, even though the majority of states and members of the Mission believe that the original fact-finding is still credible and reliable, the credibility of the *Gaza Report* may be questioned from different angles. These include the absence of consent, doubts over its impartiality, the extent to which it made factual judgments and references to law, and the later retraction made by Judge Goldstone. Nonetheless, the seriousness, magnitude and nature of the alleged breaches, the complexity of the conflict and the parties therein, as well as the efforts made by the Mission(s) to find the truth and engage the parties, provide strong evidence for the overall credibility and validity of the exercise. As a result, the Mission and its report have particular implications for IHL and UN fact-finding.

³²¹ Goldstone, above n 127, 21.

³²² Jilani, Chinkin and Travers, above n 128.

³²³ Ibid.

B Implications

In substantive and doctrinal senses, the Mission (along with its follow-up committees) seems to have fairly contributed to illuminating the facts of what happened in Gaza, and the IHL rules which were at stake in the conflict. The elucidation of facts by this exercise, although not without limitations and shortcomings, as illustrated above, has led to the documenting of several specific cases and narratives of alleged violations of the prohibitions of deliberate, indiscriminate and negligent attacks against civilians, most of which still require further action by both sides.³²⁴ This means that the Mission has carried out one of the primary tasks of fact-finding (as discussed in Part I). However, critics and the parties to the conflict contested the factual findings and the conclusions drawn from them, notwithstanding the admission of some incidents of wrongdoing, errors and regrets by Israel. In spite of their discontent, both sides carried out investigations, or claimed to do so, apparently as a result of being pressured, encouraged or reminded of their duties by this widely reported and debated fact-finding. To some extent, therefore, the revelation or documentation of the alleged facts by the Mission has possibly exerted influence upon domestic behaviour in Jerusalem and Ramallah, although not in Gaza at least in respect of conducting further investigations.

Furthermore, the Mission's legal analysis of the application of relevant IHL rules to this complex urban warfare not only enlightens the implementation of *jus in bello* with regard to civilian immunity but also challenges the strict application of the law. The Mission systematically and thoroughly examined the customary rules of distinction (codified in *Additional Protocol I*), as applied to the Gaza police, public buildings and Palestinian civilians and their infrastructure; discrimination, as applied to southern Israeli civilians and UN facilities; precaution, as applied, for example, to the UN-run school and its vicinity and launching attacks against the IDF while they were stationed in urban dwellings; and the limitations upon the use of certain weapons (WP in particular). The legal analysis generally found strong arguments in favour of the notion of civilian protection (compared, for example, to the potential risk involved for those who were in the battlefield).

Critics argue that the Mission's 'fundamental misinterpretation' of these crucial principles of IHL based upon Palestinian civilian casualties (which do not constitute violations of the law, without establishing clear intent to do so, and which disregard the use and abuse of civilians and civilian targets by Palestinian armed groups) will encourage 'insurgents and terrorists' to ignore the law.³²⁵ Also, state armed forces will be forced either to refrain from conducting appropriate military operations to avoid such international blame or ignore IHL as a result of such improper invocation and interpretation of the law — all these endanger the duty to protect civilians.³²⁶ Nonetheless, while some of the legal conclusions made in favour of the Palestinian side (eg, on the issue of human shields) and against the IDF (eg, on the charges of starving civilians and

³²⁴ *Tomuschat Report*, UN Doc A/HRC/15/50, [61]–[64]. See also *McGowan Davis Report*, UN Doc A/HRC/16/24, [79], [83].

³²⁵ See, eg, Blank, above n 5; Elron, above n 316.

³²⁶ Blank, above n 5, 402. See also Elron, above n 316.

disproportionate attacks) may be criticised as considered earlier, in Part III(A) and III(B), the overall legal assertions of the Mission concerning Palestinian and Israeli civilian protection appear to be legally defensible. For example, Israel has introduced new restrictions and orders applicable to urban warfare, as part of its 'lessons learnt'.³²⁷

Additionally, one of the most thought provoking legal assertions made by the *Gaza Report*, which may challenge the strict application of IHL, concerns the responsibility of the Gaza de facto authorities to prevent civilian attacks from within their territories and their duty to investigate alleged violations of civilian protection although they were said to have been different from the armed groups there for the purpose of applying the rule of distinction. This can be criticised or commended. It may be criticised because the question as to whether the authorities have effective (or general) control over the militants could have been investigated further, in light of (or with some analogy to) the International Law Commission's *Draft Articles on State Responsibility of States for Internationally Wrongful Acts* of 2001.³²⁸ However, taking the complex nature of the relationship between the armed groups and the Gaza de facto authorities and some of their statements into account, the Mission's innovative approach may be commended as a positive development. This appears to be a well-balanced position, which both argues in favour of the protection of the authorities from Israeli attacks and also requires some level of responsibility from them to protect civilians on the basis of their presumed informal connections with, or influence over, Hamas' military wing.

The other innovation in, or perhaps articulation of, the interpretation of the law is that indiscriminate attacks against civilians may amount to deliberate attacks depending on the circumstances and evidence available. While it was said that Israeli attacks upon the UN-run school and its vicinity were indiscriminate, the *Gaza Report* quite vaguely concluded that these were not deliberate attacks.³²⁹ In contrast, Hamas' indiscriminate attacks against southern Israel were intended to terrorise and attack the civilians there and thus constituted deliberate military action.³³⁰ Nonetheless, the fact that the *Gaza Report* did not address the question of whether this was a grave breach in the context of art 85 of *Additional Protocol I* may be significant and carry implications for the credibility of the *Gaza Report*. Finally, the *Gaza Report's* observation on the use and permanent impact of WP is significant and has led to the review of Israeli doctrine, as discussed above.

Overall, the *Gaza Report* has provided a controversial but plausible legal analysis as applied to some of the core rules and protections afforded to civilians and civilian targets. While the analysis is not without defects, it succeeded in

³²⁷ *Second Update*, UN Doc A/64/890, annex I [79]–[88].

³²⁸ See International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, UN GAOR, 56th sess, Supp No 10, UN Doc A/56/10 (3 August 2001) 112–17, emphasising that 'no Government can be held responsible for the conduct of rebellious groups committed in violation of its authority, where it is itself guilty of no breach of good faith, or of no negligence in suppressing insurrection'. See also *Home Frontier and Foreign Missionary Society of the United Brethren in Christ (United States v Great Britain)* (1920) 6 RIAA 42, 44.

³²⁹ *Gaza Report*, UN Doc A/HRC/12/48, [687].

³³⁰ *Ibid* [1688].

generating serious and valuable doctrinal debate on the application and interpretation of the law as well as some practical and accountability measures.

Based on the alleged breaches and questions raised concerning the behaviour of the parties (and some non-parties) to the conflict, among other findings, the Mission considered questions of responsibility and the duty to make reparations of both sides (as discussed in Part IV). Two of these are of great importance. The duty ‘to investigate’ IHL violations and ‘prosecute if appropriate and try perpetrators’ by Israel and the Palestinian authorities,³³¹ and the international community’s role ‘to ensure compliance by Israel’ with IHL, was expressly stated by the International Court of Justice in the *Wall Advisory Opinion*.³³² In addition, a series of recommendations and calls have been made to various international actors (the UNHRC, UNGA, UNSC and the Prosecutor of the International Criminal Court) and to the parties themselves, to take various measures, including the adoption of and action upon the details of the *Gaza Report*.³³³ It is of note that ‘a follow up of the Inquiry’ by UN bodies has ‘been emphatically recommended’.³³⁴

Consequently, on 16 October 2009, the UNHRC adopted the *Gaza Report* by majority vote.³³⁵ However, for political reasons, the UNSC has not yet formally engaged with the *Gaza Report*, despite the Mission’s specific calls on the UNSC to act.³³⁶ The UNGA adopted the *Gaza Report*³³⁷ and called upon both sides to

³³¹ Ibid, [1963]. For a detailed discussion and slightly different approach, see Michael N Schmitt, ‘Investigating Violations of International Law in Armed Conflict’ (2010) 2 *Harvard National Security Journal* 31 (emphasising in a thorough and well-thought-out article that IHL does not oblige states — or parties to a conflict — to investigate all allegations rather those which are based on credible evidence).

³³² *Gaza Report*, UN Doc A/HRC/12/48, [1912]. See also *Wall Advisory Opinion* [2004] ICJ Rep 136, 202.

³³³ *Gaza Report*, UN Doc A/HRC/12/48, ch xxxi.

³³⁴ Ibid [1967]–[1979].

³³⁵ See *The Human Rights Situation in the Occupied Palestinian Territory, Including East Jerusalem*, UN Doc A/HRC/RES/S-12/1. The *Gaza Report* was adopted by a majority of 25 (of the 47 members) to 6, with 11 abstentions and 5 casting no vote. In contrast, *Report of the Human Rights Council on its Ninth Special Session*, Human Rights Council, 9th spec sess, 3rd mtg, UN Doc A/HRC/S-9/2 (27 February 2009), was adopted with majority of 33 to 1 and 13 abstentions.

³³⁶ For the recommendations made, see *Gaza Report*, UN Doc A/HRC/12/48, [1969]. For the attitude of members of the UNSC, including the US, on the *Gaza Report*, see Shlomo Shamir, ‘Security Council Rejects Special Goldstone Report Session’, *Haaretz* (online), 8 October 2009 <<http://www.haaretz.com>>. See also Ronda Hauben, ‘Goldstone Report Transmitted to UN Security Council Part II’, *OhmyNews* (online), 27 November 2009 <http://english.ohmynews.com/articleview/article_view.asp?no=385817&rel_no=1>.

³³⁷ See *UNGA Press Release 2009*, UN Doc GA/10883:

by a recorded vote of 114 in favour to 18 against, with 44 abstentions, adopted a resolution giving Israel and the Palestinians three months to undertake ‘independent, credible investigations’ into serious violations of international humanitarian and human rights law committed during the conflict in Gaza.

carry out ‘credible’ investigations into violations.³³⁸ The UNHRC, in light of the UNGA’s decision, established two follow-up expert Committees.³³⁹ Before discussing the outcomes of the call by the UNGA, it is notable that the ICC Prosecutor hinted at his intention not to investigate the allegations at issue by saying that ‘it was still unclear whether the Court had any jurisdiction over any cases that might arise’ from the conflict, and that he would discharge ‘his duty to promote national investigations’.³⁴⁰ This response has merit because of the jurisdictional and practical issues and impediments involved.³⁴¹

A sound argument can be made in favour of national investigations as most of the parties, if not all, have made significant progress in complying with UNGA requests and IHL duties to investigate (and prosecute) alleged breaches, as shown in their reports submitted to the UNGA, which were also extensively used and referred to, by the UN follow-up committees. For instance, the *McGowan Davis Report* concluded that Israel ‘has dedicated significant resources to investigate over 400 allegations of operational misconduct in Gaza reported by the Fact-Finding Mission and others’.³⁴² Out of these the Israeli Military Advocate General³⁴³ has conducted 52 criminal investigations. Some soldiers

See also *UNGA Follow-Up to the Gaza Report*, UN Doc A/RES/64/10. The UNGA also requested that the *Gaza Report* be passed on to the UNSC, and that a Conference be convened ‘on measures to enforce ... *Convention [IV]* in the Occupied Palestinian Territory, including East Jerusalem’. For continuous endorsement of the fact-finding mission by the UNGA, see *UNGA Follow-Up to the Gaza Report II*, UN Doc A/RES/64/254. See also *Gaza Report*, UN Doc A/HRC/12/48, [1971], highlighting that in the event of failure by the UNSC ‘the General Assembly may consider whether additional action within its powers is required in the interests of justice, including under [*Resolution 377 (V)*] on uniting for peace’. See *Uniting for Peace*, UN Doc A/RES/5/377, concerning the responsibility of the UNGA to act when a permanent member of the UNSC blocks a decision or an action. This is despite the fact that art 24 of the *UN Charter* allocates to the UNSC primary responsibility to maintain international peace and security. For a discussion on the powers of the UNSC and the UNGA on matters of peace and security and the scope of the latter, see Yihdego, *The Arms Trade and International Law*, above n 48, ch 5.

³³⁸ See *UNGA Follow-Up to the Gaza Report II*, UN Doc A/RES/64/254, Preamble: reaffirming the duty to respect IHL and civilian immunity and ‘the need to ensure accountability for all violations’, inter alia, of IHL and calling upon both sides to ‘conduct independent, credible investigations’.

³³⁹ *UNHRC Follow-Up to the Gaza Report*, UN Doc A/HRC/RES/13/9, which established these committees taking into account *UNGA Follow-Up to the Gaza Report II*, UN Doc A/RES/64/254.

³⁴⁰ United Nations, *Press Conference: Luis Moreno Ocampo, Prosecutor of the International Criminal Court, to Brief following His Meeting with the Security Council on Sudan* (4 December 2009) UN Webcast Archives <webcast.un.org/rangen/ondemand/press-conference/2009/pc091204pm.rm>. For a detailed legal analysis on the subject (with a focus on non-state-actors), see Yaël Ronen, ‘ICC Jurisdiction over Acts Committed in the Gaza Strip: Article 12(3) of the *ICC Statute* and Non-State Entities’ (2010) 10 *Journal of International Criminal Justice* 1093.

³⁴¹ See Cassese, above n 102, observing that ‘a failure to push the recommendations of the Goldstone report will undermine the ... ability to press for justice in places such as Kenya, the Congo and Darfur’. Of course, questions about the fairness and uniformity of today’s international criminal justice persist, however these lie outside the remit of this article.

³⁴² *McGowan Davis Report*, UN Doc A/HRC/16/24, [77].

³⁴³ The Israeli Military Advocate General (‘MAG’) is an IDF organ which is primarily responsible for investigating operational misconduct and refer cases for prosecution, when necessary. Its decisions are subject to review by the Attorney-General and the Supreme Court of Israel. Yet, the MAG is also a legal advisor to the chief of Staff and thus his full independence has been questioned by the Mission and subsequent Expert Committees: see, eg, *ibid* [40].

have been subjected to criminal indictment and two senior military commanders have been disciplined because of their wrongdoing in the operation. Given that Israel is a democracy with commitment to the rule of law as demonstrated, for example, by the establishment of the Turkel Commission, which was charged to investigate the flotilla incident of 2010,³⁴⁴ such positive and encouraging actions may not be surprising. Nonetheless, several alleged cases which implicated the IDF ‘remain unresolved or with an unclear status two years after the events took place’³⁴⁵ and ‘all allegations of breaches’ considered in the *Gaza Report* ‘have not been adequately investigated’,³⁴⁶ including those concerning decision and policy makers. These issues, amongst other things call into question the promptness and effectiveness of the investigations conducted by Israel.³⁴⁷

Similarly, while the Palestinian Authority ‘had undertaken independent and impartial investigations in a comprehensive manner’,³⁴⁸ they were not able to investigate the rocket shelling against southern Israel. They have reported the reasons as being the non-cooperation on the part of Hamas and Israel to access the alleged crime and target sites to interview people there.³⁴⁹ Sadly, the Gaza de facto authorities, despite their claims that they have ‘conducted criminal prosecutions’, have failed to conduct or to substantiate such claims. They have particularly failed to probe the indiscriminate rocket shelling of southern Israel.³⁵⁰ All of this has meant that civilian victims of the conflict, both Palestinian and Israeli, have not yet received fair and prompt justice.³⁵¹

Nonetheless, the *Gaza Report*’s implications for IHL and UN fact-finding, both at international and domestic levels, must not be underestimated. First, the empowerment (and readiness) of the UNGA to endorse or oversee a fact-finding mission with the purpose of probing serious breaches of civilian immunity during armed conflict, particularly when the hands of the UNSC are tied as a result of political division among its members, is of great importance. Although the decisions of the UNGA may not be legally authoritative compared with decisions of the UNSC, the Gaza experience shows that states and non-state actors tend to respect the UNGA and its demands, and therefore make an attempt to comply with their general duty to cooperate with this most representative principal organ of the UN. This approach is principally and institutionally compatible with the duty of the UNGA to sustain world peace, security and justice, as shown, inter alia, in the *UN Charter* and the *UN Declaration on*

³⁴⁴ The Turkel Commission was established by the Israeli Government to investigate ‘complaints and claims raised in relation to violations of the laws of armed conflict that is practiced in Israel in general’: see Turkel Commission, ‘The Public Commission to Examine the Maritime Incident of 31 May 2010: Part One’ (Report, 23 January 2011) 24 [12]

³⁴⁵ Ibid [43].

³⁴⁶ Ibid [47].

³⁴⁷ Ibid [43]–[44].

³⁴⁸ Ibid [53].

³⁴⁹ Ibid [49]–[58]. Nonetheless, the Independent Commission carried out investigations on violations of international human rights in a very comprehensive and impartial manner as has been recognised by both UN expert committees.

³⁵⁰ Ibid [88]–[90]. However, at [89], the Committee acknowledged the efforts made by the authorities to ‘provide specific information concerning criminal investigations into alleged human rights violations committed by their security forces’.

³⁵¹ Ibid [71]–[72].

Fact-Finding.³⁵² Relating to this is the establishment of Follow-Up Expert Committees by the UNHRC, which must be seen as a success story. The two committees dealt with official reports, additional witnesses, victims, civil society and others accounts, and media reports to carry out their mandates, reviewing the appropriateness, effectiveness and promptness of the actions taken by the parties to the conflict in implementing the Gaza fact-finding recommendations, as endorsed and requested by the UNGA. The *McGowan Davis Report*, for example, reviewed developments occurring over nine months beginning in September 2010, when the first Committee produced its report. Both Committees have submitted their reports to the UNHRC while the parties submitted their reports to the UNGA. Many scholars of IHL will agree that the IHL regime lacks institutional and monitoring frameworks.³⁵³ The probing of alleged IHL violations in Gaza by instituting fact-finding under the auspices of the UN adds to the recent international measures³⁵⁴ which appears to considerably improve the application (and jurisprudence) of IHL.

Secondly, the exercise revealed that fact-finding's primary objective must be to encourage, remind, oversee and to put pressure on those who are imbued with a direct duty to investigate and prosecute perpetrators at home, as emphasised by the Mission and the UNGA. This must include non-state actors. This is in line with the duty under IHL to investigate and prosecute (as outlined in Part II). Notwithstanding the significant measures taken by Israel and the Palestinian authorities, much remains to be done on the criminal or civil justice fronts. Thirdly, the Mission has shown that fact-finding is not merely about criminal prosecutions or about liabilities but also about learning lessons. Israel introduced new orders and stringent procedures on urban warfare and civilian targets and the use of WP by its military, with the intention of mitigating civilian collateral damage. It has also assigned a legal officer to each battalion of the IDF who is responsible for advising on matters of civilian protection. Although the Palestinian Authority's devotion to, and experience in, conducting an independent international inquiry and Hamas' compliance with the establishment of a Commission of Inquiry are notable developments, it is not clear what lessons the Hamas armed groups or the Gaza de facto authorities have taken, if any, from the Gaza conflict and the *Gaza Report*.

³⁵² See *UN Charter* arts 11(2), 13 and 14, for the powers of the UNGA. See also *Uniting for Peace Resolution*, UN Doc A/RES/5/377; *2005 World Summit Outcome*, GA Res 60/L.1, UN GAOR, 60th sess, Agenda Items 48 and 121, UN Doc A/60/L.1 (20 September 2005) [139], which refers to the notion of responsibility to protect populations. This is an evolving notion which certainly embraces grave violations of IHL involving civilians. See, eg, the UNSC's direct invocation of the responsibility to protect in *Resolution 1973* regarding Libya: SC Res 1973, UN SCOR, 66th sess, 6498th mtg, UN Doc S/RES/1973 (17 March 2011).

³⁵³ See, eg, Green, above n 161, 306–14.

³⁵⁴ *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General*, UN Doc S/2005/60; *Fact-Finding on Georgia Russia*, above n 35; and the Ethiopia–Eritrea Claims Commission's final and partial awards established under the *Agreement between the Government of the State of Eritrea and the Government of the Federal Democratic Republic of Ethiopia for the Resettlement of Displaced Persons, as well as Rehabilitation and Peacebuilding in Both Countries*, Ethiopia–Eritrea, 2138 UNTS 93 (signed and entered into force 12 December 2000) art 5, have all dealt with IHL violations and even compensation issues.

All of these considerations have understandably led to both optimistic and sceptical views on the exercise. Those who are sceptical of the establishment and successes of the Gaza fact-finding may submit that the whole exercise is futile for various reasons. Since the publication of the *Gaza Report*, Hamas has continued to launch rockets against Israel and Israeli soldiers who allegedly killed Palestinian civilians.³⁵⁵ Hence, the very core objective of fact-finding, which is to resolve disputes and tensions, in effect to mitigate civilian suffering, does not seem to have been attained with respect to this conflict. Moreover, the parties to the conflict have not taken it seriously,³⁵⁶ especially Hamas' armed groups. The conflict and its chaotic aftermath were by-products of the broader political and legal issues, which require robust diplomatic and UN action. The recent prisoner swap between Israel and Hamas³⁵⁷ attests to the power of negotiations rather than the gathering of evidence through fact-finding. As considered earlier, fact-finding is highly political. It has divided not only the parties to the conflict³⁵⁸ but also powerful states such as the US and European countries and thus the problem best suits a political solution. Most importantly, non-compliance with recommendations of the *Gaza Report* by the parties has led to nothing but political rhetoric. According to this view, the overall outcome was negative, leading to unnecessary and unprecedented division between members of the Mission.

However, a more positive view is that the Mission was a worthwhile exercise. Not least, it was a manifestation of the duty of the UN, in effect the international community, to act in response to substantial civilian casualties, terror and widespread destruction of property. It is evident that Israel and the Palestinian

³⁵⁵ *McGowan Davis Report*, UN Doc A/HRC/16/24, [65]. The Committee was informed by a letter sent from the International Association of Jewish Lawyers and Jurists, stating that 'between 10 December and 10 March 2011, 78 rockets and 96 mortars were launched against southern Israel'. Regarding the Palestinian side, the *McGowan Davis Report* notes, at [64]: 'Palestinian civilians continue to be injured and killed by Israeli soldiers' and 'Palestinian children are routinely arrested in the middle of the night and taken off to military detention'. For a discussion of the most recent conflict between Israel and Palestinian militants (and not necessarily Hamas), see Brahim Barzak and Karin Laub, 'Fighting between Israel, Gaza Continues for 3rd Day', *The Washington Post* (online), 12 March 2012 <http://www.washingtonpost.com/world/middle_east/fighting-between-israel-gaza-continues-for-3rd-day/2012/03/11/gIQAehD65R_story.html>.

³⁵⁶ See, eg, David Kaye, 'The Goldstone Report' (2009) 13(16) *American Society of International Law Insight*, <<http://www.asil.org/files/insight091001pdf.pdf>>, observing that despite much that deserves to be read in it, the Goldstone Report is having limited influence over Israel. Unlike past domestic Israeli investigations into military policy, no major internal movement to support the Report's conclusions appears likely, and the United States is not pushing — at least publicly — for Israel to take the Report's conclusions seriously.

Likewise, the *Tomuschat Report* emphasised the lack of 'serious effort to address the allegation' by the Gaza authorities: see *Tomuschat Report*, UN Doc A/HRC/15/50, [100].

³⁵⁷ For facts of this issue, see Michele Chabin, 'Israeli-Palestinian Prisoner Swap Opens Doors to New Worries', *USA Today* (online), 18 October 2011 <<http://www.usatoday.com/news/world/story/2011-10-17/israel-palestinian-prison-swap/50806488/1>>.

³⁵⁸ See *UNGA Follow-Up to the Gaza Report*, UN Doc A/RES/64/10; *UNGA Press Release 2009*, UN Doc GA/10883, in which the Permanent Observer for Palestine stated that '[t]onight is a very important night in the history of the General Assembly; in the history of fighting impunity and seeking accountability'. In contrast, 'Israel's delegate said the text disregarded Israel's inherent right to defend its citizens and provided yet another pretext to bash Israel at the United Nations'.

Authority have acted upon the recommendations of the Mission. This is a real achievement, particularly when assessed in the context of the complexity of the Israel–Palestine problem, as the Mission was not meant to resolve the entire conflict nor replace the role of other processes such as diplomatic negotiations between and among the parties. The fact-finding and subsequent developments have also promoted international and domestic awareness about, and engagement with,³⁵⁹ the harm inflicted upon Palestinian and Israeli civilians, which may well shape the relevant policies of both sides in future incidents. Despite the strengths and weaknesses of the exercise, the attempt to uphold IHL by UN organs in this tragic, complex and highly divisive conflict through the method of fact-finding far outweighs the criticisms that have been levelled against the Gaza mission.

VI CONCLUSION AND SUGGESTIONS

The efforts made by the Mission and subsequent UN Follow-Up Committees to find the truth and applicable law are commendable. However, a lack of cooperation and direct evidence from both sides seriously affected the richness of some aspects of the *Gaza Report* (eg, the behaviour and tactics of Palestinian militants in built-up areas and the use of certain weapons by Israel). Largely, the law was correctly applied to the known facts. Yet, some of its legal (and factual) findings were innovative and may lead to ambiguous outcomes. In the last two or more years, the Gaza fact-finding led to UNHRC and UNGA resolutions and decisions but not to UNSC action. It has also led to the publication of follow-up expert reports and domestic investigations and some measures, especially by Israel and the Palestinian authorities, but not by Hamas. Despite the subsequent disagreement that arose between members of the Mission, which may have damaged or perhaps strengthened UN fact-finding in various ways as discussed above, and despite its other shortcomings, it remains a source of significant intellectual and academic discourse. Some further conclusions and suggestions can be drawn from the analysis above, particularly the examination of the nature and features of fact-finding, the background for instituting the Mission, the most important substantive (factual and legal) inquiries conducted into the protection of civilians in the conflict, and the credibility and wider implications of the exercise.

Fact-finding by the UNHRC and the UNGA, in situations where the UNSC is not able to act due to political rather than legal reasons, is not only essential as part of the response of the international community to such grave crises but is also a persuasive, engaging and influential (rather than confrontational) undertaking to protect the values at stake. The establishment of follow-up committees comprising eminent jurists is a major breakthrough, perhaps a decisive development. Such UN involvement reinforces the duty of those who are involved under IHL to take action when serious violations are allegedly perpetrated against the civilian population. However, impartiality, fairness and firmness from those who sponsor and undertake fact-finding is imperative in investigating the facts and applying the law to all sides. While some level of legal analysis by fact-finding appears to be generally accepted and desirable, the

³⁵⁹ See, eg, *Tomuschat Report*, UN Doc A/HRC/15/50, [9].

focus must remain on investigating and establishing facts, as envisaged in the *UN Declaration on Fact-Finding*.

The importance of UN fact-finding in the protection of civilian populations may become counter-productive unless used and employed with care and caution, including the need to craft resolutions in an unbiased manner and to secure firm and genuine prior *consent* from the parties involved. Otherwise it runs the risk of becoming highly politicised, manipulated for other purposes and constituting a source of tension rather than a source of dispute resolution, justice, accountability and deterrence.

The Gaza case confirms that UN fact-finding cannot truly succeed without securing some level of real cooperation from the parties to a conflict, although an exception may have to be made depending on the circumstances of each case. It has to be stressed that working with UN fact-finding is not only necessary for UN organs to fulfil their duties but also highly beneficial to those (responsible) states or others who are rightly or wrongly implicated in serious violations, either to disprove, or to act upon, alleged breaches of IHL. In this regard, the UN must devise a clear strategy to encourage and reward those who positively cooperate and to identify and warn those who try to manipulate fact-finding solely for political gains. Most importantly, as things stand now, non-compliance with UNHRC and UNGA fact-finding does not have legal consequences, in contrast with UNSC referred fact-finding to the ICC (like the Darfur and Libyan cases) or to a special criminal tribunal (like the Yugoslavia case). It is thus imperative for the UN to put across the message that there are consequences to those who completely ignore UN fact-finding. The UNSC must supplement the efforts of the UNGA in this respect as part of its powers and duties.

For all these reasons and other related experiences of the last couple of decades, the UN must revise its guidelines and procedures on fact-finding, when tackling its most challenging aspects. In particular, the following points deserve further consideration.

First, serious violations of IHL have a major effect on the international order and must constitute the subject of UN fact-finding, irrespective of their association or otherwise with threats to peace. Introducing (or formalising) this in the UN framework may well strengthen the enforcement of civilian protection and the role of the UN in promoting it. The *raison d'être* of this may be explained in terms of both deterrence and UN action. Universal recognition of fact-finding as a necessary tool to oversee compliance with the honouring of civilian protection will send a clear message from the international community to parties in a conflict that their behaviour is being closely watched and that the UN may examine and judge their actions/omissions, if necessary. The UN may also take appropriate action based upon the factual findings established by its fact-finding missions.

Secondly, a close relationship is necessary between various UN bodies, the UNGA and the UNSC in particular, in order to secure the consent of the parties to a conflict and to institute fact-finding with a clear and feasible mandate that provides clarity about the consequences of obstructing the work or ignoring the recommendations of a particular fact-finding mission. When serious violations of humanitarian principles are committed or are alleged to have been committed during armed conflict, a broader involvement and participation of the vital UN

organs (including the UNGA, the UNSC and the UNSG) in fact-finding activities is necessary. This can be done either as a joint enterprise among various UN organs or through the exchange of ideas and experiences. This option may well make UN fact-finding more potent rather than leaving the entire duty to the UNHRC, an important but highly politicised human rights wing of the UN.³⁶⁰ The UN must also cooperate with, and provide leadership for, fact-finding activities carried out by other bodies such as the International Humanitarian Fact-Finding Commission (established by *Additional Protocol I*, art 90), universal human rights treaty bodies and other bodies which may be formed in the future.³⁶¹ Again, fact-finding must be distinguished from the legal or political decision-making process which may follow as a consequence of an inquiry. A series of formal and informal consultations between the two principal organs (the UNGA and the UNSC) is desirable to make UN fact-finding more effective and acceptable.

Thirdly, while the consent of those who are subject to UN inquiry should remain among the principal requirements for instituting fact-finding, the gravity and seriousness of violations, the reliability and ability of the parties to take action and the interests of civilian victims and affected populations must be taken into consideration as a basis for departing from this requirement. In such cases, however, fact-finding must adhere to stringent requirements of procedural fairness. For example, all hearings must be held in private in order to safeguard the fact-finding from being used as a propaganda tool by concerned parties or others, unless all concerned parties agree to the contrary. Moreover, gathering evidence from victims, civil societies and campaigners remains a necessary element of the process because of their capacity to reveal decisive facts. Special attention must be paid to intelligence held by officials and commanders (or even rebel leaders) without which the determination of factual and legal issues may be problematic and inconclusive. This would be true even if they are not officially prepared to provide evidence, because of their crucial role in bringing decisive information on alleged breaches of the law. In the absence of definitive facts, therefore, fact-finding reports must refrain from making unqualified conclusions on questions of fact and law. In order to avoid such confusion and unnecessary disputation, they should defer to the UN organ which establishes the fact-finding. It has to be remembered here with respect to inter-state armed conflict and subsequent deployment of UN fact-finding that a *protecting power* may be requested or used to represent the unwilling state for the purposes of making the inquiry more representative and fair — an option which may not solve the problem of non-consensual fact-finding but may balance out the role of civil societies and others.

³⁶⁰ See, eg, Philip Alston, 'Reconceiving the UN Human Rights Regime: Challenges Confronting the New UN Human Rights Council' (2006) 7 *Melbourne Journal of International Law* 185. It is doubtful that the discussions which led to the establishment of the HRC took into account the role of the HRC in an armed conflict context.

³⁶¹ *ICRC Draft Resolution and Report*, above n 30, noting that

the possibility of setting up one or several mechanisms that could carry out new functions to monitor respect for international humanitarian law: inter alia, a reporting system, an individual complaints mechanism, fact-finding missions, and the quasi-judicial investigation of violations.

Fourthly, it is apparent today that UN fact-finding targets or embraces non-state actors, such as the Darfur rebels and the Palestinian authorities. The UN guidelines must recognise this as a necessary step forward to investigate violations of humanitarian principles, although the details of its implementation must be decided on a case-by-case basis depending on the nature, status, ability and responsible attitude of the non-state actor, which may be inferred from or determined by UN organs and/or regional organisations. Finally, but most importantly, the UN must come up with an institutionalised solution as to how and when *major* and *decisive* concerns of fact-finding mission members can be reasonably and justifiably addressed after their report has been submitted and published. The authority of fact-finding and the UN on the one hand and the freedom of mission members to re-consider and revisit their thoughts on the other hand are at variance and are in need of some balancing. There are three possible views on this problem.

The first possible view is the need to leave fact-finding members free from any institutionalised restriction so that they can publicly denounce or amend their views and enter into constructive/damaging disagreement in minuted discussions or using the media. This appears to be a transparent way of responding to factual revelations or changes of minds, although there is a risk that it may cause immeasurable damage to the credibility and authority of the UN and its fact-finding.

The second possible view, which considers the expertise and knowledge of members of UN fact-finding, suggests recalling and reconstituting missions to consider new evidence and other concerns and to make their own (new) conclusions. In order to retain the integrity of the process, such reconstituting would have to be decided by the body that established the fact-finding in the first place, and such a decision would need to be based on a sufficient level of concern and new evidence arising after the end of their mission. The problem with this approach, however, is that the task of missions could be made endless with claims and counter-claims of new evidence and information.

The third view, and perhaps the most persuasive and feasible (though not immune from criticism), is that follow-up expert committees, which are currently often used only for overseeing compliance with fact-finding recommendations, could be given the power to conduct a re-inquiry. One advantage of this idea is that such committees are usually established and dispatched after some level of 'calm' has returned to scenes of armed conflict and they are able to gather new evidence which may reinforce, confirm or challenge the validity of prior allegations.

Addressing all these issues arising from the Gaza experience can make UN fact-finding more effective and less politicised and therefore an increasingly important arm for implementing IHL and ensuring civilian protection in particular. The international community must therefore learn from the wider implications of the Mission and related developments in order to transform UN fact-finding into a more credible, stronger, and widely endorsed and applied method of safeguarding and strengthening IHL in the future.