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FINDING THE CRIME: THE FACT-FINDING MISSION ON THE GAZA CONFLICT THROUGH THE LENSES OF INTERNATIONAL CRIMINAL JUSTICE

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fact-finding – international enquiries – Goldstone Report – duty to investigate and prosecute – standard of proof

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Venceréis porque tenéis sobrada fuerza bruta, pero no convenceréis.

Para convencer hay que persuadir, y para persuadir necesitaríais algo que os falta:

razón y derecho en la lucha.

(Miguel de Unamuno, Ottobre 1936, Università di Salamanca)

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Table of Abbreviations

CHR	Commission on Human Rights
ECHR	European Convention on Human Rights
ECOSOC	Economic and Social Council of the United Nations
ECtHR	European Court of Human Rights
FFMGC	Fact-Finding Mission on the Gaza Conflict
HCJ	High Court of Justice
IACrtHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IDF	Israel Defense Forces
IHL	International Humanitarian Law
IHRL	International Human Rights Law
LoAC	Law of Armed Conflicts
MAG	Military Advocate General
MPCID	Military Police Criminal Investigation Division
OHCHR	Office of the High Commissioner for Human Rights
PCHR	Palestinian Center for Human Rights
PNA	Palestinian National Authority
PRSC	Palestinian Red Crescent Society
UN	United Nations
UNHRC	United Nations Human Rights Council

Preface

A crucial aspect in the legal discourse regarding accountability for massive and systematic human rights abuses is represented by the establishment of facts. No criminal trials can be triggered without facts; no investigations can be dispatched without facts; no accountability can be properly pursued without facts.

In the light of their substantial importance, facts represent the first matter to be addressed when analysing reality and, as such, it is on facts that any judicial or non-judicial legal construction leans on. Human rights violations first happen in reality. Thus, the urgent question that need to be answered is: what happened? Establishing with sufficient reasonableness that a fact, *prima facie* appearing to encompass a human rights violation, may have occurred, can justify the undertaking of more formal steps, in terms of accountability, such as criminal investigations or proceedings. One may argue that such activity belongs to States but, since human rights have become a matter of international concern, and States have often shown to be reticent on such issues, international mechanisms may represent a complementary solution. Since the second half of the last century, several international bodies have made use of commissions of enquiry or fact-finding commissions in order to address human rights matters. This tool has proved to be effective not only in performing the above mentioned task, but also in pressuring States unwilling to deal with their "dirty clothes" to undertake some process of domestic review. The side effect of any enquiry, when its findings are made public, is the exposure to the eyes of the international community of the particular situation that has been scrutinized.

Obviously, the instrument requires some sort of regulations, since it often focuses on events of a certain gravity, which, once established, have the potential of damaging the State. However, this is not the only reason for the need of a clear legal framework.

Increasingly often, fact-finding missions face episodes which would appear to *prima facie* amount to international crimes. Such heavy allegations bear further obligations for the States, since International Criminal Law places precise duties on national authorities, when an international crime has allegedly been committed. Moreover, although fact-finding mechanisms are rarely entrusted with identifying perpetrators, the mere appearance of the commission of an international crime should trigger the commencement of criminal investigations and, where appropriate, prosecutions, which by definition entail consequences on the individual's rights.

In the light of such observations and the lack of precise coordinates, one may wonder what place, in the accountability process for egregious violations of human rights, is filled by fact-finding. The present work aims at analysing the phenomenon of international fact-finding in the field of human rights through the study of a particular controversial case: the Fact-Finding Mission of the Gaza Conflict, set up in response to the military operations carried out by Israel in the Gaza Strip, between 27 December 2008 and 18 January 2009.

The work is structured into three chapters. The First Chapter aims at outlining the phenomenon of fact-finding, through the analysis of the existing *soft law* regulations. An overview of the evolution of the instrument, since its early appearances, is provided. Credibility, as the main source of legitimization, is also addressed, identifying the elements that may enhance it and consequently requiring a thorough regulation. An overview of the best standards of proof to be adopted by fact-finders in order to assess the evidence regarding specific facts, is also included. Following this, the United Nations Human Rights Council practice with regard to fact-finding and monitory functions is outlined, introducing the subject of the following chapters.

The Second Chapter is concerned with the analysis of the selected case-study: the Fact-Finding Mission on the Gaza Conflict, established by the Human Rights Council in response to the military operation, known as *Operation Cast Lead*, launched by the Israeli Defence Forces on the Gaza Strip, between 27 December 2008 and 18 January 2009. Firstly, an analysis of the genesis of the Mission is provided, in order

contextualize its mandate and methodology. Secondly, the product of its enquiry, the *Fact-Finding Mission on the Gaza Conflict Report*, also known as "*Goldstone Report*", is put at the centre of the research, providing an overview of its structure. Thirdly, the content of the Report is assumed as the basis for an analysis of the methodology adopted by the Mission. In particular, certain challenges that fact-finders may encounter in carrying forward their mandate are dealt with. Among them, one may recall the difficulties inherent to the application of International Humanitarian Law, when the information gathering process is limited due to a lack of cooperation by States, as well as the controversial application of different standards, deriving from the concomitant relevance of International Humanitarian law and International Human Rights Law. In addition, since several violations of International Humanitarian and Human Rights Law entail the criminal liability of individuals, the research also points out the hurdles implicit to any non-judicial assessment of the relevant *mens rea*, required by International Criminal Law.

Finally, the Third Chapter addresses the steps that have been taken in order to ensure that accountability for serious violations of human rights, committed during *Operation Cast Lead*, is pursued. In particular, the Chapter is divided into three main sections. Firstly, relying on different States' reports and international monitoring, domestic investigations and prosecutions are enquired, providing details on the proceedings commenced, and on the national justice systems structure. Secondly, the steps undertaken by Third States, in compliance with the international obligations arising from the unlawfulness of the situation in the Gaza Strip during *Operation Cast Lead*, are outlined. In addition, an overview of the use of universal jurisdiction by Third States for the purpose of making accountable alleged high-level perpetrators of certain international crimes is provided. Thirdly, the role that the International Criminal Court may potentially play, in the accountability process for the egregious violations of fundamental human rights, is addressed, spelling out certain issues regarding its jurisdiction, in light of the declaration issued by the Palestinian Authority accepting the Court's jurisdiction. In particular, the analysis is focused on the extent to which the prosecutorial discretion may determine that the case of the Gaza Conflict shall be

submitted to the Court's scrutiny. The discussion is complemented with some thoughts arising from the recent vote of the United Nations General Assembly, that upgraded the status of Palestine to "observer State", hence recognizing its statehood.

Chapter I

Fact-Finding: An Overview

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Introduction

The recent military operation *Cast Lead*, carried out by the Israel Defense Forces (hereinafter IDF)[1], resulted in a dramatically high number of civilian casualties, which appears to reveal some inconsistencies with the basic principles of the Law of Armed Conflicts (hereinafter LoAC). Individual criminal responsibilities could rise from the conduct of hostilities by both the belligerent parties: the IDF and some Palestinian armed groups[2]. Nevertheless, no credible domestic inquiry was undertaken in the immediate aftermath of the operation. Instead, a number of quasi judicial mechanisms have been triggered by various international bodies. These instruments were not intended as means for assessing the criminal liability of the individuals but they were aimed at securing the facts.

As it has been stated in probably the most controversial report issued by one of these commissions, commonly known as the *Goldstone Report*, or *Fact-Finding Mission on the Gaza Conflict Report* (hereinafter *FFMGC Report*):

> "[…] longstanding impunity has been a key factor in the perpetuation of violence in the region and in the reoccurrence of violations, as well as in the erosion of confidence among Palestinians and many Israelis concerning prospects for justice and a peaceful solution to the conflict."[3]

The initiation of a genuine process of accountability is essential in the interest of justice and required by International Law. Some would argue that the proper forum shall be the criminal trial. Others may prefer civil remedies. Then, one should establish whether the issue deserves to be addressed at the international or national level. Yet the

[1] The military offensive began on 27 December 2008, officially in response to the launch of rockets by Palestinian factions from the Gaza Strip into Israel. A unilateral ceasefire was declared by Israel on 18 January 2009, but hostilities went on in the immediate aftermath. For a timeline on the War on Gaza see http://www.aljazeera.com/news/middleeast/2009/01/200917205418665491.html. For the Israeli Government's Perspective on *Operation Cast Lead* see http://www.mfa.gov.il/gazafacts.

[2] Mainly the al-Aqsa Martyrs' Brigade, Hamas, the Islamic Jihad, the Popular Front for the Liberation of Palestine, the Popular Resistance Councils. See Al Jazeera In Depth, BAUER S., *Palestinian factions united by war*, 20 Jan. 2009, http://www.aljazeera.com/focus/war_on_gaza/2009/01/200911915455957756.html.

[3] *Human Rights in Palestine and Other Occupied Arab Territories: Report of the United Nations Fact-Finding Mission on the Gaza Conflict* (hereinafter *FFMGC Report*), Advanced Edited Version, para.1761, available at http://www2.ohchr.org/english/bodies/hrcouncil/specialsession/9/docs/unffmgc_report.pdf. See UN Doc. A/HRC/12/48.

importance of facts is often underestimated[4]. Firstly, as it has been argued, "[…] there can be no accountability without facts. There can be no criminal investigation without facts. There can be no sanctions without facts"[5]. Ascertaining the factual circumstances of a relevant episode is, in other words, the preliminary stage for more effective steps. Secondly, it is widely acknowledged that having "access to relevant information concerning violations"[6] of International Human Rights or Humanitarian Law (hereinafter IHRL and IHL) is part of the victims' right to a remedy. Some scholars would even argue that victims might prefer a clear assessment of the relevant facts to a legal qualification of the same events[7].

Commissions of enquiry and fact-finding commissions have been established at national and international level to these purposes. As for the Gaza Conflict, the United Nations Human Rights Council (hereinafter UNHRC) set up a fact-finding mission during its Ninth Special Session on 12 January 2009 with the mandate "[…] to investigate all violations of international human rights law and international humanitarian law by the occupying Power, Israel, against the Palestinian people throughout the Occupied Palestinian Territory, particularly in the occupied Gaza Strip […]"[8]. This chapter aims at outlining the main features of fact-finding mechanisms in the field of IHRL and IHL.

[4] ZEGVELD L., (2010) *The Importance of Fact-Finding Missions Under International Humanitarian Law*, in MELONI C., TOGNONI G. (eds.), (2012) *Is There a Court for Gaza? A Test Bench for International Justice*, T.M.C. ASSER PRESS, p.162. On the distinction between facts and law see BILDER R.B., *The Fact/Law Distinction in International Adjudication*, in LILLICH R.B. (ed.), (1991) *Fact-Finding before International Tribunals* [Eleventh Sokol Colloquium], Transnational Publishers, Inc., p.95.

[5] ZEGVELD, *Ibidem*.

[6] Part VII, para.11(c) of the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*. See UN Doc. A/RES/60/147.

[7] ZEGVELD, in MELONI and TOGNONI (eds.), (2012), p.163, footnote 9, *supra*, footnote 4.

[8] See UN Doc. A/HRC/S-9/L.1 para.14. The mandate of the Fact-Finding Mission has been subsequently broadened as follow: "[…] 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." See http:/www2.ohchr.org/english/bodies/hrcouncil/specialsession/9/factfinding mission.htm. See also *FFMGC Report*, para.1.

1. Defining the concept: Fact-Finding

According to the *Declaration on Fact-Finding by the United Nations in the Field of the Maintenance of International Peace and Security*[9]:

> "[…] fact-finding means any activity designed to obtain detailed knowledge of the relevant facts of any dispute or situation which the competent United Nations organs need in order to exercise effectively their functions in relation to the maintenance of international peace and security."[10]

Therefore, the main purpose of any fact-finding mechanism is to seek the facts "through the evaluation and compilation of various information sources"[11]. Shedding light over the circumstances and consequences of an event is an activity that can serve different aims. It can provide useful information for the resolution of a controversy between two or more parties, or supply relevant data to international bodies so as to enable them to take appropriate measures regarding a situation which falls under the scope of their mandates, etc[12].

Recently these instruments have been widely used to ascertain violations of IHRL and IHL. According to the UN Secretary-General's *Report on Impunity*, issued pursuant to resolution 2005/81 of the former Commission on Human Rights (hereinafter CHR), fact-finding missions in the field of human rights have been provided with broader mandates than simply ascertaining facts. They "[…] have been established with comprehensive mandates, including specific requests for complex legal determinations and identification of perpetrators"[13]. The UN Fact-Finding Mission on the Gaza Conflict (hereinafter FFMGC), for instance, did not confine itself to factual assumptions, but proposed a legal qualification of the relevant facts (even if it expressly stated in the *FFMGC Report* that "[…] the findings do not attempt to identify the individuals

[9] See *Declaration on Fact-Finding by the United Nations in the Field of the Maintenance of International Peace and Security* (UN Doc. A/RES/46/59).
[10] See Part I, para.2 *Ibidem*.
[11] BOUTRUCHE T., (2011) *Credible Fact-Finding and Allegations of International Humanitarian Law Violations: Challenges in Theory and Practice*, Journal of Conflict & Security Law, Vol.16, No.1, p.2. See also PARTSH K.J., *Fact-Finding and Inquiry*, in BERNHARDT R. (ed.), (1992) *Encyclopedia of Public International Law*, Volume II, p.343, where fact-finding and inquiry are defined as "methods of ascertaining facts used in international relations for differing purposes".
[12] PARTSH, *Ibidem*.
[13] Part III, para.42, *Promotion and Protection of Human Rights, Impunity, Report of the Secretary-General*. See UN Doc. E/CN.4/2006/89.

responsible for the commission of offences nor do they pretend to reach the standard of proof applicable in criminal trials"[14], thus limiting the implications of its hypothesis). Differently, the International Commission of Inquiry on Darfur has been established with the mandate "[…] to investigate reports of violations of international humanitarian law and human rights law in Darfur by all parties, to determine also whether or not acts of genocide have occurred, and to identify the perpetrators of such violations with a view to ensuring that those responsible are held accountable"[15]. In this last case, the mission went even further than the FFMGC, being bound to provide such complex assessments.

One may argue, following the previous examples, that a distinction exists between *fact-finding* missions and commissions of *enquiry* and that a definition proper of each mechanism should be outlined. Nevertheless, doctrine seems uniform in considering the two terms more or less interchangeable[16]. For the purposes of this paper the same approach of the doctrine will be adopted.

The complexity of the evaluations that these commissions have to carry out requires expertise, in order to enhance their credibility[17]. This resulted in the adoption of increasingly more precise rules, and in the inclusion of experts in the different disciplines, which might be involved in the assessments each mission has to provide[18].

[14] *FFMGC Report*, para.25.
[15] *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General*, Executive Summary, available at http://www.un.org/news/dh/sudan/com_inq_darfur.pdf.
[16] See, for instance, PARTSH K.J in BERNHARDT R., (1992), *supra*, footnote 11; BOUTRUCHE, (2011), *supra*, footnote 11; WILKINSON S., *Standards of Proof in International Humanitarian and Human Rights Fact-Finding and Inquiry Missions*, Research Project, Geneva Academy of International Humanitarian Law and Human Rights, available at http://www.genevaacademy.ch/docs/Standards%20of%20proo%20report.pdf (visited on 22 august 2012); AKANDE D., TONKIN H., (6 April 2012), *International Commissions of Inquiry: A New Form of Adjudication?*, Blog of the European Journal of International Law, available at http://www.ejiltalk.org/international-commissions-of-inquiry-a-new-form-of-adjudication/.
[17] BOUTRUCHE, *Ibidem*.
[18] See, for instance, the efforts carried out by the International Bar Association in *Guidelines on International Human Rights Fact-Finding Visits and Reports* (hereinafter *Lund-London Guidelines*), Raoul Wallenberg Institute of Human Rights and Humanitarian Law; Lund University, available at http://www.factfindingguidelines.org/about.html, which is primarily draft for NGOs; see also the recent ongoing multi-annual research *Monitoring, Reporting and Fact-Finding*, led by the Program on Humanitarian Policy and Conflict Research of Harvard University, available at http://www.hpcrresearch.org/research/monitoring-reporting-and-fact-finding (visited on 22 august 2012).

Summarizing, fact-finding is any activity aimed at ascertaining and possibly qualifying the relevant facts of an episode, which unveils a violation of one or more binding provisions of law. This task can be carried out adopting different methodologies according to the specific mandate of the body entitled with the power to conduct the enquiry. The clearer and more precise the rules of procedures, the more credible the findings of the body entrusted will be.

In addition it must be underlined what fact-finding is not. In fact, no authoritative or binding assessment can be inferred from any of these mechanisms, since they are not tribunals or courts and "[…] do not, and cannot be expected to apply the same degree of scrutiny or standard of certainty […]"[19] of those fora.

1.1 Different types of Fact-Finding Mechanisms

The phenomenon of fact-finding has experienced a significant evolution, since its earliest appearance. The *Hague Conventions* of 1899 and 1907 already dealt with International Commissions of Inquiry[20] but the purpose of these mechanisms was that of solving certain kinds of controversies on points of facts, between two or more parties to a treaty. In other words, they were conceived as an alternative to other diplomatic settlements of disputes. As a matter of fact, art.9 of the Convention suggests the establishment of such commissions when States "[…] have not been able to come to an agreement by means of diplomacy […]". In these terms, States would have been empowered with the ability to trigger them. With the birth of the League of Nations, conciliatory functions were entrusted to the Council and the Assembly. The usefulness of the procedures of fact-finding in collecting information emerged vividly and international institutions began to increasingly recur to them, in order to exercise their powers[21].

[19] WILKINSON, pp.11-12, *supra*, footnote 16.
[20] *Hague I - Pacific Settlement of International Disputes*: 29 July 1899, 32 Stat. 1779, 1 Bevans 230, 26 Martens Nouveau Recueil (ser. 2) 720, 187 Consol. T.S. 410, *entered into force* Sept. 4, 1900, Title III available at http://www1.umn.edu/humanrts/instree/hague1.ht ml#1 in English, although the authoritative version is in French. See also RAMCHARAN B.G., *Introduction*, in RAMCHARAN B.G. (ed.), (1982) *International Law and Fact-Finding in the Field of Human Rights*, Martinus Nijhoff Publishers, pp.3-4; VITE' S., (1999) *Les procédures internationales d'établissement des faits dans la mise en œuvre du droit international humanitaire*, Editions Bruylant, pp.13-18.
[21] RAMCHARAN, *Ibidem*, p.3.

More recently, with the adoption of many international instruments concerning human rights, legal obligations have been set upon States, providing standards of protection of those rights to be fulfilled at the national level. Domestic legislation and enforcement is the best way of implementing those standards, however, in the event of an alleged breach, if the State is not able or willing to take appropriate steps in order to ensure the respect of the international norm, a matter of fact rises[22]. First of all, it must be ascertained whether the circumstances of the case indicate that the standard provided by the international provision has been actually disregarded. Only then, further steps can be taken. Fact-finding mechanisms have served this purpose, thus becoming part of "[…] the action taken by the international community to secure respect for human rights"[23].

1.1.1 Monitoring the Respect of Human Rights through Fact-Finding

Since the early 1950s, fact-finding missions in the field of Human Rights have been established by the United Nations. In particular, a mission entrusted with the mandate to investigate practices relating to the issue of forced labour was set up in 1951[24]. Subsequently, only since 1967 fact-finding became firmly part of the machinery used in assisting and protecting human rights[25].

The activity of fact-finding in the field of human rights differs from the model set forth in the *Hague Conventions*. Mainly, "[…] as a method of implementation of human rights [it] is not […] a neutral activity"[26]. This means that it serves the purposes and principles adopted by the organizations which set it up. Thus, a fact-finding mission will put at the centre of its enquiry what is of major concern for the body entrusted with the

[22] See VALTICOS N., *Foreword*, in RAMCHARAN B.G. (ed.), (1982) *supra*, footnote 20.
[23] VALTICOS, *Ibidem*.
[24] An *ad hoc* committee on forced labour was set up by the International Labour Organization jointly with the United Nations Economic and Social Council. It revealed that forced labour was used throughout the world as means of political coercion and as a punishment for infringement of labour regulations, seriously undermining the effectiveness of human rights. See on this topic *Eradication of forced labour*, General Survey concerning the Forced Labour Convention, 1930 (No. 29), and the Abolition of Forced Labour Convention, 1957 (No. 105), Report III (Part 1B), International Labour Conference, 96th Session 2007, para.8. See also MILLER R., (1973) *United Nations Fact-Finding Missions in the Field of Human Rights*, Australian Year Book of International Law, Vol.40.
[25] MILLER, *Ibidem*.
[26] VAN BOVEN T.C., (1973) *Fact-Finding in the Field of Human Rights*, Israeli Yearbook of Human Rights, para.22, cited in RAMCHARAN, (1982) p.7, *supra*, footnote 20.

power to establish it. According to RAMCHARAN[27], it is possible to highlight some features proper of the fact-finding mechanisms in the field of human rights:

i) they serve the purpose of assisting in the restoration of human rights;
ii) they tend to give priority to human rights concerns;
iii) they proceed from the assumption that, being the government responsible for the protection of human rights, when evidence of a violation of those rights is established, the government shall produce evidence of the contrary;
iv) they are inquisitorial in nature;
v) not every rule applicable to traditional fact-finding might also be applicable to fact-finding in the field of human rights.

This lack of neutrality stems from the fact that human rights are a matter of public interest. This latter concept is defined with special reference to the body entrusted with the power to deploy the investigative mechanism. Put it in another way, when human rights are at the centre of concern of that institution, this circumstance has to be taken into account by fact-finders. It does not mean that the activities have to be carried out in a way which is biased, but they must consider the broader (political) context[28]. It is the triumph, although often merely theoretical, of the humanitarian reasoning over the *raison d'état*.

Fact-finding mechanisms in the field of human rights have been variously classified. VILJOEN, for instance, distinguishes between:

i) *Investigative fact-finding* mechanisms, entrusted with the task of conducting a sort of enquiry into alleged situations of major concern with regard to human rights. They are *ad hoc* treaty-based instruments and generally provide the establishing body with a final report;
ii) *Indirect fact-finding* mechanisms, aimed at monitoring the fulfillment of legal obligations arising from the implementation of human rights treaties standards. They examines periodically States reports;

[27] RAMCHARAN, in RAMCHARAN (1982) *Ibidem*.
[28] VAN BOVEN (1973) cited in RAMCHARAN, (1982) *supra*, footnote 26. See also FRANCK T.M., FAIRLEY H.S., (1980) *Procedural Due Process in Human Rights Fact-Finding by International Agencies*, The American Journal of International Law, Vol.74, No.2, p.309.

iii) *Complaints-based fact-finding* mechanisms, triggered by individual communications reaching a standard for their admissibility.[29]

According to ERMACORA, instead, it is possible to draw the following articulation:

i) *Institutionalized form* of fact-finding, a sort of quasi-judicial procedure "to which States parties submit from the very beginning by an unconditional accession to a convention";
ii) *Indirect fact-finding* mechanisms, or "periodic reports";
iii) *Fact-finding instruments ad hoc*.[30]

However, this paper will mainly address *investigative* mechanisms of fact-finding in the field of human rights, not only aimed at ascertaining facts but also at providing non-binding legal determinations of the relevant circumstances of the case.

1.1.2 Fact-Finding in the Field of International Humanitarian Law

Art.90 of *Protocol I Additional* to the *Geneva Conventions*[31] shows the importance given to facts for the purpose of implementing IHL[32]. In 1992, an International Humanitarian Fact-Finding Commission tasked with monitoring the compliance with the LoAC was first established, pursuing the provisions set forth in the above mentioned article. Although the main purpose of this tool appears to be that of ascertaining facts, a reading of para.2 reveals more complex tasks, which might also include a legal assessment of the relevant circumstances of the case. The Commission has not played a significant role up to now, yet it reveals some crucial aspects of the uncovering of facts related to armed conflicts[33]. For instance, the timeliness of the enquiry addressed to in

[29] The above mentioned classification is proposed by VILJOEN F., (2004) *Fact-Finding by UN Human Rights Complaints Bodies – Analysis and Suggested Reforms*, Max Planck Yearbook of United Nations Law, Vol.8, pp.54-62.
[30] ERMACORA F., (1968) *International Enquiry Commissions in the field of Human Rights*, Human Rights Journal, p.186, cited in RAMCHARAN (ed.), (1982), p.8, *supra*, footnote 20.
[31] Art.90, *Protocol Additional* to the *Geneva Conventions* of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977. See also the International Humanitarian Fact-Finding Commission website at http://www.ihffc.org/index.asp?Language=EN&page=home.
[32] See also BOUTRUCHE, (2011), p.4, *supra*, footnote 11.
[33] On the International Humanitarian Fact-Finding Commission, see more extensively CONDORELLI L., (2001) *The International Humanitarian Fact-Finding Commission: an obsolete tool or a useful measure to implement international humanitarian law?*, International Review of the Red Cross, 842, p.393;

art.90(3)(b), which is essential to secure facts that could possibly be altered by the wrongdoer and thus, requires a certain degree of urgency[34]; the composition of the Commission, that have to take into account the technicalities of some evaluations to be done[35]; etc.

Fact-finding mechanisms in the field of IHL have been set by other international bodies. One notorious example is the FFMGC, which was established to investigate alleged violations of the LoAC during the military operation *Cast Lead*[36], yet it is not the only one. Enquiry commissions have been established by the UN Security Council, following its resolution 780, to ascertain violations of the *Geneva Conventions* in the Former Yugoslavia[37], or, according to resolution 1564 in 2004, to investigate alleged violations of IHL in Darfur[38].

When dealing with allegations of violations of *jus in bello*, different challenges arise for the fact-finders. When the fact-finding body is entrusted with the power to provide legal assessments, establishing whether a breach of the Geneva Law has occurred implies complex evaluations, that sometime need technical experience concerning, for instance, the methods of warfare[39]. This should lead to consider carefully how to appoint the members of the mission. Many principles governing the conduct of hostilities are not clear-cut principles and need a flexible approach when establishing if they have been violated. The proportionality rule is a good example of this hurdle, since there is no certain way of ascertaining whether an attack was proportionate or not. In addition, it might be necessary to have access to relevant information in the hand of governments' sources and the authorities might be unwilling to provide them or, more generally, to cooperate with the fact-finders. Legal qualifications of the facts in itself

KUSSBACH E., (1994) *The International Humanitarian Fact-Finding Commission*, The International and Comparative Law Quarterly, Vol.43, No.1, pp.174-185; VITE', (1999) pp.43-48, *supra*, footnote 20.

[34] See SANDOZ Y., SWINARSKI C., ZIMMERMANN B. (eds.), (1987) *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, International Committee of the Red Cross, Martinus Nijhoff Publishers, pp.1048-1049, para.3633.

[35] *Ibidem*, p.1049, para.3634.

[36] See *supra*, footnote 8.

[37] Commission of Experts Established Pursuant to Security Council Resolution 780 (Yugoslavia Commission of Experts). For a general overview see WILKINSON, *supra*, footnote 16.

[38] International Commission of Inquiry on Darfur. For a general overview see *Ibidem*, p.29.

[39] See, for instance, BOUTRUCHE, (2011) pp.13-16, *supra*, footnote 11; VITE', (1998) pp.275-281, *supra*, footnote 20. The UNHRC, for instance, decided to include, in the FFMGC, Colonel Desmond Travers, for its recognized experience in the conduct of military operations (former officer in the Irish Armed Forces).

may give rise to criticism since, for example, asserting that an armed conflict of an international character is ongoing rather than one of a non-international character, bears different implications in terms of legal obligations[40].

Further challenges rise from the interaction of IHL and IHRL. It is commonly recognized that these two bodies of law are in a relation of *lex specialis-lex generalis*[41]. Thus, increasingly often, fact-finders have to be familiar with different standards[42].

These are only part of the issues concerning fact-finding in the field of IHRL and IHL. They are essential to any enquiry of this kind, since the nature of the latter is hybrid. They are not judicial, hence they cannot be subjected to rules governing judicial bodies. After all, their aim is pre-judicial, being that of ascertaining facts. Yet, being empowered with the task of producing - non-binding - legal assessments makes them quasi-judicial, which poses a matter of credibility. This reverberates on the rules governing their activities. A balance between effectiveness and fairness, timeliness and exhaustiveness is necessary.

1.2 The Importance of Fact-Finding for International Human Rights Law and International Humanitarian Law

Uncovering human rights abuses is not only a legal imperative, which requires State Authorities to open investigations and bring those responsible to justice. It is also a tool to ensure some form of reconciliation between offenders and offended. It supports what is commonly called Transitional Justice. Reports by fact-finding bodies represent a sort of "sounding board" for public opinion, a counselor for States and a monitor for international agencies and institutions[43].

[40] An issue that has been widely discussed in the *FFMGC Report*, as well as among scholars, is the status of the Gaza Strip as an occupied territory. The implications are not irrelevant, since the legal regime and the norms applicable shall be determined accordingly.

[41] According to the International Court of Justice (hereinafter ICJ) in its Advisory Opinions on the *Legality of the threat or use of nuclear weapons* (ICJ, 8 July 1996) and *Legal consequences of the construction of a wall in the Occupied Palestinian Territory* (ICJ, 9 July 2004), both the two branches of law, IHRL and IHL, apply during armed conflicts. However, when they contradict, IHL prevails, given its nature of *lex specialis* with respect to IHRL, which is the *lex generalis*. More extensively on this issue, see RONZITTI N., (2011) *Diritto Internazionale dei Conflitti Armati*, G. Giappichelli Editore, pp.159-164.

[42] The standards to be adopted and applied will be discussed in section 2.

[43] For an overview on the impact of the reports of some fact-finding missions see WILKINSON, *supra*, footnote 16.

Enquiries into alleged violations of IHRL or IHL can stimulate further actions by governments and, when they reveal to be unwilling or incapable to carry out such measures, can justify the intervention of international bodies. As a matter of fact, the State has the primary responsibility for the implementation of international norms on human rights. Firstly, it has to enhance legislation according to the standards set forth in conventional and customary International Law. Secondly, when a breach of those rules occurs, it bears the responsibility to provide the victims with a remedy, since IHRL and IHL address the individuals in their relationship among themselves and with the State Authorities[44]. When States do not comply with these legal obligations, international institutional actors can intervene both in the disclosure of relevant facts – by means of procedures allowing them to gain knowledge of the factual circumstances – and in taking measures to remedy or repress such breaches[45].

Moreover, unveiling the circumstances of a relevant violation of IHRL or IHL is part of a "right to remedy" to which victims of abuses are entitled. Compliance with this right represents the first step towards reconciliation. After all, the importance of truth has been recognized by international justice in multiple occasions. Truth commissions have been established in different countries as an alternative to criminal trials, in order to promote a healthy overcoming of the past, when tragic escalations of violence occurred.

The following paragraphs will address these matters. To what extent can fact-finding contribute in the promotion and enforcement of human rights? This question is essential to the definition of fact-finding, since it justifies how to shape it and provides useful patterns for evaluating its effectiveness.

[44] See SASSOLI M., BOUVIERE A.A., QUINTIN A., *How does Law protect in War? Cases, Documents and Teaching Material on Contemporary Practice in International Humanitarian Law, Volume I, Outline of International Humanitarian Law*, Third Edition, ICRC, Chapter 14.
[45] See also SCHMITT M.N., (2011) *Investigating Violations of International Law in Armed Conflict*, Harvard National Security Journal, Vol.2, pp.31-84.

1.2.1 Ensuring Compliance with Human Rights and International Humanitarian Law: the *Duty to Investigate*

In the Conclusions of the *Report on Impunity*[46], the UN Secretary-General stressed that "[…] commissions of inquiry and fact-finding missions can play an important role in combating impunity" and that they represent an effective tool to address violations of IHRL and IHL.

Nowadays, it is widely recognized that individuals should be held responsible for their conducts toward other human beings. This resulted in the criminalization of several acts amounting to breaches of IHRL and IHL[47]. The outcome has been that of allotting individual liability for the commission of criminal conducts upon individuals, without prejudice to the possible responsibility of the State. For these norms a primary duty to ensure their fulfillment falls upon the State whose nationals have carried out the unlawful act. Accordingly, the relevant State Authorities have to carry out investigations and, where necessary, prosecute those who are responsible[48].

a) The Duty to Investigate in International Humanitarian Law

As for IHL this duty proceeds from the Geneva Law which imposes explicitly upon the High Contracting Parties at least a duty to repress breaches of the Conventions[49]. For what artt.50, 51, 130, 147 respectively of *Geneva Conventions* I, II, III, IV address

[46] *Supra*, footnote 13.

[47] Under International Criminal Law, several acts amounting to violations of IHRL and IHL have been qualified as *international crimes*, namely war crimes, crimes against humanity, genocide, crime of aggression (see the *Rome Statute of the International Criminal Court*, art.5), but also slavery and forced labour, torture, apartheid, forced disappearances, terrorism (although they do not represent core crimes under International Criminal Law, not being included in the *Rome Statute*, relevant customary norms provides for their criminality. More extensively on this topic, see RATNER S.R., ABRAMS J.S., BISCHOFF J.L., (2009) *Accountability for Human Rights Atrocities in International Law. Beyond the Nuremberg Legacy*, Third Edition, Oxford University Press, or CASSESE A., (2008) *International Criminal Law*, Second Edition, Oxford University Press.

[48] The duty to investigate is autonomous and it prescinds from the assessment on the alleged breach of an international rule. In other terms, it is a primary procedural obligation, not of a restorative nature (such as the right to compensation arising from the proved commission of a crime). In addition, it qualifies as an "obligation of means", meaning that the Authorities will have to carry out the enquiry with diligence, but it does not imply a result in terms of culpability of the individual investigated. Thus, it does not have to end with the commencement of the prosecutorial stage. See BESTAGNO F., (2003) *Diritti umani e impunità. Obblighi positivi degli Stati in materia penale*, Vita e Pensiero, pp.166 and *ff*.

[49] *Geneva Conventions* of 1949, artt.49, 50, 129, 146. For a comprehensive overview on the purposes of the aforementioned articles, see PICTET J., (1952-1959) *Commentary on the Geneva Conventions of 12 August 1949*, Volumes I, II, III, IV, ICRC, pp.363-370, 263-266, 617-625, 584-595.

as *grave breaches* of the Conventions, even an obligation to enact penal legislation, investigate and prosecute is established, along with the principle *aut dedere aut judicare*, which requires States to extradite, upon request by other High Contracting Parties, the responsible, when they do not intend to or are not capable of prosecuting him[50]. *Additional Protocol I* reaches a further step by "operationalizing"[51] the duty to investigate and prosecute. According to art.87 of *Protocol I*, the enquiry shall be deferred to the armed forces authorities and, following the ICRC *Commentary*, the commander shall act as an "investigating magistrate". The principle, set forth in the *Geneva Conventions* and *Additional Protocol I*, referred to war crimes[52], enjoys the status of customary norm, as Rule 158 of the ICRC *Customary International Humanitarian Law* study[53] shows. Thus, it applies also to States not parties to the Protocol.

b) The Duty to Investigate in International Human Rights Law

As for IHRL the obligation stems less clearly from the *International Covenant on Civil and Political Rights* (hereinafter *ICCPR*). Art.2(2) of the Covenant requires States "[…] to adopt such laws or other measures as may be necessary to give effect to the rights recognized […]" in it. In its General Comment No.31, the Human Rights Committee spelled out this provision, by affirming that a "general obligation to investigate allegations of violations" exists and that "a failure by a State Party to investigate allegations of violations could in and of itself give rise to a separate breach

[50] On the obligation of *aut dedere aut judicare*, see extensively DAVID E., (2009) *Éléments de droit pénal international et européen*, Bruylant, pp.705-712.
[51] SCHMITT, (2011) pp.40-43, *supra*, footnote 45.
[52] According to Rule 156 of the ICRC *Customary International Humanitarian Law* study (HENCKAERTS J.M., DOSWALD-BECK L., (2009) *Customary International Humanitarian Law*, ICRC, Third Edition, Cambridge University Press) and art.85(5) of *Additional Protocol I* to the *Geneva Conventions*, *grave breaches* are *war crimes*. The two concepts differ slightly as for the consequences they originally entail. *Grave breaches* shall imply domestic criminal liability, *war crimes*, on the other hand, entail international criminal responsibility. Nowadays the two notions have progressively overlapped so that there is less need to treat them differently. On this process see ÖBERG D.M., (March 2009) *The absorption of grave breaches into war crimes law*, International Review of the Red Cross, Vol.91, No.873.
[53] See also SCHMITT, (2011) p.44-48, *supra*, footnote 45. The author of the article underlines in the footnotes that the authoritativeness of the study cannot be given for granted and it consequently needs to be treated with caution. Nonetheless, the *Introduction* to the study (available at http://www.icrc.org/customaryihl/eng/docs/v1_rul_in) unveils a rigorous methodology in the assessment regarding the customary nature of a certain rule, by collecting copious information from States practice in order to corroborate the two elements of a customary rule, *i.e. usus* and *opinio juris sive necessitates*, as it has been required by the ICJ in numerous cases.

of the Covenant"[54]. The text of the General Comment provides also the standards according to which an investigation into alleged violations of human rights shall be carried out: "promptly, thoroughly and effectively through independent and impartial bodies". These provisions have to be adjusted to the specific context to be investigated. As it has been outlined above in this paper[55], human rights norms are to be applied to armed conflict as well. Thus, the typical relationship between them and IHL plays a fundamental role in shaping the standards applicable to enquiries into alleged violations of IHRL during armed conflicts. Consequently, an investigation of this kind will be carried out according to IHL standards[56].

c) The Duty to Investigate as Part of a Right to a Remedy

A duty to investigate is also part of what is known as the *right to a remedy* as endorsed in *The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, adopted by the UN General Assembly in 2005[57]. Accordingly, the obligation to ensure, to the fullest extent, respect for IHRL and IHL includes, among other provisions, the duty to investigate alleged violations[58]. The *Principles* provide also standards according to which investigations shall be conducted, recalling those set forth in General Comment No.31 of the Human Rights Committee[59]: effectiveness, promptness, thoroughness and impartiality. Those provisions apply to all violations of IHRL and IHL[60]. In addition to this general

[54] UN Human Rights Committee, General Comment No.31, *Nature of the General Obligation Imposed on States Parties to the Covenant*, para.15, UN Doc. CCPR/C/21/Rev.1/Add.13 (26 May 2004). See also SCHMITT, (2011), pp.48-49, *Ibidem*. The author gives further evidence as for the obligation to investigate gleaning from the jurisprudence of the European Court of Human Rights, which in the case *McKerr v. United Kingdom*, for instance, affirmed its existence upon the State Authorities.
[55] See *supra*, p.10.
[56] SCHMITT, (2011) pp.51-55, *supra*, footnote 45.
[57] See UN Doc. A/RES/60/147.
[58] *Ibidem*, Principle 3(b).
[59] *Supra*, footnote 54.
[60] See SHELTON D., *The United Nations Principles and Guidelines on Reparations: context and contents*, in DE FEYTER K., PARMENTIER S., BOSSUYT M., LEMMENS P. (eds.), (2005) *Out of the Ashes. Reparation for Victims of Gross and Systematic Human Rights Violations*, Intersentia, p.20. According to the author, there are three different categories referred to in the text of the *Basic Principles*: (a) obligations arising from all internationally guaranteed Human Rights and International Humanitarian Law, (b) international crimes, (c) gross violations of Human Rights Law and serious violations of International Humanitarian Law. Art.3 can be found in Part II, which addresses Human Rights Law and International Humanitarian Law in general. See also VAN BOVEN T., *The United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of*

obligation to ensure respect for human rights, Part VII of the *Basic Principles* defines the contents of the *victims' right to remedy*, which include "access to relevant information concerning violations […]"[61], *i.e.* gross violations of IHRL and serious violations of IHL[62]. As it has been already noted, these obligations apply also to international crimes and, in particular, to war crimes and crimes against humanity[63] as contained in artt.7 and 8 of the *Rome Statute*.

The establishment of fact-finding mechanisms at the international level, in cases where the State is unable or unwilling to carry out genuine investigations – as it is the case of Gaza with regard to the military operation named *Cast Lead* -, can replace the action that the State Authorities should take. Firstly, they can remedy to the inconsistencies of domestic enquiries with international standards, for instance, by the appointment of members retaining a more impartial attitude towards the subject matter of investigations, or the approval of a more transparent procedure than that adopted by internal bodies, etc. Secondly, they can bring to the attention of the public opinion situations of systematic – or even endemic – disregard for the common values of humanity, where States are completely unwilling or unable to conduct any sort of enquiry, thus covering the truth. This could also lead to further consequences on the judicial ground, by encouraging the exercise of jurisdiction at national or international level, thus granting the enforcement of the *duty to prosecute*, endorsed in many international legal instruments[64]. Obviously, the mechanism is to be resorted to with caution, since it represents an interference in the national sovereignty. It is preferable to place the task of investigating on state authorities, in full observance of the principle of *complementarity*[65].

International Human Rights Law and Serious Violations of International Humanitarian Law, United Nations Audiovisual Library of International Law, p.3.

[61] See *supra*, footnote 6, Principle 11(c).

[62] See SHELTON, in DE FEYTER *et al.*, (2005) pp.20-21, *supra*, footnote 60.

[63] *Genuinely Unwilling: an Update*, Palestinian Centre for Human Rights, August 2010.

[64] Rule 158, Study on *Customary International Humanitarian Law*, *supra*, footnote 52. See also, artt.49, 50, 129, 146, respectively of the I, II, III, IV Geneva Conventions of 1949.

[65] On complementarity see SCHABAS W.A., (2011) *An Introduction to the International Criminal Court*, Fourth Edition, Cambridge University Press, pp.190-199; WILLIAMS S.A. and SCHABAS W.A., *Article 17 Issues of Admissibility*, in TRIFFTERER O., (2008) *Commentary on the Rome Statute of the International Criminal Court – Observers' Notes, Article by Article*, Second Edition, C.H. Beck – Hart – Nomos, pp.605 and *ff*.

1.2.2 Strategies for Implementing Human Rights: Accountability through Non-Prosecutorial Options

The concept of *accountability* entails multiple meanings, being possible to refer it to States, groups of individuals, non-state actors, individuals, etc. For human rights atrocities, mainly, the term can be referred to two different notions, that of "individual responsibility" and "criminal responsibility"[66]. The former aims at allotting upon individuals the liability for acts breaching the law; the latter qualifies the consequences deriving for the responsible[67]. Nevertheless, ascertaining the culpability of an individual does not in itself relieve the State from its own responsibility[68].

Accountability serves different purposes. Apart from that of deterrence[69], it aims also at providing victims with a sense of justice, a sort of satisfaction which is encompassed also in what has been recognized as the *victims' right to a remedy*[70].

There is a wide range of methods of assessing accountability. Among the available options, one may put investigatory or fact-finding mechanisms, which, as it has been outlined above, have been considered as effective tools to address human rights violations. Recalling what has been spelled out above in this chapter, fact-finding missions do not seek to assess the responsibility of individuals, nor do they intend to establish the State responsibility. After all, they are not judicial mechanisms. What they really aim at is the uncovering of facts and, only when the mandate provides so - indeed sporadically -, the identification of perpetrators. The acknowledgement of what has happened in a past event can produce a similar effect to that of criminal proceedings, *i.e.*

[66] RATNER *et al*, (2009) pp.3 and *ff*, *supra*, footnote 47.
[67] For a more general notion of responsibility, see DARCY S., (2007) *Collective Responsibility and Accountability Under International Law*, Transnational Publishers, p.xiv.
[68] In the International Law Commission's 1980 *Draft Articles on State Responsibility*, the very concept of criminal responsibility has been referred to certain violations of International Law committed by States, thus, forging the concept of *State criminal responsibility*. Nonetheless, the concept has proved to be exceptionally controversial and, finally, it has been abandoned in the International Law Commission's 2001 *Articles on State Responsibility*. From that moment forth breaches of obligations of particular importance have been classified as giving rise to State's general responsibility. See RATNER *et al.*, (2009), p.17, *supra*, footnote 47.
[69] Achievable through the prospect of prosecution and punishment.
[70] VAN BOVEN, *supra*, footnote 60. The author defines *satisfaction* as including a "broad range of measures, from those aiming at cessation of violations to truth seeking, the search for the disappeared, the recovery and the reburial of remains, public apologies, judicial and administrative sanctions, commemoration, and human rights training".

satisfaction. This has been confirmed by multiple experiences, such as States practice[71] or official statements of international bodies[72].

The publication of reports by fact-finding commissions, although aimed at assessing the facts, spreads, especially if the mechanism is international in nature, knowledge of the relevant circumstances of an event, thus producing public awareness of the suffering caused to victims of atrocities[73]. The outcome is a process of blaming, at least, of the social group that has carried out the abuses. This process of moral condemnation can contribute to promote what is known as the restorative component of justice[74].

RATNER[75] identified a number of ways by which inquiry commissions can contribute in assessing accountability:

i) effective panels can establish authoritative records of abuses "[…] helping to educate the public, […] deter future abuses and strengthen the rule of law". In addition, they are more likely than a court to depict a useful truth;
ii) the acknowledgement of truth can heal in a more effective way the wounds – not only physical but mainly psychological – suffered by the victims;
iii) they can impose moral condemnation and, if they allot responsibilities, represent the basis for further sanctions;
iv) they promote human rights and can discredit the perpetrators of abuses;
v) they can provide a different range of solutions, which courts may not be entitled to assess, through their recommendations.

Obviously, they do not need to be the only mechanism of accountability for a specific event. If they are backed by judicial actions their effectiveness will be improved further on. That is the case of the Commission of Inquiry on Darfur, whose findings have been submitted to the Security Council that, subsequently, issued a referral to the International Criminal Court.

[71] In this sense, one may consider the role of *Truth Commissions* in South Africa and Latin America.
[72] Unveiling the truth has been recognized by the United Nations *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* as part of the *victims right to a remedy*. See footnote 6, Principle 11. See also the UN Secretary- General *Report on impunity*, footnote 13.
[73] See VITE', (1999) pp.410 and *ff* , *supra*, footnote 20.
[74] RATNER *et al*, (2009) pp.270-271, *supra*, footnote 47.
[75] RATNER *et al*, pp.270 and *ff*, *Ibidem*. Similarly, see BOUTRUCHE, 2011, *supra*, footnote 11.

1.2.3 Unveiling the Truth? Public Conscience and Reconciliation through the Acknowledgement of Past Atrocities

A further effect and justification for fact-finding is represented by the pursuit for reconciliation. Accountability does not only serve the individual's need for justice, but it is also a fundamental component of social healing. In this sense, the term accountability must be read as truth-seeking, or, more precisely, as accountability through the acknowledgement of truth. The shift in the point of view is from the global to the local level. It has already been noticed that fact-finding can provoke a process of moral blaming upon the perpetrators of violences, especially when facts are disclosed in front of the public arena, and consequently trigger further mechanisms for establishing responsibilities. At the local level, differently, uncovering the truth is essential to initiate a process of catharsis which would enable victims of atrocities to put behind the psychological trauma suffered[76].

The described effect is originally enshrined in the notion of Transitional Justice[77]. Fact-finding activities in the sense adopted in this paper are not means of Transitional Justice, yet, it is arguable, they can produce to a certain degree similar externalities. According to a broad definition, Transitional Justice "involves anything that a society devises to deal with a legacy of conflict and/or widespread human rights violations"[78]. Thus, it would include also fact-finding, when used to address violations of human rights. Apart from this formalistic argument, it has already been highlighted how fact-finding missions usually end up with the publication of reports, whose authoritativeness depends largely on the members appointed, the rules adopted, the standard of proof

[76] See VITE', (1999) p. 425, *supra*, footnote 20. The author cites the case of Salvador where "the philosophy underlying the decision to establish the Commission and its mandate is that in order to put behind them the trauma of the war, the Salvadorians had to go through the catharsis of facing the truth. Bringing to light the truth is thus an integral component, indeed part and parcel of the process of reconciliation and reunification of Salvadorian society. There can be no reconciliation without the public knowledge of the truth […]" (UN Press Release SG/SM/4942-CA/76, footnote 1303)

[77] More diffusely on Transitional Justice, see ELSTER J., (2004) *Closing the books: Transitional Justice in historical perspective*, Cambridge University Press. See also MANI R., *Reparation as Component of Transitional Justice: pursuing "Reparative Justice" in the Aftermath of Violent Conflict*, in DE FEYTER *et al.*, (2005), pp.53 and *ff*, *supra*, footnote 60.

[78] ROHT-ARRIAZA N., *The New Landscape of Transitional Justice*, in ROHT-ARRIAZA N., MARIEZCURRENA J. (eds.), (2006) *Transitional Justice in the Twenty-First Century: Beyond Truth Versus Justice*, Cambridge University Press, p.2, cited in DUDAI R., (2007) *A Model for Dealing with the Past in the Israeli-Palestinian Context*, The International Journal of Transitional Justice, Vol.1, p.260, footnote 4.

applied, etc. An accurate collection of findings, carried out following transparent rules, will reduce to the eyes of victims and perpetrators, the relativity of truth, instilling reliability to the final report. The disclosure of those findings, although not specifically aimed at this, can produce a partial *satisfaction* of the victims' rights. In particular, as outlined above, accessibility to relevant information regarding events amounting to violations of IHRL and IHL is part of the *victims' right to a remedy*. Since *satisfaction* is not only part of an individual's right, but it is also a fundamental component of Transitional Justice[79], pursuing the individuals' *right to a remedy* means pursuing also Transitional Justice.

Obviously, better results would be achieved if the mechanism were triggered at the national level, thus, with no prejudice to national sovereignty. A domestic uncovering of truth would be preferable also due to its meaning, the internalization of the wrongness of the conducts. Yet complementarity requires an external intervention when the State is "genuinely unwilling"[80] – or incapable - to deal with the past. Besides, it is a duty of the international community in its entirety to promote justice for victims of mass atrocities, and this duty does not originate only from political and moral sources but, in many cases, from legal norms[81].

2. Rules for Fact-Finding: a Quest for Legitimization

The *Declaration on Fact-Finding by the United Nations in the Field of the Maintenance of International Peace and Security*[82] provides that "fact-finding should be comprehensive, objective, impartial and timely" (para.3), thus setting standards according to which fact-finding bodies will have to operate in the future. The aim of the General Assembly was most probably that of strengthening the role of such mechanisms enhancing their credibility, an essential element to gain credit by those States – and consequently by the individuals subjected to their jurisdiction – who might find

[79] DOAK J., (2011) *The Therapeutic Dimension of Transitional Justice: Emotional Repair and Victim Satisfaction in International Trials and Truth Commissions*, International Criminal Law Review, Vol.11, No.2, pp.263-298.
[80] This expression is borrowed from *Genuinely Unwilling: ad Update*, *supra*, footnote 63.
[81] RATNER *et al*, (2009) pp.369-370, *supra*, footnote 47.
[82] See *supra*, footnote 9.

themselves under the lenses of an investigative body[83]. Credibility instills authoritativeness to the fact-finding mechanism and its findings, and can partially grant the cooperation by the State under investigation. Furthermore, the mandate of enquiry commissions have been progressively broadened by empowering them not only to find the facts but also to provide legal qualifications of them. For these legal findings to be shared, it is essential for the fact-finders not to be biased and to conduct even-handed investigations. In this sense, the composition of the enquiring panel rises another issue, that of expertise. Increasingly often, members tend to be selected not only between lawyers but also among experts in the specific field that is to be investigated. In fact, an interdisciplinary approach can further enhance the reliability of the findings. A central issue is that of the standard of proof. Fact-finding in the sense adopted by this paper is not judicial, nor it aims at reaching the same depth of analysis of a judicial body. Yet, the findings by enquiry commissions are increasingly acquiring importance in the carrying forward of further judicial initiatives[84]. How are these findings to be used by prosecutorial bodies or civil courts? Obviously, the matter needs to be addressed from the angle of the standard of proof adopted. What standard could satisfy a court of law?

In the following two sections, these issues will be addressed from different points of view, with a special focus on that of criminal justice. Grave breaches of the *Geneva Conventions* and serious violations of IHRL often entail individual criminal responsibility, which can be ascertained through different mechanisms, such as the intervention of the International Criminal Court (hereinafter ICC) - where the act falls under its jurisdiction, thus constituting one of the four international crimes recognized by the *Rome Statute* -, or the exercise of Universal Jurisdiction by national criminal judicial systems.

Moreover, the need for common rules in establishing fact-finding mechanisms stems also from the criticism that they often have to face. The *FFMGC Report*, for instance, has been strongly criticized both by Israel[85] and the US Government[86] as deeply flawed,

[83] See BERG A., (1993) *The 1991 Declaration on Fact-Finding by the United Nations*, European Journal of International Law, Vol.4, p.108.
[84] See NEALE A.J., (2011) *Human Rights Fact-Finding into Armed Conflict and Breaches of the Law of War*, Proceedings of the Annual Meeting (American Society of International Law), Vol.105, pp.85-89.
[85] See, for instance, Haaretz Online, *Israel official reply on Goldstone Gaza report: Probe biased, flawed*, available at http://www.haaretz.com/news/israel-official-reply-on-goldstone-gaza-report-probe-biased-

but this skepticism is not only political, since it comes sometimes also from the academic community which raises more substantial objections[87].

2.1 International Human Rights and Humanitarian Law Standards

Despite their nature of non-judicial bodies, it is essential for fact-finding missions to be regulated by the law, both procedurally and substantially, no matter the complexity of the legal assessments they are entitled to issue. Thus, the question that immediately arises is: what law?

As for the substantial law, a general approach would suggest to consider the "constitutional or treaty-régime within which"[88] the enquiry mechanism has been established. Consequently, it will be applicable the substantive law relevant to the parent body. This is the case, for instance, of the fact-finding mechanisms under art.41 of the *ICCPR*, or the International Humanitarian Fact-Finding Commission under art.90 of *Protocol I Additional* to the *Geneva Conventions*. Obviously, nothing will prevent these bodies from applying also general rules of International Law which might be relevant to a specific case under their attention. Differently, *ad hoc* missions might be empowered with the application of specific rules, according to their mandate. Examples may be that of the UNHRC Fact-Finding Mission on the Gaza War, which the HRC provided with a specific mandate[89], or the Commission of Inquiry on Darfur, also bound to respond to specific issues[90]. As outlined by Professor RAMCHARAN, a commission

flawed1.26576 0 or, *Barak: FFMGC Report 'false, distorted and irresponsible'*, available at http://www.haaretz.com/news/barak-goldstone-report-false-dist orted-and-irresponsible-1.265821 or, else, *Peres: Goldstone is a small man out to hurt Israel*, available at http://www.haaretz.com/news/peres-goldstone-is-a-small-man-o ut-to-hurt-israel-1.267149.

[86] See, as an example, Al Jazeera Online, *US House rejects FFMGC Report*, available at http://www.aljazeera.com/news/americas/2009/11/200911320434191455.html or, an interview with Justice Richard Goldstone lead by Al Jazeera, available at http://www.youtube.com/watch?v=Moag8mcfd N4. See also the US official response to the *FFMGC Report* during the 12th Session of the Human Rights Council, available at http://geneva.usmission.gov/2009/09/29/gaza-conflict/.

[87] See BLANK L.R., (2010) *Finding Facts but Missing the Law: The FFMGC Report, Gaza and Lawfare*, Case Western Reserve Journal of International Law, Vol.43, Nos.1-2; Emory Public Law Research Paper No.10-127.

[88] RAMCHARAN B.G., *Substantive Law Applicable*, in RAMCHARAN (ed.), (1982) p.27, *supra*, footnote 20.

[89] See *supra*, p.6

[90] See *supra*, p.8

may also be required to take into account domestic law and verify whether the international standards have been fulfilled at the national level[91].

Generally, a fact-finding mechanism, in the recognition of the applicable substantive law, being a quasi-judicial body, will be guided by the sources of law listed in art.38 of the *Statute of the International Court of Justice*:

i) international conventions;
ii) international custom;
iii) general principles recognized by civilized nations;
iv) judicial decisions and teachings of the most prominent jurists as subsidiary means of interpretations and determinations of the rules of law.

In the field of human rights a number of international legal instruments and customs may be invoked to assess the standards applicable to an enquiry. Firstly, the *Charter of the United Nations* provides a list of norms which are mostly considered customary law and have been developed in a variety of treaties, conventions and more specific legal tools, such as the *ICCPR*, the *Universal Declaration of Human Rights*, etc. Particular reliance must be put upon these instruments due to their widely acknowledged customary nature and the fact that most States are parties to the *UN Charter*. IHL further provides a range of rules applicable to armed conflicts, aimed at protecting the individual and, in particular, the civilian population. The *Geneva Conventions* and their *Additional Protocols* offer a good collection of provisions, part of which is considered international customary law[92]. International Criminal Law and, particularly the *Statute of the ICC*, criminalizes acts that are clearly considered unlawful by the international community[93], although the list of State Parties to the Statute is narrower than one might have expected.

[91] RAMCHARAN, in RAMCHARAN (ed.), (1982), *supra*, footnote 88.
[92] See the *Study on Customary International Humanitarian Law*, ICRC, *supra*, footnote 52.
[93] Although the drafting of the inherent articles of the *ICC Statute* has received support by nearly all States, it is still controversial whether every act listed constitutes a crime under International Customary Law. This holds true especially for genocide and the crime of aggression, even though the latter presents many aspects which do not reflect the opinion of the international community as a whole. Differently, crimes against humanity and war crimes cannot be considered entirely customary law. Most of the acts enumerated in artt.7 and 8 of the Statute do actually amount to crimes under customary law but it is still premature to confer the same status to all of them. See RATNER *et al.*, (2009) pp.27 and *ff*, *supra*, footnote 47.

The jurisprudence of international tribunals and courts provides useful guidelines as to how to interpret the international norms, spelling out the standards required by the law and establishing which obligations are considered *erga omnes* and shall be respected strictly.

However, it is to be noted that standards do not necessarily correspond to binding rules. In its general meaning, a standard is a parameter which is used to evaluate a particular situation or event and provide an assessment as to how it should be. In the field of human rights, the content of the standard is informed not only by binding legal instruments, such as those mentioned above, but also by general principles of a non-binding character. Although most States are not contractually bound by any of these non-binding principles, none of them "can escape comparison with them and evaluation of the measure of freedom which it secures to its people on the basis of the comparison"[94]. In this manner, fact-finders in the field of human rights are entitled to introduce in their reasoning also humanitarian considerations and principles by which some States may not be bound, not being parties to the treaty or convention providing them.

On the other side, the law provides the framework for the fact-finding body. Obviously, standards stem from the law, but the latter in itself plays a role in the process of finding the facts. Ascertaining the factual circumstances of an event is, in fact, no neutral activity. One should select the relevant facts by referring to the law applicable. Thus, the activity of pure fact-finding cannot be completely separated by that of "law-finding"[95].

IHL poses further challenges to the process of fact-finding and, in particular, regarding the standards to be adopted. First of all, there is an interplay between the standards adopted by this branch of International Law and IHRL. The two sets of rules establish different thresholds to assess that a certain rule has been violated. Yet, both normative frameworks aim at the same target, *i.e.* the protection of the individual. Furthermore, the "hard core" of IHRL is considered to be applicable also during armed

[94] *Report of the Study Group to Examine the Labour and Trade Union Situation in Spain*, ILO Official Bulletin, Second Special Supplement, Vol.LII, (1969), No.4, para.1264 cited in RAMCHARAN, in RAMCHARAN (ed.), (1982), footnote 16, *supra*, footnote 88.
[95] See also BOUTRUCHE, (2011), *supra*, footnote 11.

conflicts. Consequently, not every violation of the latter constitutes a breach of the LoAC. One should first establish under which body of law the assessment will be delivered. Secondly, an assessment under IHRL may require the application of a standard stemming from IHL. The right to life can provide a useful example of this interaction. This right, affirmed in particular by IHRL[96] cannot be derogated even in situation of emergency, not even in an armed conflict. Yet, IHL provides more detailed rules as to the protection of the individual's life during military operations. Thus, when assessing whether an individual's right to life has been violated, the standards set by IHL will be applied[97]. In addition, practical challenges can undermine the complete and coherent application of IHL. It is not easy, for instance, to assess whether the proportionality rule has been breached, since a mission might not possess all the relevant information regarding the alleged incident, and due to the fact that such an assessment has to be issued according to an *ex ante* perception[98].

2.2 Criminal Law Standards

Increasingly often, findings of *prima facie* international crimes are included in the reports of several commissions of enquiry. Asserting that an international crime has been perpetrated bears further difficulties as to the establishment of the relevant elements of the crime. Firstly, evidence of the *actus reus* and its attributability to the perpetrator should be presented. Secondly, it is required to demonstrate the relevant mental element or *mens rea* of the wrongdoer, *i.e.* the intent or knowledge of committing the wrongful act. Finally, no justification or excuse should be invoked by the perpetrator. This would be the order a court of law may follow in building an accusation for an international crime.

Obviously, the purpose of a fact-finding mechanism is that of ascertaining facts, without being bound to produce evidence of the mental element. The legal assessment will also be limited to a statement on the lawfulness or unlawfulness of the mere *actus reus*. Nonetheless, in some cases fact-finders went further, assessing that some evidence

[96] See art.6 of the *ICCPR*, art.2 of the *European Convention on Human Rights*, art.3 of the *Universal Declaration of Human Rights*, art.2 of the Charter *of Fundamental Rights of the European Union*, art.4 of the *American Convention on Human Rights*, art.4 of the *African Charter on Human and Peoples' Rights*, art.2 of the *Cairo Declaration on Human Rights in Islam*.
[97] See SASSOLI *et al*, Chapter 14, *supra*, footnote 44.
[98] See BUTRUCHE, (2011) pp.19 and *ff*, *supra*, footnote 11.

of the *mens rea* had been found[99]. In addition, commissions of enquiry have been also empowered with the task of indicating possible perpetrators, as it has been the case of the International Commission of Inquiry on Darfur. When fact-finding bodies are empowered to this extent, given their quasi-judicial nature, problems arise regarding the procedural rules that may govern their work. As a matter of facts, affirming that an international crime has been committed implies a heavier condemnation for belligerents, since international crimes represent, according to the *Statute of the ICC*, the most heinous acts that could be perpetrated by and against mankind[100].

As for the material element of the crime, fact-finders will front the same problems and recur to the same norms emanating from IHRL and IHL. After all, International Criminal Law assumes, as a basis, treaties and conventions entailing Human Rights and Humanitarian Law obligations. In addition, the provisions set forth in the *Rome Statute* as well as international customs will serve as a basis for the activity of fact-finding[101]. As for the mental element, when the enquiring body is entitled to provide such an assessment, reliance will be put primarily on art.30 of the *Rome Statute*, which provides as follows:

> "Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge"[102]

Thus, intent and knowledge represent the minimum threshold for assessing the criminality of the wrongful act. The article further explains what the two requirements mean in details[103]. The reservation clause at the beginning of the article leaves room to different *mens rea* requirements, as provided by other provisions. Obviously, the

[99] The *FFMGC Report*, for instance, reports that in addition to the objective elements that may indicate that international crimes have been committed, the panel found reasonable ground to assess that there was intent and knowledge on the part of the armed forces of the criminal conducts. See, for instance, para.1934, on collective punishment. See also the extensive reasoning concerning the strike on the UNRWA compound, paras.543 and *ff*.

[100] See the continuous references to acts amounting to crimes under the jurisdiction of the ICC as "unimaginable atrocities that deeply shock the conscience of humanity" or "such grave crimes" or, "most serious crimes of concern to the international community as a whole", in the Preamble of the *ICC Statute*.

[101] See *FFMGC Report*, paras.286-293.

[102] Art.30(1) of the *Rome Statute of the International Criminal Court*.

[103] See also, AMATI E., CACCAMO V., COSTI M., FRONZA E., VALLINI A., (2006) *Introduzione al diritto penale internazionale*, Giuffré Editore, pp.139 and *ff*. See also, CASSESE A., (2008) pp.56 and *ff*, *supra*, footnote 47.

reference to other sources cannot be indiscriminate, otherwise only marginal importance would be given to the article itself[104]. Nevertheless, although the Court shall apply the Statute in the first place and, only in a subordinate position, other relevant treaties and conventions, a fact-finding mission will be more weakly bound by this rule and, consequently, more detached in the choice of the standard applicable, provided that internal coherence is respected to a certain degree.

Moreover, it must be born in mind that, generally, commissions of enquiry are mandated to make a determination as for the responsibility of the State and only exceptionally assess the individual criminal liability of perpetrators. Thus, a precise statement regarding the mental element is not required.

2.3 Procedural Law and Standards

As for the procedural rules, in the past, large autonomy was left to fact-finders, being irrelevant the nature of the enquiring body, that could have been monocratic, permanent, *ad hoc*, etc[105]. Each of them could adopt its own rules of procedure. *Ad hoc* committees established by the former CHR, under ECOSOC resolutions 1503 and 1235[106], were bound by a number of requirements set out in the authorizing resolution, yet they adopted very different detailed rules of procedure. Various attempts to formalize common rules have been carried out, throughout history, but none of them has been capable to serve as a binding set of procedural norms for fact-finding missions. An International Conference on Human Rights was held in Teheran in 1968 under the auspices and the coordination of the UN General Assembly. In the final act it was recommended the ECOSOC to request the former CHR to prepare model rules of procedure for UN bodies entrusted with the task of dealing with violations of human rights[107]. An *ad hoc* Working Group was set up by the Commission, in response to a

[104] AMATI *et al.*, pp.143-144, *Ibidem*. The crime of genocide, for instance, requires a more specific *mens rea, i.e. dolus specialis*, which is the specific "intent to destroy, in whole or in part, a national, ethnical, racial or religious group". See CASSESE, p.137, *Ibidem*.
[105] A more detailed overview of the practice of different fact-finding bodies in the past is available in SAMSON K.T., *Procedural* Law, in RAMCHARAN (ed.), (1982) p.47, *supra*, footnote 20.
[106] See *infra*, 68-69.
[107] See CLARK R.S., *Legal Representation*, in RAMCHARAN (ed.), (1982) pp.125-126, *supra*, footnote 20.

draft issued by the Secretary-General in 1969[108]. The Working Group produced a Report containing the *Model Rules of Procedure for United Nations Bodies dealing with Violations of Human Rights*[109]. The main purpose of the Working Group was that of providing a set of rules replacing the total lack of procedural provisions for enquiring bodies into alleged situation of violation of fundamental rights[110]. In 1980 the International Law Association formulated the *Belgrade Minimal Rules of Procedure for International Human Rights Fact-Finding Missions*, which collect a number of rules for the conduct of "[…] credible, reliable, efficient and effective" enquiries[111]. Subsequently, in 1991 the UN General Assembly adopted without a vote the *Declaration on Fact-Finding by the United Nations in the Field of the Maintenance of International peace and Security*[112] resulting from the work of the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization[113]. Along with a definition of fact-finding, which has been recalled previously in this chapter[114], the *Declaration* pointed out the fundamental requirements to confer credibility to any fact-finding mechanism, *i.e.* comprehensiveness, objectivity, impartiality and timeliness[115]. More recently, in 2008, the International Bar Association's Human Rights Institute issued a study aimed at providing common standards of procedure for fact-finding in the field of human rights, bearing in mind that the information collected there is being increasingly used by tribunals to produce evidence of the facts alleged to have occurred. The resulting document, the *Guidelines on International Human Rights Fact-Finding Visits and Reports* also known as *Lund-*

[108] See the *Draft Model Rules of Procedure suggested by the Secretary-General of the UN for Ad Hoc Bodies of the United Nations entrusted with Studies of Particular Situations alleged to reveal a Consistent Pattern of Violations of Human Rights*, UN Doc. E/CN.4/1021/Rev.1.
[109] See UN Doc. E/CN.4/1134 – 1 February 1974. See also, (2001) *Training Manual on Human Rights Monitoring*, Professional Training Series No.7, Office of the High Commissioner for Human Rights, p.360.
[110] The lack of procedural rules was chronic and was leading to a too heterogeneous practice by fact-finding bodies. This deficiency was not filled even by the procedures established under the auspices of the United Nations. For specific narrative concerning the *status quo* of practice by fact-finding bodies before and immediately after the advent of the United Nations, see KAUFMAN S.B., (1968-69) *The Necessity for Rules of Procedure in Ad Hoc United Nations Investigations*, The American University Law Review, Vol.18, p.739.
[111] CONDÉ H.V., (2004) *A handbook of international human rights terminology*, Second Edition, University of Nebraska Press, p.24. See also RAMCHARAN, (1982) pp.250-252, *supra*, footnote 20.
[112] See *supra*, footnote 9.
[113] The Special Committee is an organ of the General Assembly.
[114] See *supra*, p.5
[115] See Part I, para.3 of the *Declaration*. See also BERG, (1993) *supra*, footnote 83.

London Guidelines, has been endorsed by a scarce number of organizations, none of them of an or intergovernmental nature[116].

Nowadays, there cannot be said to exist binding rules of procedure for fact-finding mechanisms. On the contrary, international instruments have tried to set up procedural standards, with the intent of evening the *modus operandi* of enquiring bodies and provide international recognized tools to enhance their credibility. As a matter of facts, the *UN Declaration on Fact-Finding*, providing comprehensiveness, objectivity, impartiality and timeliness as general principles of enquiry, aimed precisely at that, conferring as much credibility as it may be possible to instruments that are not judicial and, thus, do not present the same authoritativeness of tribunals or courts, but, at the same time, carry out quasi-judicial functions, especially when they are entitled to produce legal assessments regarding the facts.

In the following paragraphs, I will address some procedural issues in the light of the above mentioned principles. When dealing with serious violations of IHRL or grave breaches of IHL, it may be useful to compare the standards applied by enquiring bodies with the rules of procedure governing criminal trials, since, not seldom, the acts may entail individual criminal responsibility.

2.3.1 The Mandate

Since among States the echo of fact-finding missions depends largely on the credibility and fairness of the mechanism, it is essential that the first effort to obtain their confidence should be spent on establishing the mandate, according to which the enquiring body will carry out its tasks. According to the *UN Declaration on Fact-Finding*:

> "The decision by the competent United Nations organ to undertake fact-finding should always contain a clear mandate for the fact-finding mission and precise requirements to be met by its report"[117]

and following:

[116] The *Lund-London Guidelines* are available at http://www.unhcr.org/refworld/docid/4a39f2fa2.html or http://www.factfindingguidelines.org/index.html.
[117] Part II, art.17 of the *Declaration*.

> "Fact-finding missions have an obligation to act in strict conformity with their mandate and perform their task in an impartial way […]"[118]

A clear mandate is obviously the first way in which the States will get in contact with the fact-finding mission. It is also the basis according to which the enquiring body will bring about its tasks. When the body is permanent, rooted in conventional sources, the mandate is often referred also as *terms of reference*, as opposed to its competence, which, on the contrary, is determined by its general mandate, according to the conventional source giving birth to it[119]. *Ad hoc* bodies, differently, are mandated according to specific terms of reference that are established from time to time by the parent organ. This leads to a problem of selectivity, since the parent body will be the only one entrusted with the responsibility to establish the fact-finding mechanism, and often it will do so, according to its political needs of condemnation of particular States[120]. Consequently, it is fundamental that the parent organ maintains a sort of "geographical balance" in its policy, not focusing only on specific countries, especially when its scope of activity tends to be universal.

An element that could enhance credibility and dispel doubts regarding the unbiased nature of the fact-finding body is represented by the even-handedness of the mandate. This relates also to the impartiality of the body carrying out the enquiry. Earlier in this chapter, it has been noted that fact-finding commissions cannot act as completely neutral bodies, since they are established by organs which are often empowered to safeguard specific values. In this sense the enquiring mechanism will be biased to a certain extent, but the bias insists only upon the legal values protected by the sponsoring body. What is to be avoided is the bias as for the conclusions of the investigation and that insisting upon one of the possible parties to the situation under enquiry. In other words, fact-finders cannot undertake their duties, believing to reach predetermined conclusions, nor can they initiate an investigation concerning a dispute between two or

[118] Part III, art.25 of the *Declaration*.
[119] See ERMACORA F., *The Competence and Functions of Fact-Finding Bodies*, in RAMCHARAN (ed.), (1982) p.83, *supra*, footnote 20.
[120] Such a distorted practice has been detected also by Professor ERMACORA, p.88, *Ibidem*. According to the author some commissions of enquiry established by the former UN CHR, such as the Working Group empowered to enquire the allegations of torture of political prisoners in the Republic of South Africa established in 1967, although created in response to situations of massive disrespect for Human Rights, were deemed to serve the parent body, by providing it with information that would allow it to take a particular political decision. On the issue of selectiveness see *infra*, pp.70-71.

more parties, *a priori* concentrating their efforts only on one of them. The latter eventuality is specific of fact-finding in the field of IHL, where the risk of being biased towards one or more of the belligerents is higher.

Obviously, although fact-finders should zealously abide by their terms of reference, they should also be granted a certain flexibility so as to allow them to bring about their duties exhaustively and extend the enquiry, where appropriate, to events strictly related to those pointed out in the original mandate[121].

Finally, but preliminarily in the logical and chronological order that may be followed in establishing a fact-finding commission, the parent organ should ask to itself which purposes the body will serve. What will follow to the release of the mission's report? A political condemnation or more substantive steps, such as mediation, conciliation or even judicial actions? The question goes to the point of the debate regarding fact-finding which can be reassumed with the words of a former UN official:

> "If the facts found by the group are solely to be used for propaganda purposes and to support generally pre-conceived political views on the situation investigated, then fact finding will be of limited usefulness. Far greater value would be obtained should the mission's work constitute the basis of a political or legal solution to those problems examined"[122]

2.3.2 Members

Few words should be spent on staffing, since the composition of a fact-finding mission is highly likely to influence its functioning and credibility to the eyes of governments. It is widely acknowledged that fact-finders should be independent, upright and impartial[123], but not always sponsoring bodies are capable of selecting the staff in a manner which is consistent with these principles, since their scope is not always understood.

[121] See *Lund-London Guidelines*, art.6.
[122] MILLER R., (1973) p.41, *supra*, footnote 24. See also FRANCK and FAIRLEY, p.309, *supra*, footnote 28.
[123] See FRANCK and FAIRLEY, pp.313 and *ff*, *Ibidem*; RATNER *et al*, (2009) pp.261-262, *supra*, footnote 47.

According to the *UN Declaration on Fact-Finding*, the Secretary-General should prepare and periodically update a list of experts available for undertaking fact-finding activities[124]. Expertise seems to be the first characteristic that has to be considered in the choice of members, but experience has shown that it is not sufficient. A geographical criteria in the selection of commissioners might be desirable and, sometimes, choosing an individual with no connection at all with the country under investigation may result in a more detached judgment[125]. Apart from technical skills, fact-finders should be unbiased, that is to say that they "should be, and should be seen to be, free of commitment to a preconceived outcome"[126]. Impartiality is, thus, a fundamental guiding principle that has to be applied not only to the interpretation of the mandate but also in the application of the underlying international standards[127]. This implies that the investigation has to be conducted even-handedly, *i.e.* with the same thoroughness towards all parties[128]. Impartiality is also a general principle inherent to all legal systems[129] and also firmly embedded in International Criminal Law[130], and it goes hand in hand with the principle of independence, which requires the judges not to accept any instruction emanating from political or governmental authorities. The same is provided by the *UN Declaration on Fact-Finding* which reads as follows:

> "Their members [members of fact-finding missions] have an obligation not to seek or receive instructions from any Government or from any authority other than the competent United Nations organ"[131]

[124] Part II, art.14 of the *Declaration*.
[125] Nonetheless, the choice of Justice Richard Goldstone as head of the UN Fact-Finding Mission on the Gaza Conflict has been praised by many, in the light of its Jewish roots and widely recognized experience in the field of International Criminal Law and IHRL and IHL, despite the harsh criticism spread by the Israeli authorities and US Officials. See, for instance, ROBERTSON G.R., (2010) *Human Rights Fact-Finding: Some Legal and Ethical Dilemmas*, Thematic Papers No.1, International Bar Association's Human Rights Institute.
[126] FRANCK and FAIRLEY, p.313, *supra*, footnote 28.
[127] See the *Training Manual on Human Rights Monitoring*, p.92, *supra*, footnote 109.
[128] *Ibidem*.
[129] See, for instance, UBERTIS G., (2009) *Principi di Procedura Penale Europea. Le Regole del Giusto Processo*, Second Edition, Raffaello Cortina Editore, pp.33 and *ff*. The author refers to art.6 of the *ECHR*, or art.14 of the *ICCPR*, as well as to national systems (see, for instance, art.111 of the Constitution of the Italian Republic).
[130] See art.40 of the *Rome Statute of the International Criminal Court*. For a more extensive analysis of the principles of independence and impartiality of judges in International Criminal Law see: CASSESE, (2008) p.379, *supra*, footnote 47; DESCHÊNES J. and STAKER C., *Article 40 Independence of the Judges*, in TRIFFTERER, (2008) pp.961-967, *supra*, footnote 65.
[131] Part III, art.25 of the *Declaration*.

In conclusion, although there is no fixed rule as for the selection of members of commissions of enquiry, the principles above mentioned must be taken into account, since the success and credibility of the fact-finding body will heavily depend on them. It is still current the observation advanced by some scholars according to which "no effort at all was made to develop principles for disqualification or recusation […] to guard against the appearance of bias in the selection of fact finders"[132].

2.3.3 General Principles of Procedure for Investigations

The international recognized principle of *due process of law* is also applicable to enquiries into human rights issues in the form of *fair procedure*. Yet, the enhancement of this principle does not serve the same purposes of the *fair trial*, which aims at protecting the individual from any possible abuse by the judicial authorities[133]. According to prominent scholars, having a clear set of rules, recalling the human rights provision of *due process of law*, is essential to fact-finding, since it enhances credibility and, consequently, increases the probabilities that States will cooperate with the mission[134]. Obviously, this does not mean that the right of the investigated are set aside. On the contrary, recently, it has been argued that "the greater the potential impact of its [of the mission] work on the rights of suspected perpetrators, the higher the procedural standards required"[135].

[132] FRANCK and FAIRLEY, p.315, *supra*, footnote 28.

[133] On the *due process of law* see, among others, MAZZA O., *Diritto a un equo processo*, in PINESCHI L., (2006) *La tutela internazionale dei diritti umani. Norme, garanzie, prassi*, Giuffrè Editore, pp.469 and *ff*.

[134] In chronological order, this thesis has been supported by FRANCK and FAIRLEY, p.317, *supra*, footnote 28; VITE', (1998) pp.231 and *ff*, *supra*, footnote 20; RATNER *et al*, (2009) pp.268 and *ff*, *supra*, footnote 47.

[135] RATNER *et al*, (2009) pp.268-269, *Ibidem*. According to the author "the extent to which a panel's inquiry resembles judicial proceedings assumes great importance where the commission intends to identify perpetrators", referring to national truth commissions, but the same applies to international commissions of enquiry, such as the *International Commission of Inquiry on Darfur*. The Commission adopted a very cautious approach, as testified in the Final Report. Firstly, it is clearly stated that the findings collected do not intend in any way to assess as to the criminal liability of individuals, but only to pave the way for further investigations. Secondly, the methodology adopted required a standard according to which a cross-examination of elements of proof should have been carried out before assessing that it would have been *reasonable* to believe that an individual may have perpetrated the act referred to. Finally, there have been no disclosure of the relevant names to the public, in full respect of the right of the suspects to a fair trial. See *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General*, paras.643 and *ff*.

Many international legal instruments provide general rules and principles for conducting the enquiry, but generally each fact-finding panel gives itself the rules of procedure that believes to be the most appropriate to the case under investigation. The absence of a binding set of norms reflects the need for flexible procedures which could adapt to a wide range of situations. A commission of enquiry into alleged violations of IHL will front different problems in bringing about its mandate than a commission enquiring into the conditions of detainees. Moreover, the aim of fact-finding commissions is that of providing as much evidence of the facts under investigation as possible, which is quite different from what a tribunal normally does. Hence, the procedures, although aimed at enhancing transparency and credibility, do not have to hinder the capacity of the enquiring body to carry out its mandate comprehensively[136].

The *Training Manual on Human Rights Monitoring* sponsored by the *Office of the High Commissioner for Human Rights* (hereinafter OHCHR) lists a set of principles that Human Rights Officers should abide by in carrying out their duties, "[…] including information gathering, interviewing, […] monitoring economic, social and cultural rights, monitoring during periods of armed conflict, verification and assessment of the information collected, and use of the information to address human rights problems"[137]. Although not binding, these principles can be found reproduced in a number of other relevant international instruments[138]. Following, I will briefly outline the main issues arising when conducting an investigation into Human Rights issues.

a) Gathering and Verifying Information

Establishing precise rules for information gathering is the first step for enhancing credibility in the fact-finding process. This issue has to be dealt with mainly from two perspectives. First of all, the identification of possible sources of information. Fact-finding bodies are often established as *ad hoc* mechanisms, which do not generally have a permanent presence on the geographical area under investigation. Moreover, they normally have to carry out their mandate in a relatively short period of time.

[136] See VITE', (1998) pp.232 and *ff*, *supra*, footnote 20.
[137] See the *Training Manual on Human Rights Monitoring*, pp.87 and *ff*, *supra*, footnote 109.
[138] See, for instance, the *Lund-London Guidelines* sponsored by the International Bar Association (footnote 18) or VV.AA., (2008) the *Manual on Human Rights Monitoring. An Introduction for Human Rights Field Officers*, Norwegian Centre for Human Rights.

Consequently, it is fundamental that they cooperate with local authorities, NGOs, witnesses among the population, victims, etc[139]. A transparent approach would suggest to make known the sources, unless this could endanger their safety and security, especially when the source is an individual, which might suffer threats or intimidations, or even physical damages for having revealed sensible information[140]. In practice, fact-finding missions tend to disclose the names of public sources or NGOs[141]. Secondly, and most importantly the reliability of each source must be assessed and corroborated in a satisfying way, by cross-referencing to other sources of information, that might be available. This implies that the objectivity of the information gathered must be carefully assessed. Accordingly, an enquiry cannot be thorough and comprehensive enough unless all available sources of information have been explored and cross-examined[142]. A higher threshold for the admissibility of the source of information should be established when assessing the criminal liability arising from certain acts that might amount to criminal offences under International Criminal Law.

Investigations into violations of IHL pose further problems as for the reliability of the sources of information, since certain circumstances cannot be verified but through specific sources, to which the Mission might not have direct access[143].

b) Hearings, Interviews and Protection of Witnesses

Collecting testimonies from individuals, victims or witnesses, is part of the fact-finders' implicit powers. Accordingly, the mission can gather oral accounts of what has happened or what consequences followed a particular event[144]. The *UN Declaration on*

[139] See the *Manual on Human Rights Monitoring. An Introduction for Human Rights Field Officers*, pp.5 and *ff*, *Ibidem*. See, also VITE', (1998) pp.249-250, *supra*, footnote 20.
[140] See the *Training Manual on Human Rights Monitoring*, p.90, *supra*, footnote 109; the *Manual on Human Rights Monitoring. An Introduction for Human Rights Field Officers*, pp.91 and *ff*, *Ibidem*.
[141] See, for instance, the *FFMGC Report*, paras.137 and *ff*. The Mission met with a wide range of stakeholders involved in the facts under investigation. The same approach was adopted by the *International Commission of Inquiry on Darfur*, which had the opportunity to meet also high-level governmental officials, differently from the FFMGC, that could not count on the cooperation of the Israeli Authorities. See the *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General*, paras.20 and *ff*.
[142] See the *Training Manual on Human Rights Monitoring*, p.91, *supra*, footnote 109.
[143] The proportionality test, for instance, requires an evaluation *ex ante*, in the light of information available to the party carrying out the attack. Thus, it is essential to know what the attacker knew at the time the attack was carried out. See VITE', (1998) pp.250 and *ff*, *supra*, footnote 20.
[144] DIEYE A., *Hearings*, in RAMCHARAN (ed.), (1982) p.94, *supra*, footnote 20. The author distinguishes hearings from interviews, the former being more formal and procedurally controlled, to the

Fact-Finding is concerned to point out that the hearing should be fair. To this purpose the commission must adopt those rules that may be necessary[145]. Non-binding instruments provide a wide range of procedural guidelines which cannot be extensively analyzed herein. Therefore, only the most critical aspects to consider when receiving oral testimonies will be outlined.

Generally, it is advisable that commissioners assume a pro-active approach in receiving oral accounts. As a matter of facts, witnesses or victims may address spontaneously the members of the commission, but only the latter knows what will be relevant to their mandate. Great support to these purposes will also come from local NGOs, due to their stronger contact with the territory and the local population. Obviously, the testimony should never be paid, but a refund for travel expenses and accommodation should be provided to the witness. In addition, fact-finders should be willing to carry out visits on-the-spot, not only to verify first-hand the situation under investigation, but also to gather oral accounts[146].

In carrying out the hearing, it is considered to be a good practice that of informing the witness or victim of the overall mandate of the mission, prior to the questioning. Interviewees should also be informed of the confidentiality or publicity of the proceeding, so as to allow them to decide whether to participate or not[147]. Before any questioning, the witness should be given the opportunity to make a narrative statement and, only subsequently, further questions may be posed by the members of the panel. In this manner, fact-finders should guide the witness in giving evidence which is consistent with the terms of reference of the mission. The chairman should be entitled to supervise

point that the witness has to pronounce an oath according to which they swear to tell the truth, and the latter implying the general power to receive passively information, without any specific procedure, typical of visits on-the-spot. For the purposes of this paper no clear distinction will be drawn between the two instruments but only an outline of the mission's power to collect oral accounts of the events.

[145] See Part III, art.27 of the *Declaration*.

[146] See the *Training Manual on Human Rights Monitoring*, pp.109 and *ff*, *supra*, footnote 109.

[147] *Ibidem*. See also the *Manual on Human Rights Monitoring. An Introduction for Human Rights Field Officers*, pp.10 and *ff*, *supra*, footnote 138. According to rule 41 of the *Lund-London Guidelines*, *supra*, footnote 18, "[t]he delegation should inform interviewees of the terms of reference, as well as giving reasons for the visit, prior to or at the meeting, in a language they understand". Rule 42 reads "[t]he delegation should take a careful note of whether an interviewee provides informed consent to be interviewed and identified or quoted and of future possible uses of their statements. If they do not consent, their wishes must be respected".

the hearing[148]. This practice reveals that the procedure adopted in conducting interviews tends to be inquisitorial rather than adversarial, since there are no parties represented before the panel[149]. Yet, some elements of adversarial procedures may be identified in the fact that it is normally given to governments the possibility to respond to the allegations and accounts presented by individuals. Thus, the full implementation of this opportunity lays in the hands of the same governments, being deferred to them the decision to cooperate or not with the enquiring body[150]. It is commonly acknowledged that the interviewer should pose open-ended questions and follow a pattern which goes from the less to the most sensitive topic for the witness, so as to make him feel comfortable[151]. Interpreters should be provided when necessary[152]. An explicit witness' permission should be obtained to tape record the interview. Similarly, if photos will be taken[153].

[148] More extensively on the specific procedure to be followed during the hearing, see DIAEYE, in RAMCHARAN, (1982) pp.96-97, *supra*, footnote 144. See also *Ibidem*, pp. 116 and *ff*; *Draft Model Rules of Procedure suggested by the Secretary-General of the UN …*, rule 22, *supra*, footnote 108. See, for instance, the transcripts of public hearings held in Gaza and Geneva by the UNHRC FFMGC, available at http://www2.ohchr.org/english/bodies/hrcouncil/specialsession/9/factfindingmission.htm. The described pattern is normally followed by Justice Richard Goldstone, Chairman of the Mission, by addressing the witnesses and victims on the general mandate of the panel. He also stressed in each session that the interviews held in Gaza City or Geneva are not of a judicial nature nor they pretend to function as truth commissions, being something different, yet "serious", quoting Goldstone's words.

[149] DIAYE, *Ibidem*. Differently, in the ECtHR system a recognized mixed procedure is adopted during fact-finding activities, since representatives of the parties involved are generally present at the hearings and can examine the witness, but the leading role is played by the presiding judge. See, on the issue, LEACH P., PARASKEVA C., UZELAC G., (2009) *International Human Rights & Fact-Finding. An Analysis of the fact-finding missions conducted by the European Commission and Court of Human Rights*, Report by the Human Rights and Social Justice Research Institute at London Metropolitan University.

[150] DIAYE, *Ibidem*, p.97.

[151] In the *Training Manual on Human Rights Monitoring*, p.92, *supra*, footnote 109, sensitivity is considered to be one of the key principle in conducting investigations regarding abuses of Human Rights. According to the Manual, the Human Rights Officer "should be sensitive to the suffering which an individual may have experienced". In addition, particular categories of witnesses may be interviewed, paying particular attention to their conditions. See for instance rule 45 of the *Lund-London Guidelines*, *supra*, footnote 18, which reads "[m]embers of the mission should be especially aware of the vulnerabilities of particular categories of potential interviewees and such interviewees should be approached with the utmost care […]".

[152] See the *Training Manual on Human Rights* Monitoring, *Ibidem*, pp.113-114; *Manual on Human Rights Monitoring. An Introduction for Human Rights Field Officers*, pp.14 and *ff*, *supra*, footnote 138.

[153] See the *Training Manual …*, p.114, *Ibidem*.

Various manuals and UN sponsored documents provide criteria for assessing the credibility and reliability of interviewees and cross-checking the information gathered[154].

Measures of protection should also be provided in order to prevent any kind of retaliation into which the witness or victim may incur, due to their testimony. Particular precautions should be taken in conducting the interview, such as a careful choice of the place where to hold the hearing, which should be far from the capillary surveillance of the governmental authorities, if threats may come from them. Tape recording and cameras should be avoided when the interviewee's safety is at risk. The witness should also be asked what measures of protection he would believe appropriate to shield him from any possible retaliation[155]. In this regard, there is a gap between the procedures enacted by enquiring mechanisms of a quasi-judicial character and the requirements of criminal proceedings. As a matter of fact, witness' protection cannot undermine the rights of the defense. Generally, a balance should be found according to a determination of the presiding judges, which are empowered to dispose measures of protection for the witness or victim, upon a request issued by the defense, the prosecutor or the legal representatives of interviewees[156].

c) Visits on the Spot

According to GOLDMAN "[i]nvestigating and ultimately attributing responsibility […] generally require on-site investigation and extensive testimony from victims and witnesses"[157]. A field visit may allow fact-finders to obtain first-hand knowledge of the situation, verify the consequences of the acts alleged to have been committed, interview

[154] See the *Training Manual …*, *Ibidem*; the *Manual on Human Rights Monitoring. An Introduction for Human Rights Field Officers*, *supra*, footnote 138. VITE', (1998) *supra*, footnote 20, also proposes some criteria for the choice of witnesses. First of all, the interviewee should not appear to have political reasons for its testimony, especially when the inquiry is focused on violations occurred during armed conflicts of a non-international character, where political partisanship may become the reason for discrediting the opposite party. Secondly, the possible witness' distrust towards the mission should be taken into account. Cross-checking the information provided by the witness with accounts of individual that may have known them is also advisable. Finally, it is recommended to rely on the assistance of local and international NGOs present on the ground. See pp.281-292.

[155] See, for a more extensive analysis of the issue of witness' protection, the *Training Manual …*, pp.110-111, *Ibidem*. See also the *Lund-London Guidelines*, at rule 38, *supra*, footnote 18.

[156] So it is provided for in rules 87-88 of the *Rules of Procedure and Evidence* adopted by the ICC. Similarly, in rule 75 of the *Rules of Procedure and Evidence* adopted by the ICTY.

[157] GOLDMAN R.K., (1993) *International Humanitarian Law: Americas Watch's Experience in Monitoring Internal Armed Conflicts*, American University International Law Review, Vol.9, No.1, p.89.

witnesses and victims, meet with governmental representatives, gather information from NGOs based in the region, etc. In other words, it is a valuable working method to implement the mission's mandate.

Generally, on-site visits may take place upon a formal invitation by the state authorities or following a request on the part of the parent body. The Inter-American system of protection of human rights provides detailed rules regarding field visits. According to art.39 of the *Rules of Procedure of the Inter-American Commission on Human Rights*, the Commission has the power to dispatch an on-site investigation *motu proprio* and obtain from the State into which the violation has been carried out all the necessary facilities[158]. Chapter IV (Title II) further specifies that "[…] it [the State] shall commit itself not to take any reprisals of any kind against any persons or entities cooperating with or providing information or testimony to the Special Commission"[159]. Thus, a clear obligation to cooperate with the enquiring body is established[160]. Art.57 enshrines a set of rules for conducting on-site visits: the State shall grant the Special Commission freedom of movement on the territory of the country and the availability of local means of transportation; access to jails, detention and interrogation sites shall be ensured to the commissioners as well as meetings with persons in detention; the State Authorities shall provide the members of the Mission with measures apt at safeguarding their security; every document that may be requested by the mission shall be submitted by the relevant authorities, etc[161].

[158] Art.39(1) of the *Rules of Procedure* reads as follow: "If it deems necessary and advisable, the Commission may carry out an on-site investigation, for the effective conduct of which it shall request and the State concerned shall furnish all pertinent facilities. In serious and urgent cases, and with the prior consent of the State in whose territory a violation has allegedly been committed, the sole presentation of a petition or communication that fulfils all the formal requirements of admissibility shall be necessary in order for the Commission to conduct on-site investigation". Thus, the possibility to undertake an on-the-spot visit may be subject to the prior consent of the State, in urgent cases. In this case it would not require further determinations of the governmental authorities.

[159] Art.56 of the *Rules of Procedure*.

[160] The Inter-American Court of Human Rights has jurisdiction *ratione materiae* over cases entailing breaches of the Convention and, since the power to dispatch an inquiry is established also in art.48(1)(d) of the *American Convention on Human Rights*, the Court shall be entitled to decide over matters regarding the cooperation between States and the Commission, pursuant to art.61 of the Convention and art.2 of the *Statute of the Inter-American Court of Human Rights*.

[161] Specifically on the activities the Special Commission may undertake during an on-site investigation, see VARGAS C.E., *Visits on the spot. A. The Experience of the Inter-American Commission on Human Rights*, in RAMCHARAN, (1982) pp.137 and *ff*, *supra*, footnote 20.

On-the-spot visits may be undertaken also by the organs of the Council of Europe. Previously to its abolition, the former European Commission of Human Rights[162] had the power, based on the former art.28(a)[163] of the *European Convention on Human Rights*, to initiate an investigation, upon a petition submitted by the representatives of the parties, in order to ascertain the facts. Nowadays, the same power may be used by the European Court of Human Rights (hereinafter ECtHR) through delegates appointed by the Court itself among its judges[164]. The previous mechanism could be triggered only following an application by either a Contracting Party or an individual complain. This means that the Commission did not have a the power to recur to the investigative procedure *motu proprio*. Case practice is therefore much less consistent than that of the Inter-American System for the Protection of Human Rights[165], despite the increase registered in the last decade. Also in the European System for the Protection of Human Rights it is fundamental for fact-finding missions to obtain the full cooperation of the governmental authorities of the state where the enquiry will take place. Although a right to deny any form of cooperation seems not to be available to States, it has been noted that it would be practically impossible to carry out an on-site investigation without the logistic support of the authorities[166]. In such cases the State would be acting in breach of the *European Convention of Human Rights* and the *Rules of Procedure* of the ECtHR[167]. In general, the obligation to cooperate would imply that the State should

[162] The European Commission of Human Rights was an ancillary organ of the ECtHR, entrusted with the task of selecting the cases which would match the requirements to be judged by the ECtHR. It was set up in 1953 and eventually abolished in 1998 with the adoption of Protocol No.11.

[163] The original text of the article read as follow: "In the event of the Commission accepting a petition referred to it: a) it shall, with a view to ascertaining the facts undertake together with the representatives of the parties and examination of the petition and, if need be, an investigation, for the effective conduct of which the States concerned shall furnish all necessary facilities, after an exchange of views with the Commission […]", available at http://www.hri.org/docs/ECHR50.html.

[164] Rule A1(3) of the *Annex to the Rules of Court*, which addresses this mechanism as "on-site investigation".

[165] For an overview of the main cases brought before the former European Commission of Human Rights, see KRUGHER H.C., *Visits on the spot. B. The experience of the European Commission of Human Rights*, in RAMCHARAN, (1982) pp.151 and *ff*, *supra*, footnote 20. See also LEACH *et al*, (2009) pp.71 and *ff*, *supra*, footnote 149.

[166] The same has been underlined for the Inter-American System for the Protection of Human Rights (LEDESMA H.F., (2008) *The Inter-American System for the Protection of Human Rights: Institutional and Procedural Aspects*, Inter-American Institute of Human Rights, San José, p.397, cited in LEACH *et al*, *Ibidem*). LEACH *et al* cite two relevant cases of lack of cooperation by the state authorities with the Commission, *Cyprus v Turkey* (nos. 6780/74 and 6950/75, 26.5.75 *et seq.*, Commission Report of 10.7.76) and *Shamayev v Georgia and Russia* (no. 36378/02, 12.4.05, paras.26-49).

[167] The thesis of the delinquency of the State acting in breach of the procedural duty to cooperate is affirmed also with regard to the Inter-American System for the Protection of Human Rights by FARER

provide the Mission with all the facilities that may be necessary to carry out its investigation, *i.e.* freedom of movement in the territory of the country, any information regarding individuals in detention, access to any place of detention that the Mission wishes to visit, etc[168].

As for the practice of the UN bodies, specifically the Special Procedures available to the UNHRC (and the former CHR), the main characteristics will be outlined in the following section.

From the cases considered above, it can be inferred that the main problem when mandating a fact-finding mission to carry out on-site investigations is that of cooperation. The *UN Declaration on Fact-Finding* calls the States to implement a policy of admitting UN fact-finding commissions into their territories and provides that they explicitly motivate their refusal[169]. The following rules spell out in details the obligations arising for the States in order to provide the Mission with full cooperation:

i) fact-finding missions should be granted all the immunities necessary to serenely carry out their mandate, including full confidentiality and the access to any place of detention or interrogation that may be requested by them (part III, art.23 of the *Declaration*);

ii) individuals that may be interrogated by the members of the mission should be protected from any retaliation or harmful consequence, for having testified (part III, art.23 of the *Declaration*);

iii) local laws and regulations should not be used in such a manner as to hinder the work of the mission (part III, art.23 of the *Declaration*);

iv) the members of any mission should be granted the immunities and privileges accorded to experts on missions by the *Convention on the Privileges and Immunities of the United Nations* (part III, art.24 of the *Declaration*).

Eventually, it is to be noted that, in contexts of armed conflict, no matter whether of an international or non-international character, the parties' cooperation is even more

T.J., *Finding the Facts: The Procedure of the Interamerican Commission on Human Rights of the Organization of American States*, in LILLICH, (1991) pp.275-287*supra*, footnote 4.

[168] LEACH *et al*, p.75, *supra*, footnote 149.

[169] See Part III, artt.20 and 21 of the *Declaration*.

valuable, due to the difficulties inherent to the situation to be ascertained[170]. Access to relevant information in the hand of the intelligence may be fundamental in order to assess that a specific event was the consequence of a lawful, instead of unlawful, conduct. The FFMGC, for instance, was denied the access to Israel nor it received any cooperation from the Government[171].

2.4 Report and Recommendations

Reporting is the final stage of the fact-finders' activity. Although the *UN Declaration on Fact-Finding* did not provide for the drafting of recommendations and, for long, it has been argued that fact-finding missions should not have them included in their final reports, it is common practice to formulate such recommendations to the parent body in order to suggest how to restore respect for human rights[172]. Reporting is also the way to make the public opinion aware of systematic patterns of violations and, thus, to trigger that mechanism of public condemnation earlier mentioned in this chapter. Generally, two types of reports can be distinguished: internal reports, used within the mission only, and external reports, usually addressed to the parent body or other agencies or institutions[173].

Some principles should guide fact-finders in drafting reports. Firstly, a report should be precise and accurate, which implies the terms of reference to be clearly spelled out, a transparent explanation of the methodology adopted as well as a methodic assessment and verification as for the reliability of the sources of information received, etc. Secondly, it is crucial that reports are timely, especially when a pattern needs to be identified, such as in cases where it is to be ascertained the material element of an international crime, or when the authorities' concern has to be promptly raised in

[170] More extensively on fact-finding regarding IHL, see VITE', (1998) pp.269-275, *supra*, footnote 20.
[171] See the *FFMGC Report*, paras.173-175. See also the Correspondence between the UN Fact-Finding Mission with the Government of Israel regarding cooperation, *Annex II* to the *FFMGC Report*.
[172] Art.17, Part II of the *Declaration* only provides that "[…] [t]he report should be limited to a presentation of findings of a factual nature". The same is underlined by VAN BOVEN T.C., *The Reports of Fact-Finding Bodies*, in RAMCHARAN (1982) pp.183-184, *supra*, footnote 20. The same author takes note of the increasing inclusion in fact-finding reports of recommendations and argues that the traditional view is somehow in contrast with the aim of fact-finding, which is that of "assisting in the restoration of respect for human rights". Since commissions of enquiry usually gain a deep insight into situations of abuses of Human Rights, it would be *naïve* to deny the value of such an advice.
[173] See the *Training Manual on Human Rights Monitoring*, p.390, *supra*, footnote 109, and the *Manual on Human Rights Monitoring. An Introduction for Human Rights Field Officers*, p.18, *supra*, footnote 138.

response to ongoing systematic violations of human rights. Finally, and here the gap with the previous opinion lies, a report should be "action-oriented", meaning that it should entail recommendations, since fact-finders are aware of the situation more than anybody else[174]. Granting the compliance with these principles means granting credibility and reducing the risk of being criticized by the States that may be involved in the situation investigated. Moreover, no uniform standard can be adopted by fact-finders, since each case will have its own specificities and each commission will have to carry out its mandate in a way which fits the situation to be investigated[175].

Factual and legal findings deserve particular accuracy when put down on paper. It has already been pointed out the importance of establishing a methodology and make it knowable to those who will read the report. As for the facts, it is fundamental to highlight the criteria adopted to assess their truthfulness and the evidence collected. The former Special Rapporteur on Iraqi-occupied Kuwait underlined that "[t]he presentation of the facts and conclusions should be as transparent as possible necessitating […] a description of the kind of information and evidence which allows for a given conclusion"[176]. Obviously, this requirement varies according to the specific mandate of the commission. If the terms of reference ask for the identification of individual perpetrators, the threshold will be higher[177]. Facts should also be presented precisely, meaning that fact-finders should avoid too general or vague considerations. Also in this case, the degree of precision will change according to the nature of the mechanism triggered. An enquiry report into specific events will generally need to be more precise than a report of a situation. Moreover, the expected outcome of the procedure adopted will influence the report. If judicial steps are expected to be taken following the release of the report, then the facts should be presented in the most precise and accurate possible way. Differently, when a diplomatic settlement of the dispute is envisaged, a lower standard in reporting the events will probably be accepted[178]. Finally, facts should always be contextualized, especially with regard to fact-finding in the field of IHL, being possible that a specific act amounts to a breach of the law only if committed in a

[174] These criteria are set out in the *Training Manual …*, pp.390-391, *Ibidem*.
[175] More extensively on this aspect of reporting, see VITE', (1998), pp.350 and *ff*, *supra*, footnote 20.
[176] KÄLIN W., *Human Rights in Times of Occupation: The Case of Kuwait*, Law Books in Europe, p.13, cited in VITE', p.357, *Ibidem*.
[177] VITE', *Ibidem*.
[178] P.360, *Ibidem*.

context of international armed conflict rather than a non-international one[179]. Moreover, facts should not be put in context only regarding the law applicable, but they should also be considered in the light of other factual circumstances, such as the efforts that a government may have undertaken to ensure the compliance with IHL obligations, or the precautions that may have been adopted to prevent the loss of civilian lives or to ensure the right to life. Some of these circumstances may only be relevant on a factual plan, other should also be taken into account when a legal assessment is required. As underlined above in this chapter, the practice of enquiry commissions shows that it is becoming increasingly common to include in the reports also legal findings. Although, originally, the role of fact-finding missions was only that of ascertaining the facts, nowadays, human rights bodies entitled with the power of establishing missions of enquiry tend to broaden their mandates, since responding to a matter of law entails more strength than a simple factual finding[180]. Such power can be considered implicit also when the mandate does not expressly provide for it, otherwise there would be no space for recommendations. This has been the turning point for fact-finding, as it marked its quasi-judicial nature[181]. At the same time, it must be born in mind that those findings can never reach the threshold required in a court of law. That has lead to some ambiguities, when judicial institutions have relied too heavily on legal findings collected by commissions of enquiry, not pursuing, as it should have been the case, the physiological avenues represented by criminal investigations[182]. As a matter of facts, the issue entails an epistemological problem, since the difference between judicial and quasi-judicial fact-finding is merely formal and it lies in the rules of procedure.

Finally, the issue of recommendations deserves some attention, since it is becoming increasingly usual to have them included in the reports, despite the fact that, at the beginning, enquiry commissions were not entrusted with such power. As a matter of facts, empowering fact-finding missions with that possibility would have meant, in the

[179] Pp.364 and *ff*, *Ibidem*.
[180] P.368, *Ibidem*.
[181] P.370, *Ibidem*.
[182] That has been the case of the International Criminal Tribunal for the former Yugoslavia (hereinafter ICTY), that judged basing on the conclusion reached by the Commission of Experts established pursuant to Resolution 780(1992) of the Security Council (see VITE', *Ibidem*, p.371); also the former ICC prosecutor seems not to have exhausted the normal fact-finding and criminal investigative avenues, relying too heavily on the Report on Darfur, presented by the *International Commission of Inquiry on Darfur* (see SUNGA L.S., (2011) *How can UN human rights special procedures sharpen ICC fact-finding?*, The International Journal of Human Rights, Vol.15, No.2, p.200).

view of most governments, mixing an objective activity, that of ascertaining the facts, with a political one, that of making recommendations[183]. The practice of UN bodies has revealed to be more open, although it has not been explicitly affirmed that reports shall recommend specific actions. A recommendation in International Law is an "act that suggests to its recipient to undertake a given behavior"[184]. Generally, it addresses both the international community and the governments that may be involved in the situation under investigation. Recommendations do not have a binding effect, yet, when they recall the obligation to abide by the rules set forth in a treaty, the *pacta sunt servanda* principle should suffice to affirm that the recipient should adapt to the content of the recommendation[185].

3. Standard of Proof – A Comparative Perspective

Fact-finding missions in the field of human rights aim at ascertaining the facts of a specific event, generally revealing a breaches of IHRL and IHL. Such mechanisms, similarly to tribunals, intervene *ex post facto*, which poses a question of method. To what degree of certainty can a fact be considered to have actually happened? That is a very crucial question that fact-finders should always ask to themselves, in the light of the possible outcome of their enquiries. What is the most appropriate standard of proof to be adopted?

Epistemological studies have shown that the results of any factual investigation depend on the context in which the latter is carried out, the methodology adopted and the purposes it aims at[186]. Consequently, science is not unbiased when it is capable of finding a predetermined objective truth, which indeed exists but only in the past. Objectivity belongs to the method adopted, not to the supposed reality[187]. That is a

[183] VITE', pp.380-381, *Ibidem*.
[184] NGUYEN QUOC D., DAILLIER P., PELLET A., *Droit international public*, p.345, cited in VITE', p.383, *Ibidem*, (my own translation).
[185] Obviously the obligation arises when the recipient is a party to the treaty. On this topic, see VITE', pp.383-384, *Ibidem*.
[186] See UBERTIS G., *La ricerca della verità giudiziale*, in UBERTIS G., (1992) *La conoscenza del fatto nel processo penale*, Giuffré Editore, p.1.
[187] POPPER K.R., (1959) *The Logic of Scientific Discovery*, published in 2005 by Taylor and Francis e-Library, at pp.280-281 reads "The old scientific ideal of *episteme* [emphasis added] - of absolutely certain, demonstrable knowledge - has proved to be an idol. The demand for scientific objectivity makes it inevitable that every scientific statement must remain tentative forever. It may indeed be corroborated, but every corroboration is relative to other statements which, again, are tentative. [...] for it is not his

conquest already achieved by empirical sciences, especially in the field of quantum mechanics, with the so named *observer effect*. Accordingly, and translated into a less technical language, it is not possible to observe and know something without modifying it[188]. UBERTIS argues that, transferred to the judicial epistemology, the above mentioned observations entail two consequences:

i) If it is true that the result of any factual enquiry does not reproduce an absolute "factuality", also the factual materials used by the judge for its decision is not the consequence of a passive acknowledgement of the evidential elements emerged;
ii) The judicial legal reasoning cannot be seen as a perfect syllogism. Differently, it stems from multiple different circumstances that affect the judge in its finding.[189]

Where the legal sciences differs from the empirical sciences is in the object of their reasoning. It must be remembered that the judge does not study facts but deals with statements of facts. Consequently, although "the truth lies in the facts", what the judge aims at is the proof of those facts[190]. In the same way, fact-finders generally intervene when a given fact is said to have happened and their knowledge will depend on the accounts and materials they will be able to collect. This represents the starting point of any enquiry and, on this basis, the investigators have to work. Their task will be that of collecting as much evidence as they will be able to, in order to corroborate a given piece of information.

From these observations the importance of an appropriate standard of proof stems clearly, especially if the findings collected are to be used in other procedures or may trigger other mechanisms for the pursuit of accountability. Only very recently scholars have started to identify the best practices adopted by commissions of enquiry in

possession of knowledge, of irrefutable truth, that makes the man of science, but his persistent and recklessly critical quest for truth". Also cited in UBERTIS, p.2 at footnote 2, *Ibidem*.

[188] The principle originally affirmed that an increase in the precision of an empirical measurement would cause a greater change in the object to be observed. See HEISENBERG W., (1930) *The Physical Principles of Quantum Theory*, University of Chicago Press. See also UBERTIS, p.2, *Ibidem*.

[189] UBERTIS, p.3, *Ibidem*.

[190] *Ibidem*, p.9.

carrying out their fact-finding role[191]. This section will be aimed at outlining the different standards of proof available to fact-finders. The fact that, at present, no binding norm regarding the evaluation of evidence exists has to be born in mind, since fact-finders tend to give themselves rules according to what their mandate specifically requires.

3.1 Establishing a clear Standard of Proof

"Finding a fact [...] means determining that its existence is more probable than its non-existence"[192]. As underlined in the above paragraph, no absolute certainty can be reached in such determination. Consequently, fact-finders have to rely on the evidence which is presented before the mission or collected after the allegation of a fact. "Evidence", on the other hand, is what "[...] makes evident a fact [...]"[193], and it is "relevant" when it reveals "[...] any tendency in reason to prove any material matter [...]"[194]. Finding a link between facts and evidence means asking to oneself when evidence must be considered sufficient to prove that a fact has actually occurred. It means, in other words, establishing which standard of proof is the most appropriate to consider a fact proved, but what is a standard of proof?

According to a fairly recent definition:

> "standard of proof [...] marks a point somewhere along the line between two extremes: a mere conjecture at one end, and absolute certainty at the other. Proof furnished in support of a particular proposition must meet or surpass this point for a [...] finding to be made. In practice, this may either constitute a very explicit exercise of applying a standard of proof, [...] or [...] based upon a number of unarticulated factors concerning the evidence that has been furnished."[195]

[191] See, for instance, the *Monitoring, Reporting, and Fact-Finding* policy project led by the Program on Humanitarian Policy and Conflict Research. Website: http://www.hpcrresearch.org/research/monitoring-reporting-and-fact-finding.
[192] American Law Institute's (1942) *Model Code of Evidence*, cited in RAMCHARAN B.G., *Evidence*, in RAMCHARAN, (1982) p.64, *supra*, footnote 20.
[193] NOKES G.D., (1967) *An Introduction to Evidence*, p.3, cited in *Ibidem*.
[194] American Law Institute's (1942) *Model Code of Evidence*, *supra*, footnote 21.
[195] DEL MAR K., (2011) *The International Court of Justice and Standards of Proof*, in BANNELIER, CHISTAKIS, HEATHCOTE (eds.), (2011) *The ICJ and the Development of International Law. The Lasting Impact of the Corfu Channel case*, Routledge, cited in WILKINSON, pp.12-13, *supra*, footnote 16.

Documenting serious violations of human rights can be demanding, and especially when these events occur in the context of armed conflicts they pose further challenges, for the reasons already explored above in this chapter. Recent studies have shown that fact-finders, in the choice of the most adequate standard of proof, must find a balance between a strict standard, which may reveal to impede the achievement of their mandate due to the scarcity of time and resources, and a low standard, which would negatively influence the rigorousness of the enquiry, and indirectly its credibility[196].

Moreover, it is to be remembered that standards of proof are needed both to establish that a fact has happened and to assess the adherence of a factual situation to the legal framework applicable[197]. This observation is not of minor importance, since, as shown above, fact-finding missions are often empowered to provide some sort of legal assessment.

In conclusion, the importance of identifying a clear standard of proof emerges from what has been discussed up to this point. Since those who are entrusted with the task to ascertain that an alleged fact has happened and amounts to a violation of a relevant legal obligation are generally not present when the fact occurs, it is necessary to set a clear criterion to enhance their credibility. This criterion will serve the purpose of establishing the truthfulness or falseness of the statement affirming that the fact has actually happened.

3.2 Few Notes on the Admissibility of Evidence

In the process of judicial fact-finding, judges have to deal first with the probative value of the evidence submitted by the parties. Such probative value can be said to determine the admissibility of evidence, and it has no fixed definition, since its content varies and is referred to the facts at stake[198]. This preliminary evaluation of evidence is generally present also in the procedure followed by fact-finding missions, as

[196] See, for instance, WILKINSON, *Ibidem*.
[197] *Ibidem*.
[198] For a definition of "probative value" in different legal systems see: MAY R., WIERDA M., (2002) *International Criminal Evidence*, Transnational Publishers, p.107; UBERTIS, in UBERTIS (ed.), (1992) pp.16 and *ff*, *supra*, footnote 186; UBERTIS G., entry *Prova*, in (2006) *Digesto delle Discipline Penalistiche*, UTET Giuridica, pp.320-322.

exemplified by the FFMGC[199]. However, it concerns the source of evidence and not the piece of evidence itself. The reason for such an assessment lies in the fact that the whole mechanism is not judicial, nor it can pretend to act as a judicial body. Judicial procedures are generally ruled by norms which provide for criteria for the admissibility of evidence. Enquiry mechanisms, on the contrary, are not positively regulated and they, consequently, have to give themselves rules and create remedies to compensate for the lack of a detailed and comprehensive procedure[200]. Therefore, as far as evidence is concerned, it is common practice to determine the probative value of evidence, assessing the reliability and credibility of its source[201].

It is worth spending few words on the difference between reliability and credibility, although it has been difficult to clearly differentiate the two concepts both for scholars and jurisprudence. According to the ICTY Trial Chamber:

> "Credibility depends upon whether the witness should be believed. Reliability assumes that the witness is speaking the truth, but depends upon whether the evidence, if accepted, proves the fact to which it is directed"[202]

However, the same tribunal, in other judgements, defines reliability "in the sense of being voluntary, truthful and trustworthy"[203], thus, as a synonym of credibility.

[199] See *infra*, pp.81-82.

[200] It is even argued that commissions of enquiry and fact-finding commissions are not bound by the rules of evidence generally adopted by national legal systems, due to their impossibility to fully verify the allegations brought before them. In fact, this would require full access and freedom to conduct on-site investigations within the territory of the State (or States) involved. Due to these circumstances, such commissions have to enjoy a certain degree of flexibility in matters concerning evidence, especially in light of the possibility generally recognized to the complainants to present whatever type of evidence. See VITE', (1998) pp.308-315, *supra*, footnote 20.

[201] Although not explicitly endorsed by the Report, the International Commission of Inquiry on Darfur, often refers to the reliability and credibility of the information gathered and the sources of evidence. See extensively the *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General*. It is to be noted that reliability is not so plainly considered a component of the probative value and, thus, of admissibility. Someone argues that it would constitute a different category, deserving a separate analysis from that regarding admissibility. See, more extensively, MAY and WIERDA, pp.107 and *ff*, *supra*, footnote 198.

[202] *Prosecutor v. Kunarac et al.*, (Case No.IT-96-23-T and 23/1-T) "Foča", ICTY T. Ch.II, Decision on Motion for Acquittal, 3 July 2000, para.7, cited in KLAMBERG M., (2011) *Fact-finding in International Criminal Procedure – How Collection of Evidence may Contribute to Testing of Alternative Hypotheses*, paper to be presented during lecture at the Amsterdam Centre for International Law (ACIL), electronic copy available at http://ssrn.com/abstract=1847710, p.7.

[203] *Prosecutor v. Aleksovski*, (Case No.IT-95-14/1), ICTY A. Ch., Decision on Prosecutor's Appeal on Admissibility of Evidence, 16 February 1999, para.15, cited in KLAMBERG, p.8, *Ibidem*. See also

KLAMBERG proposes a different interpretation of the two requirements, redefining reliability as "observational accuracy" and credibility as "truthfulness". The former hints at the sensory perception of the source of evidence, mainly the witness, while the latter refers to its genuineness[204]. Consequently, despite its credibility, the information provided by a witness (*i.e.* the source of evidence) might subsequently reveal to be wrong, due to a lack in the observational accuracy.

Whatever the most appropriate standard for admissibility may be, the practice of international enquiry commissions has revealed a tendency to admit whatever type of evidence, provided that it does not appear to be biased. What a biased source of evidence is can be inferred from the following statement of the UN Special Committee on Human Rights in the Arab Territories occupied by Israel:

> "We have made sure not to cite any information that may be considered as emanating from sources that are hostile to the Government of Israel and that could therefore be criticized as to their motivation"[205]

Thus, it is possible to conclude that, as a general rule, any information can be admitted in the information gathering process before a fact-finding commission[206]. Nevertheless, some limits to this inclusive approach have to be set, especially when the sources from which the evidence emanates are in principle biased or politically sided against the authorities under scrutiny.

3.3 Assessing the Evidence: Different Standards of Proof

The second and decisive step in building a finding is the evaluation of the evidence collected. When can it be considered quantitatively sufficient and sufficiently corroborated to determine the existence or non-existence of an alleged fact? The answer is provided by the standard of proof adopted by the mission and it entails a matter of credibility, since the lower the standard, the less credible the findings reported. Moreover, it is argued that establishing a clear standard of proof in advance contributes

Prosecutor v. Dusko Tadić, (Case No.IT-94-1), ICTY T. Ch., Decision on Defence Motion on Hearsay, 5 August 1996, para.16.

[204] KLAMBERG, p.8, *Ibidem*.

[205] Cited in RAMCHARAN, in RAMCHARAN, (1982) p.70, *supra*, footnote 192.

[206] According to RAMCHARAN, p.80, *Ibidem*, commissions of enquiry should benefit by "flexible admissibility criteria" and be able to "employ [...] all the kinds of evidence that it deems necessary".

to limit the evidence gathering process, by setting the minimum threshold to consider the evidence sufficient to reach a satisfying conclusion[207]. As a matter of facts, the process of gathering evidence could virtually go on indefinitely but, as it has already been pointed out, fact-finding commissions have limited time and resources.

Firstly, a terminological issue has to be raised. The words "standard of proof" are more commonly used before judicial bodies, such as tribunals and courts, while commissions of enquiry and fact-finding commissions generally prefer to address the same matter with the terms "degree of certainty"[208]. However, this distinction will not be taken into account for the purposes of this paper.

It is submitted by several scholars, and the practice of international enquiries confirms their position, that the standard of proof represents a matter inherent to each fact-finding mechanism. Generally, with the exception of the case in which the parent body provides for a specific standard, the appointed mission will be competent to establish the most appropriate rules for its work, which will depend on the "mandate and procedure in which the fact-finding process takes place"[209]. However, RAMCHARAN supported that in the absence of an explicit determination of the parent organ, fact-finding missions should be guided by some principles in the choice of the most appropriate rules for carrying out their mandate. Accordingly, the author argued that, as a general principle, a "balance of probabilities" standard should be adopted[210].

RAMCHARAN's opinion introduces the issue of different standards of proof. It is widely acknowledged that three main standards of proof can be identified[211]:

i) *Balance of probabilities* or *preponderance of evidence*, which "consists of comparing information that confirms a fact or violation with information that

[207] VITE', (1998) p.321, *supra*, footnote 20.
[208] See WILKINSON, p.13, *supra*, footnote 16. See also VITE', *Ibidem*, who also refers to the threshold to affirm that a given fact has happened as "*degré de certitude*".
[209] BOUTRUCHE, (2011) p.9, *supra*, footnote 11. See also: RAMCHARAN, in RAMCHARAN, (1982) pp.79-80, *supra*, footnote 20; VITE', (1998) p.321, *supra*, footnote 20.
[210] RAMCHARAN, *Ibidem*.
[211] See VITE', (1998) pp.323 and *ff*, *supra*, footnote 20; BOUTRUCHE, (2011) p.9, *supra*, footnote 11; WILKINSON, p.14, *supra*, footnote 16.

questions it."[212] The fact will be considered to have happened if the former proof reveals to be more convincing;

ii) *Convincing proof* or *clear and convincing evidence*, used by the Inter-American Court of Human Rights "in which the Court relies on evidence 'capable of establishing the truth of the allegations in a convincing manner'"[213];

iii) *Proof beyond a reasonable doubt*, representing the strictest standard, generally employed in national criminal proceedings, and leaving almost no room for doubts as for the fact that an event has actually taken place[214].

Given this framework, in this section, the practice of national and international judicial and non-judicial bodies will be outlined, in order to assess which would be the most appropriate standard of proof to be adopted by fact-finding missions, bearing in mind the specificities of these mechanisms, which have been outlined above in this chapter.

3.3.1 National Criminal Trials

Firstly, national practices will be analysed. However, since this paper is dealing mainly with the reporting of serious violations of IHRL and IHL, often entailing the individual criminal liability of the perpetrators, only criminal courts' practices will be taken into account.

Despite the differences in civil cases, both civil law and common law systems tend to adopt a "beyond a reasonable doubt" standard in criminal litigation. In the UK and the US, the prosecutor has to demonstrate that there cannot be any doubt regarding the guilt of the accused, so that the probability that the latter could be innocent is reduced to almost 0 per cent. According to WILKINSON, "if it were to be quantified, conviction should correspond to a 95 per cent probability that the accused is guilty"[215]. The reasoning behind the endorsement of such threshold lies in the old justification

[212] BOUTRUCHE, *Ibidem*.
[213] *Ibidem*. See also *Velasquez Rodriguez Case*, Judgement (Merits) 29 July 1988, Inter-American Court of Human Rights, Series C, No.4, 1988, para.129, also cited in VITE', (1998) p.324, *supra*, footnote 20.
[214] WILKINSON, p.17, *supra*, footnote 16. See also KOKOTT J., (1998) *The Burden of Proof in Comparative and International Human Rights Law. Civil and Common Law Approaches with Special Reference to the American And German Legal Systems*, Studies and Materials on the Settlement of International Disputes, Kluwer Law International, pp.197 and *ff*.
[215] WILKINSON, *Ibidem*.

according to which "it is more costly to convict an innocent person than to acquit a guilty one"[216]. In civil law systems the "beyond a reasonable doubt" standard is also widely accepted[217]. However, different phrasings can be found. The French system requires the judge to reach an "intime conviction", which would correspond "to guilt without the shadow of a doubt"[218]. The study initiated by WILKINSON on behalf of the Geneva Academy of International Humanitarian Law and Human Rights also considers the standard of proof adopted under Sharia Law. Justified by the harshness of punishments, the slightest doubt regarding the culpability of the accused shall entail an acquittal. However, judges (*qādi*) are entitled to use their wisdom when they believe that the standard provided by the law is not appropriate[219].

At national level, standards of proof are also employed in responding to different needs than that of establishing the culpability of the accused. For instance, a certain degree of certainty as for the facts of an episode that may result in the responsibility of an accused is required for the court to issue a warrant of arrest, or for the prosecutor to take a case to court. Both cases represent preliminary steps to a full trial. Thus, the aim of reaching a certain threshold of certainty is that of carrying forward the case before court. The standard of proof adopted in these contexts can more easily match the purposes of fact-finding missions, since they represent only preliminary steps in terms of accountability. As a matter of facts, a determination issued by an enquiry mechanism does not necessarily imply that a court of law will reach the same conclusion[220]. For instance, the UK criminal system of investigation requires that a warrant of arrest be issued if there is ""reasonable grounds for suspecting" that an individual has committed a crime"[221]. The Italian Code of Criminal Procedure sets the standard for issuing a

[216] *Ibidem*.
[217] See for instance the German Code of Criminal Procedure which requires a "beyond a reasonable doubt" standard (WILKINSON, p.18, *Ibidem*; CLERMONT K.M., SHERWIN E., (2002) *A Comparative View of Standards of Proof*, The American Journal of Comparative Law, Vol.50, No.2, p.245; KOKOTT, (1998) pp.18-19, *supra*, footnote 214). See also art.533 of the Italian Code of Criminal Procedure, according to which the accused shall appear to be guilty "al di là di ogni ragionevole dubbio", which is the equivalent of the "beyond a reasonable doubt" standard.
[218] WILKINSON, *Ibidem*.
[219] *Ibidem*.
[220] See p.19, *Ibidem*. The author reports that "the decision to prosecute may possibly be compared to a decision to make public determinations in a fact-finding context; in both cases, decisions may not rely only on the achievement of an evidentiary standard."
[221] *Ibidem*.

precautionary measure (*misura cautelare*) to "gravi indizi di colpevolezza"[222], which, in terms of pre-trial custody, has to be interpreted as requiring a prognostic judgement as for the merit of the controversy. This judgement should lead to the culpability of the accused[223]. Similarly, in the UK, prosecutors would only press charges when satisfied that the evidence is sufficient to provide a "realistic prospect of conviction against each defendant on each charge"[224]. In all these cases, nothing is decided as for the culpability of the accused. Thus, the conclusion of the pre-trial assessment could be subsequently overruled with the final judgement. In the same way, the findings of a fact-finding mission could be proved to be wrong by a court of law, without undermining the usefulness of the mechanism.

3.3.2 International Trials Practice

When dealing with the standards of proof adopted by international courts it is important to distinguish between tribunals dealing with criminal (*strictu sensu*) matters and those concerned with the settlement of international disputes or with the criminal liability of States[225]. As a matter of facts, the former are bound by those principles that aim at protecting the accused. Consequently, for these tribunals the standard to be adopted cannot but be that of "beyond a reasonable doubt", differently from the latter, that might adopt a lower degree of certainty in certain circumstances.

a) International Tribunals not of a Criminal Character

The ICJ and the ECtHR seem to adopt a case-by-case approach, as far as standards of proof are concerned.

The *European Convention on Human Rights* (hereinafter *ECHR*) and the *Rules of Court* do not provide for any particular standard to be adopted by the ECtHR. However, the Court constantly applied the "beyond reasonable doubt" standard, which has been

[222] Art.273 of the Italian Code of Criminal Procedure.
[223] LATTANZI (ed.), (2009) *Codice di Procedura Penale. Annotato con la giurisprudenza*, Giuffrè Editore, p.806.
[224] WILKINSON, p.19, *supra*, footnote 16.
[225] On this last concept, the criminal responsibility of States, see WYLER E., (2002) *From 'State Crime' to Responsibility for 'Serious Breaches of Obligations under Peremptory Norms of General International Law'*, European Journal of International Law, Vol.13, No.5, pp.1147-1160. See also HÜLS V., (2004) *State Responsibility for Crimes under International Law: Filling the Justice Gap in the Congo*, lawanddevelopment.org.

employed in order to guarantee its main function, *i.e.* the protection of human rights at the level of States[226]. The Court has repeatedly explained the significance of this standard. In the *Greek Case*, it affirmed that:

> "[...] not a doubt based merely on a theoretical possibility or raised in order to avoid a disagreeable conclusion, but a doubt for which reasons can be drawn from the facts presented"[227]

Subsequently, in the *Ireland v. United Kingdom* judgement, the ECtHR spelled out that this standard could be reached through the ascertainment of "[...] the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact [...]"[228]. However, differently from the "beyond a reasonable doubt" standard adopted by national courts, the one employed by the Court:

> "[...] it has never been its purpose to borrow the approach of the national legal systems that use that standard. Its role is not to rule on criminal guilt or civil liability but on Contracting States' responsibility under the Convention. The specificity of its task under Article 19 of the Convention – to ensure the observance by the Contracting States of their engagement to secure the fundamental rights enshrined in the Convention – conditions its approach to the issues of evidence and proof."[229]

The same approach has been adopted by the Inter-American Court of Human Rights, which affirmed, in the *Velásquez Rodríguez* case:

> "[...] the international protection of human rights should not be confused with criminal justice. States do not appear before the Court as defendants in a criminal action. The objective of international human rights law is not to punish those individuals who are guilty of violations but rather to protect the victims and to

[226] WILKINSON, p.19, *supra*, footnote 16. See also LEACH *et al.*, (2009) pp.14-15, *supra*, footnote 149.
[227] See the so called *Greek Case* (*Denmark, Norway, Sweden and the Netherlands v Greece*, Nos.3321/67, 3322/67, 3323/67 and 3344/67, Commission Report of 5.11.69, para.30) cited in LEACH, *Ibidem*.
[228] *Ireland v United Kingdom*, No.5310/71, 18.1.78, Series A no. 25, para.161, cited in LEACH, *Ibidem*.
[229] *Nachova v Bulgaria*, Nos.43577/98 and 43579/98, 6.7.05 ECHR 2005-VII, para.147, cited in LEACH, *Ibidem*.

> provide for the reparation of damages resulting from the acts of States responsible."[230]

The ICJ, conversely, has been less rigorous in applying a unique standard of proof. Its judgements show a certain creativity in assessing the evidence collected, which is confirmed by the different wordings of the standard adopted, and the explicit reference in the *Corfu Channel* case to three different standards: *degree of certainty*, *no room for reasonable doubt*, *fall short of conclusive evidence*[231]. However, the Court practice shows that the standard adopted tends to increase according to the importance of the matter dealt with and the function carried out by the ICJ. According to WILKINSON, the Court applies a lower standard of proof when dealing with evaluations of facts, while it applies a higher standard when dealing with legal assessments, such as the state responsibility[232].

b) International Criminal Tribunals

International criminal justice poses further problems in the choice of the best standard of proof. As a matter of facts, due to the gravity of the acts they are called to deal with, international criminal trials may result, when the accused is found guilty, in harsher punishments than a fine (typically the imprisonment of the perpetrator). In addition, international criminal tribunals hardly enjoy direct access to the facts, despite the obligation to cooperate which generally binds the States[233]. The combination of these two factors with the internationally recognized rights of the accused, in particular the presumption of innocence, requires the standard of proof to be particularly strict. Consequently, the ICTY, the ICTR, the Special Court for Sierra Leone, the Special Tribunal for Lebanon and the ICC adopted a "beyond reasonable doubt" standard[234].

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[230] *Velásquez Rodríguez v Honduras*, 29.7.88, Inter-American Court of Human Rights (Ser.C) No.4 (1988), para.134, cited in LEACH, *Ibidem*.

[231] WILKINSON, p.20 and footnote 81, *supra*, footnote 16.

[232] WILKINSON calls the former function "declarative", and it equates the standard adopted therein with that of "preponderance of evidence". The latter function is, instead, addressed as "determinative" and it entails much heavier consequences for the States, since it determines their legal responsibility for certain acts. See *Ibidem*.

[233] KOKOTT, pp.1-3, *supra*, footnote 214. As for the obligation to cooperate see MAY and WIERDA, (2002) pp.53 and *ff*, *supra*, footnote 198.

[234] See WILKINSON, pp.20-21, *supra*, footnote 16. See also: Rule 87(A) of the *Rules of Procedure and Evidence* of the ICTY; Rule 87(A) of the *Rules of Procedure and Evidence* of the ICTR; Rule 87(A) of the *Rules of Procedure and Evidence* of the Special Court for Sierra Leone; Rule 148(A) of the *Rules of Procedure and Evidence* of the Special tribunal for Lebanon; art.66(3) of the *Statute of the ICC*. In the

Notably, international criminal jurisprudence specifies the meaning of "proof beyond reasonable doubt". In the *Tadić* case, the Appeal Chamber of the ICTY submitted that:

> "The test for proof beyond reasonable doubt is that 'the proof must be such as to exclude not every hypothesis or possibility of innocence, but every fair or rational hypothesis which may be derived from the evidence, except that of guilt'."[235]

Hence, the approach adopted by the ICTY is that of excluding every possible explanation for a given fact, in order to meet the standard of "proof beyond reasonable doubt" as for the actual happening of that fact at the hand of the accused. Accordingly, "[t]he standard of proof beyond reasonable doubt requires a finder of fact to be satisfied that there is no reasonable explanation of the evidence other than the guilt of the accused"[236].

International Criminal Tribunals may take into account also circumstantial evidence, which is usually employed to prove the *mens rea* element in the commission of a crime, due to the frequent lack of direct evidence. The court only needs to demonstrate that from an overall evaluation of all the evidence collected, the guilt of the accused can be inferred. Therefore, it is not required that each piece of evidence be sufficient to demonstrate the facts at stake[237].

Also in the case of International Criminal Tribunals, it is interesting to consider the standard of proof required in pre-trial phases. For instance, according to Rule 47(B), the Prosecutor of the ICTY may issue an indictment for confirmation by a judge, when "there is sufficient evidence to provide reasonable grounds for believing that a suspect

Flick case (VI NMT, at 1189) the Nuremberg tribunal spelled out that: "(1) there can be no conviction without proof of personal guilt. (2) such guilt must be proved beyond a reasonable doubt. (3) the presumption of innocence follows each defendant throughout the trial. (4) the burden of proof is at all times upon the prosecution. (5) if from credible evidence two reasonable inferences may be drawn, one of guilt and the other of innocence, the latter must be taken." (cited in MAY AND WIERDA, p.130, *Ibidem*).

[235] *Prosecutor v. Dusko Tadić*, Case No.IT-94-1-A, 15 July 1999, ICTY A. Ch., para.174. See also KLAMBERG, pp.10-11, *supra*, footnote 202.

[236] *Prosecutor v. Mrkšić et al.*, ICTY A. Ch., 5 May 2009, cited by KLAMBERG, p.11 at footnote 67, *Ibidem*.

[237] See KLAMBERG, pp.12-13, *Ibidem*. See also MAY and WIERDA, (2002) pp.111-112, *supra*, footnote 198. The authors cite an English case (*Exall*, 1866) where the court described the effect of circumstantial evidence as it follows: "It has been said that circumstantial evidence is to be considered as a chain, and each piece of evidence as a link of the chain, but that is not so, for then, if any one link broke, the chain would fall. It is more like the case of a rope comprised of several cords. One strand of the cord may be insufficient to sustain the weight but three stranded together may be quite of sufficient strength."

has committed a crime"[238]. How this phrasing shall be interpreted is spelled out by the reviewing judge in the *Rajić* case, according to which the evidence supporting the indictment should lead "a reasonable or ordinarily prudent man to believe that a suspect has committed a crime"[239]. However, in later cases, other reviewing judges interpreted the requirement as entailing a higher standard of proof, which, accordingly, would have been sufficient, in the absence of any counter-argument of the defence, to convict the accused[240]. At an earlier stage the Prosecutor may decide to initiate an investigation when, once assessed the information received or obtained, "there is sufficient basis to proceed"[241]. Similarly, the Prosecutor of the ICTR may proceed according to the same standards of proof[242].

3.3.3 International Fact-Finding Practice

A recent study carried forward by the Geneva Academy of International Humanitarian Law and Human Rights has revealed many inconsistencies in the practice of enquiring mechanisms regarding standards of proof[243]. For the benefit of this paper I will reproduce below a table summarizing the different standards of proof adopted by the commissions examined by the study above mentioned.

Fact-Finding Mission	Standard of Proof
Commission of Experts established pursuant to Security Council Res.780 (Yugoslavia)	Mixture of terms: *i) Reasonable to conclude* *ii) Reasonable to presume* *iii) Reasonable degree of certainty* *iv) Sufficient evidence to conclude*
UN Commission on the Truth for El Salvador	Used three explicit categorised standards against which all findings are measured: *i) Overwhelming evidence* *ii) Substantial evidence* *iii) Sufficient evidence*
International Commission of Inquiry on Darfur	Generally, *"adopted an approach proper to a judicial body"*

[238] Rule 47(B) of the *Rules of Procedure and Evidence* of the ICTY.
[239] Case cited in MAY and WIERDA, (2002) p.124, *supra*, footnote 198.
[240] P.125, *Ibidem*.
[241] Art.18(1) of the Statute of the ICTY.
[242] Rule 47(B) of the *Rules of Procedure and Evidence* of the ICTR and art.17(1) of the Statute of the ICTR.
[243] See WILKINSON, *supra*, footnote 16.

	Named individuals (confidential list): to do so *"require[ed] a reliable body of material consistent with other verified circumstances, which tends to show that a person may reasonably be suspected of being involved in the commission of a crime"*
UN Fact-Finding Mission on the Gaza Conflict	Generally, *"would follow international standards of investigation"*. In all circumstances *"there was sufficient information of a credible and reliable nature for the Mission to make a finding in fact"*
International Commission of Inquiry mandated to establish the facts and circumstances of the events of 28 September 2009 in Guinea	Only set explicit standard in relation to individuals: *"... person may reasonably be suspected of having participated in the commission of a crime."* Additionally when naming individuals, it applied different degrees of certainty regarding involvement: *i) prima facie evidence* *ii) sufficient ground* *iii) may be held liable* *iv) presumed involved* *"Information received must be checked against independent sources, preferably eyewitness accounts, and independently verified... Thus, the report does not include any testimony that has not been corroborated by at least one other source."*
Report of the Mapping Exercise documenting the most serious violations of human rights and international humanitarian law committed within the territory of the Democratic Republic of Congo between March 1993 and June 2003	Reasonable suspicion: each incident listed was backed up by at least two independent sources
International Commission of Inquiry to investigate all alleged violations of international human rights law in the Libyan Arab Jamahiriya	Nothing explicit: *i) distinguish its evidence from evidence that could be used in criminal proceedings* *ii) sought to rely primarily on first hand information* *iii) took into account all forms of information, notwithstanding their qualitative differences*
International Commission of Inquiry on	Overarching application of *"reasonable*

Syria	*suspicion"* supported by a mixture of descriptive terms

Table 1. This table appears in the study led by WILKINSON S., *Standards of Proof in International Humanitarian and Human Rights Fact-Finding and Inquiry Missions*, Geneva Academy of International Humanitarian Law and Human Rights, pp.40-41, available at: http://www.geneva-academy.ch/docs/reports/Standards%20of%20proo%20rep ort.pdf. For the benefit of the reader, I have slightly modified the entry labels, describing the specific commission considered, by reproducing its full name. In addition, I omitted, in the label concerning the standard adopted by the UN Commission on the Truth for El Salvador, the following words: "Did not arrive at any finding where evidence was "insufficient"", since I considered it not relevant for the purposes of the present paragraph.

Despite the different phrasings, the standards categorized in the above table can be easily classified according to the three main standards of proof identified at the beginning of this section, *i.e.* balance of probabilities, clear and convincing evidence and proof beyond reasonable doubt[244]. However, WILKINSON suggests to add a fourth category, *i.e.* "reasonable suspicion", which would imply that there is ground to believe that an incident has occurred, but this does not automatically exclude other possibilities (classic wording, according to the scholar, would be "may be reasonable to conclude")[245].

When assessing the standard of proof adopted by a fact-finding mission, both the nature and intrinsic limits of the mechanism, and the type of conducts to be investigated must be considered[246]. The former factor would suggest to adopt a lower standard of proof, such as a "balance of probabilities". As a matter of facts, the time and resources constraints, as well as the lack of enforcement powers, do not allow for a higher standard. In addition, the "beyond reasonable doubt" standard is typical of judicial scrutiny, as it has been pointed out in the previous paragraphs, and fact-finding is not a judicial mechanism. The latter factor, instead, would allow, in cases concerning mass human rights violations, for a "beyond reasonable doubt" standard, due to the seriousness and gravity of the offences investigated. However, the presumption of innocence, which is imperative to respect in a criminal trial, gives way to lower degrees of certainty, when the enquiry mechanism is mandated to assess a situation, and does not have to identify perpetrators of mass atrocities. In addition, in favour of this

[244] See *supra*, p.55.
[245] WILKINSON, p.49, *supra*, footnote 16.
[246] See also pp.40-41 *Ibidem*.

conclusion, it has to be considered the misinformation sometimes caused by the lack of cooperation by states.

In conclusion, it seems reasonable to set the ideal standard of proof to be adopted in a non-judicial fact-finding context according to a "balance of probabilities". That is the opinion of eminent scholars[247] and it can be inferred from the practice of enquiry missions[248]. However, a certain flexibility should always be granted. Multiple factors may influence the degree of certainty that a fact-finding mission can use or must use in order to make a finding in fact. Beyond time and resources constraints, the type of finding itself may influence the standard of proof. As a matter of facts, an enquiry commission may be entitled to investigate patterns of conducts rather than single episodes. In such case, the commission has to identify a trend following the logic of the inductive reasoning and, consequently, will be allowed to apply a lower standard. Yet, the same argument could be used to justify the adoption of a higher degree of certainty, due to the political implications that the findings may determine for the government or group to which the investigated trend may be attributed. A fact-finding mission may also be entrusted with the task of identifying possible perpetrators. In this case, a higher standard of proof may be required, due to the consequences that the investigation may produce on individuals, following the rationale of criminal trials[249]. At the same time, one could argue that a higher standard should be required only if the findings regarding the possible perpetrators are to be made public, while, in the opposite event, a "balance of probabilities" approach may be sufficient[250]. Thus, on the one hand, a "balance of probabilities" standard can be considered sufficient for fact-finding mechanisms. On the other hand, allowance should be granted for at least two more standards, the lowest, *i.e.* "one of the reasonable conclusions"[251], the highest, *i.e.* "clear and convincing evidence".

[247] See, for instance, WILKINSON, pp.49 and *ff*, *Ibidem*; RAMCHARAN, in RAMCHARAN (ed.), (1982) pp.79-80, *supra*, footnote 192.
[248] I agree with the author, WILKINSON, in affirming that the majority of the cases considered in Table 1 (*supra*, pp.62-63) can be classified as adopting a "balance of probabilities" standard.
[249] See BOUTRUCHE, (2011) p.10, *supra*, footnote 11.
[250] A comprehensive analysis of these issues can be found in WILKINSON, pp.51-55, *supra*, footnote 16.
[251] According to WILKINSON, this standard, which I did not mention before, is to be set between a mere suspicion and the "preponderance of evidence" standard. The fact at stake might have occurred but there is room for other conclusions. See *Ibidem*.

3.4 Challenges Inherent to International Humanitarian Law and International Criminal Law: Identifying Patterns

An issue deserving some attention is that of identifying patterns of violations. This may be required by the large amount of events that may have occurred, which demands for a selection of the most representative cases, by the mandate of the fact-finding mechanism itself, or by a norm as a condition for its application.

Armed conflicts are generally the scene of hundreds or even thousands of incidents and violations of human rights. Fact-finding missions, consequently, tend to limit their work and select individual cases that, put together, may be symptomatic of trends of violations. After all, fact-finding does not consider specific cases in their individuality, but aims at contextualizing the single events into broader scenarios, unless differently provided for in the mandate[252]. The FFMGC and the International Commission of Inquiry on Darfur are representative of the constraints that may affect the work of such mechanisms. Both instruments, having to deal with situation of widespread denial of fundamental human rights, had to be selective in the choice of the incidents to investigate[253].

When the mandate so provides, the enquiring body will have to explicitly deal only with patterns of violations of human rights and, since each pattern is constituted of individual cases, it will have to cover both single events and trends[254].

Lastly, the application of a specific norm may require the identification of patterns. That is the case of some international crimes, that are characterized also by a contextual

[252] See BOUTRUCHE, (2011) pp.6-8, *supra*, footnote 11.
[253] See para.223 of the *Report of the International Commission of Inquiry on Darfur to the Secretary-General* ("It was not possible for the Commission to investigate all of the many hundreds of individually documented incidents reported by other sources. The Commission, therefore, selected incidents and areas that were most representative of acts, trends and patterns relevant to the determination of violations of international human rights and humanitarian law and with greater possibilities of effective fact-finding"); para.157 of the *FFMGC Report* ("In view of the time frame within which it had to complete its work, the Mission necessarily had to be selective in the choice of issues and incidents for investigation. The report does not purport to be exhaustive in documenting the very high number of relevant incidents that occurred in the period covered by the Mission's mandate and especially during the military operations in Gaza. Nevertheless, the Mission considers that the report is illustrative of the main patterns of violations"); see also BOUTRUCHE, (2011) p.11, *Ibidem*.
[254] BOUTRUCHE, p.12, *Ibidem*.

element. Crimes against humanity, for instance, need to be "committed as part of a widespread or systematic attack directed against any civilian population"[255].

The need to identify a pattern poses a fundamental question: when can the incidents documented be considered sufficient to affirm the existence of a trend? Left aside the jurisprudence of international tribunals, which is obviously relevant to the issue at stake and surely to be taken into account by fact-finders, it appears that the solution to the above mentioned problem is left to the discretion of the enquiry commission. Much depends on the standard of proof adopted. A clear example may be found in the case of the Sub-Commission mandated to investigate the allegations of the applicants governments before the European Commission of Human Rights about torture and ill-treatment. 11 out of 213 cases were proven "beyond reasonable doubt". It would appear to be a very insignificant number compared to the totality of allegations. Yet, the Sub-Commission found that it was sufficient to prove that the practice of ill-treatment or torture was systematic and widespread[256]. In the view of the author of this work, these conclusions have to be interpreted in the light of the high standard of proof applied and the nature of the investigative instrument, which was not judicial.

4. UN Sponsored Fact-Finding

Fact-finding has represented, among the procedures available to the UN bodies, one of the most effective tools in promoting the implementation of human rights norms. Fact-finding activities may be undertaken by the three main organs of the UN system, namely the General Assembly, the Security Council and the Secretary-General. Yet the largest use of this mechanism has been made by the General Assembly and its subsidiary bodies, in particular the recently born HRC and the former CHR, dismantled and replaced by the Council in 2006. In particular, the UNHRC inherited the machinery of Special Procedures conceived by its predecessor, despite some criticism pushing for a reform. These procedures allow the Council to receive complaints and to establish mechanisms for monitoring the respect of human rights following two different schemes, reporting on situations and reporting on countries. In this framework, fact-

[255] Art.7(1) of the *Rome Statute of the International Criminal Court*. See also BOUTRUCHE, p.12, *Ibidem*.
[256] For further details see BOUTRUCHE, p.13, *Ibidem*.

finding missions can be deployed for the purpose of acquiring relevant information by the Special Procedures mandate holders or by the HRC itself as *ad hoc* mechanisms for enquiring specific events that may threaten the full respect for human rights.

In the light of the role played by the HRC to promote accountability for massive and systematic violations of IHRL and IHL throughout the world, among which the recent establishment of a fact-finding mission mandated to enquire the recent events occurred in the Gaza Strip during *Operation Cast Lead*, this section will be focused on the UN human rights system and its evolution as well as the hurdles it encountered to fulfill its global purposes.

4.1 From the Commission on Human Rights to the Human Rights Council

The UN competence in the field of human rights has not always been given for granted. At its inception, according to part of the doctrine, the UN system was set upon a list of values, among the other two pillars[257], relevant to both international and domestic legal systems[258]. This was the outset of human rights in the framework of the UN, marked by the proclamation of the *Universal Declaration of Human Rights* in 1948 by the General Assembly[259]. According to art.68 of the *Charter of the United Nations*, the Economic and Social Council (hereinafter ECOSOC) shall have established commissions in the economic and social field to promote the protection of Human Rights[260]. After the set up of the so-called "nuclear commission" with ECOSOC resolution 5(I) in February 1946, the full Commission was established shortly after (June 1946) by ECOSOC resolution 9(II)[261]. The Commission was entrusted with the task of submitting proposals, recommendations and reports to the ECOSOC regarding

[257] The other pillars were and are economic and social development, international peace and security. See *In larger freedom: towards development, security and human rights for all, Report of the Secretary-General*, UN Doc. A/59/2005.
[258] See BOVA M., (2011) *Il Consiglio Diritti Umani nel sistema onusiano di promozione e protezione dei diritti umani: profili giuridici ed istituzionali*, G. Giappichelli Editore, pp.9 and *ff*. See also RAMCHARAN B.G., (2011) *The UN Human Rights Council*, Routledge Global Institutions Series, pp.1 and *ff*.
[259] UN Doc. A/810 (1948).
[260] The article reads "[t]he Economic and Social Council shall set up commissions in economic and social fields and for the promotion of human rights, and such other commissions as may be required for the performance of its functions".
[261] RAMCHARAN, (2011) p.23, *supra*, footnote 258, and BOVA, (2011) pp.42-44, *supra*, footnote 258.

any matter related to the promotion of human rights[262] and, in fact, it contributed to the drafting of several international legal instruments such as the *International Bill of Human Rights*[263], the *UN Declaration on the Rights of the Child*, the *UN Declaration on the Elimination of All Forms of Racial Discrimination*, etc[264]. It can be said that the Commission contributed in the creation of the core treaties and conventions founding IHRL[265]. Nevertheless, the lack of effectiveness was reflected in the statement of the Commission, according to which it had "no power to take action"[266] with regard to individual communication relating to violations of human rights. Although the ECOSOC responded further broadening the mandate of the Commission by providing that it would have been informed of the individual communications addressed to the Secretary-General, the first mechanisms for monitoring situations of concern for human rights, brought to the attention of the UN institutions also by individual, were set starting from 1967, with the adoption of ECOSOC resolution 1235. This date marked the birth of the system of Special Procedures, aimed at providing a response to gross violations of human rights. The system was formally recognized by member states only twenty years later, in 1993, at the Wien World Conference on Human Rights[267] and it counted in particular the two procedures under ECOSOC resolutions 1235 and 1503[268]. The Commission made also large use of fact-finding mechanisms, which represented

[262] According to the terms of reference set out in ECOSOC resolution 5(I) the Commission shall have had competence over matters concerning "(a) an international bill of rights; (b) international declarations or conventions on civil liberties, the status of women, freedom of information, and similar matters; (c) the protection of minorities; (d) the prevention of discrimination on grounds of race, sex, language, or religion". The mandate was subsequently broadened, following a Report issued by the Commission itself in 1946 according to which "[a]ttention was drawn to the fact that item (e) of the terms of reference as reconsidered in the Report of the Preparatory Commission […] – "any matters within the field of human rights considered likely to impair the general welfare or friendly relations among nations" – was not included in the terms of reference […]. The Commission agreed to request the Council to consider the desirability of adding a clause substantially on the lines of the original item (e) […]" (See UN Doc. E/38/Rev.1). See BOVA, p.45, *Ibidem*.

[263] Informal name indicating the body encompassing the *Universal Declaration of Human Rights*, the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*.

[264] For a comprehensive list of Human Rights legal instruments see BOVA, (2011) pp.52-54, *supra*, footnote 258.

[265] See BOVA, *Ibidem*, and RAMCHARAN, (2011) pp.25-26, *supra*, footnote 258. This function is also known as *standard-setting* (BOVA, *Ibidem*), meaning the legislative activity leading to the adoption of international treaties on Human Rights, which, being those instruments binding, produces a compression of the state sovereignty.

[266] BOVA, p.45, *Ibidem*, and RAMCHARAN, p.24, *Ibidem*.

[267] See BOVA, pp.115 and *ff*, *Ibidem*.

[268] *Ad hoc* working groups and individual experts could be appointed by the Commission on Human Rights since its inception, thus, the monitoring function had already gradually developed, when the system of Special Procedures was recognized.

probably the most effective tool in dealing with human rights issues, since the inception of the UN system of protection of human rights[269]. However, the tension between national sovereignty, strongly defended by States, and the universality in the promotion of human rights hindered the Commission's activity. Moreover, mild selection criteria for members of the Commission unearthed the hypocrisy behind a politicized organ aimed at dealing with human rights issues[270]. As a result, in 2006 the Commission on Human Rights was dismissed and replaced by a new subsidiary organ of the General Assembly, the Human Rights Council (HRC). The Council was established with GA resolution 60/251[271] after complex but incredibly brief negotiations[272]. The new body appeared to be innovative under many aspects, ranging from the adoption of a new procedure for monitoring state compliance with internationally recognized Human Rights standards, known as Universal Periodic Review, to a new geographical distribution of seats inside the Council. However, this work will only deal with the system of Special Procedures, inherited from the former Commission on Human Rights, and the fact-finding activity, which has been increasingly employed beginning from the Council's inception[273].

4.2 UNHRC Fact-Finding and the Special Procedures

The Council, and the Commission before, have made large use of fact-finding. As it has been mentioned earlier, enquiries can be deployed by either the Special Procedures mandate holders or the Council itself, by the appointment of *ad hoc* commissions. The activity of fact-finding sponsored by the UN has revealed to be probably among the most effective tools in the promotion of human rights at a global level[274]. In fact, it is central to every procedure available to the HRC. The main rules governing it have already been outlined, since they were mostly developed within the UN system, although fact-finding by NGOs is also stimulating the adoption of guidelines which can

[269] RAMCHARAN, (2011) p.27, *supra*, footnote 258.
[270] In 2003 Gaddafi's Libya presided the annual session of the Commission, notwithstanding its inclusion in the so-named *top offenders*, and rating as "Not Free State" by *Amnesty International* and *Freedom House* (BOVA, (2011) p.40, *supra*, footnote 258)
[271] UN Doc. A/RES/60/251.
[272] See BOVA, (2011) pp.59-62, *supra*, footnote 258.
[273] For an extensive overview of the UNHRC functions, procedures, aims and purposes, see BOVA, *Ibidem*, and RAMCHARAN, (2011) *supra*, footnote 258.
[274] RAMCHARAN, (2011) p.95, *supra*, footnote 258.

be applied also to institutional fact-finding, as they are generally the product of high-level experts, whose prestige is widely acknowledged[275]. Hence, the object of the following pages will be the legal basis for the establishment of fact-finding by the UN and to what extent these mechanisms can promote human rights and carry forward the cause for accountability.

4.2.1 Legal Foundations of Fact-Finding within the UNHRC

The establishment of fact-finding commissions undermines the national sovereignty of States, since it often results in an assessment – which may be factual or legal, according to the mandate – as for the treatment they reserve to Human Rights within their boundaries or extraterritorially, when an international armed conflict is under the lenses of the commissioners. This led to harsh criticism when the first expert group was about to be set up by the former CHR to investigate the situation in South Africa[276]. It was submitted that human rights were a matter of exclusive interest of the State, recalling to some extent the attitude widespread among the subjects of the international community, before the *UN Charter*[277]. However, those States in favor of the setting up of the Group responded invoking the view according to which human rights had become a matter of international interest and, consequently, the power of the UN to establish enquiries into situation of alleged disrespect for human rights was accordingly founded.

It was clear from the beginning that if a legal basis should have been found for these mechanisms, it was to be linked with the overall mandate of the UN and, specifically, with the function of promoting and ensuring the full respect for human rights as a precondition for the other two pillars of the organization, development and peace and security. Nowadays, the issue stands still. GA resolution 60/251, establishing the HRC on the ashes of the defunct CHR, assign to the former the aim of addressing "[…] situations of violations of human rights, including gross and systematic violations, and make recommendations thereon"[278]. To do so, "the Council shall assume […] all mandates, mechanisms, functions and responsibilities of the Commission on Human

[275] The *Lund-London Guidelines* represent a good example of the recent developments in conceptualizing rules for NGOs-sponsored fact-finding.
[276] See MILLER, (1973) pp.43-44, *supra*, footnote 24.
[277] BOVA, (2011) pp.19-24, *supra*, footnote 258.
[278] UN Doc. A/RES/60/251, para.3

Rights"[279]. In addition, as CHINKIN underlines, the Council, being a subsidiary organ of the GA, shares with it the residual responsibility for the maintenance of international peace and security, which may be threatened by a situation of systematic disrespect for human rights. This confers authority to establish commissions of enquiry to fulfill its functions. It is thus to be noted that there is still no positive legal ground to reckon the power to set up these types of mechanisms. In other words, it is to be considered an implicit power of the UN organs dealing with issues relating to human rights[280].

Some authors are not satisfied with this explanation but appeal to other justifications. Among them, some argue that a stronger legal foundation may have come from the adoption of a Code of Conduct for Special Procedures mandate holders[281]. According to them, the rules enshrined in the Code represent an implicit recognition of the power of the HRC to deploy such enquiries[282].

What is apparent is that, until now, there is no positive rule grounding the power of the HRC to undertake fact-finding. Yet, the practice has shown the usefulness of the instrument in shedding light on episodes which may threaten the respect for human rights. Obviously, the mandate of each mission shall be shaped carefully, and the Council will always have to bear in mind that the findings will never be of a judicial nature. Consequently, the cooperation of the governments involved will always have to be looked for, enacting measures to enhance credibility to the eyes of the formers, and

[279] *Ibidem*, para.6. See also CHINKIN C., *UN Human Rights Council Fact-Finding Missions: Lessons from Gaza*, in ARSANJANI M.H., COGAN J.K., SLOANE R.D., WIESSNER S., (2011) *Looking to the Future. Essays on International Law in Honor of W. Michael Reisman*, Martinus Nijhoff Publishers, p.479-481.

[280] See also ERMACORA, (1982) *supra*, footnote 119. The implicit power of the UN to intervene in Human Rights matters is nowadays recognized as customary law. According to SIMMA B., *Human Rights*, in TOMUSCHAT C. (ed.), (1995) *The United Nations at Age Fifty. A legal perspective*, Kluwer Law International, cited in DOMÍNGUEZ REDONDO E., (2011) *Rethinking the Legal Foundations of Control in International Human Rights Law – The Case of Special procedures*, Netherlands Quarterly of Human Rights, Vol.29, No.3, pp.278-279, "[…] UN practice has embodied a *droit de regard* in human rights matters in a series of institutions and mechanisms by which compliance of states with international standards is monitored irrespective of whether the target states have acceded to a particular human rights treaty. […] I would submit that we are on safe ground in considering the entitlement of the UN to respond to violations of human rights in the ways indicated to be firmly established in present international law". It is thus an implicit power of the UN system as a whole.

[281] The Code was adopted in 2007 with resolution 5/2 of the Council.

[282] See DOMÍNGUEZ REDONDO, (2011) *supra*, footnote 280, according to which the adoption of a Code of Conduct represent an official consent to the establishment of Special Procedures and activities connected with them by the Council.

the "use of the product" will have to take into account the implications on the legitimization of the Council to make use of enquiries.

4.2.2 Fact-Finding in the Framework of Special Procedures

Activities of fact-finding can be carried out in order to gather information to be transmitted to the Special Procedures mandate holders. The system of Special Procedures is an older machinery than the Council itself. It dates back to the first years of the 1960s, when the former CHR begun an activity of setting up working groups in response to the increasing number of petition presented by the Developing Countries concerning gross violations of human rights, "as exemplified by the apartheid policy"[283]. The legal basis for the establishment of such mechanisms was to be found in artt.62 and 68 of the *UN Charter*. These were the prototypes of the first Special Procedure to be established, under ECOSOC resolution 1235 (XLII) of 1967[284]. That was a public procedure involving two stages, publicly debating country-specific situations during the annual session, brought before the Commissions by governments or NGOs, and "studying and investigating particular situations (or individual cases) through the use of whatever techniques the Commission deemed appropriate"[285]. The outcome of such mechanism could vary and could range from publicly embarrassing the country at stake, to drafting recommendations entailing possible steps to be undertaken in order to put an end to the violations. The Commission, among other means, could gather information regarding the alleged violations by deploying missions that could visit the country and collect testimonies and other relevant materials, *i.e.* fact-finding missions. In 1970 the ECOSOC established a new procedure under resolution 1503 (XLVIII). The resolution authorized the Commission to set up a Working Group entrusted with the mandate to examine individual communications – generally received by the Secretary-General - and refer to the Sub-Commission[286] only those revealing "a

[283] BOVA, (2011) pp.120-121, *supra*, footnote 258.
[284] *Ibidem*, p.122; see also STEINER H.J., ALSTON P., GOODMAN R., (2008) *International Human Rights in context. Law, Politics, Morals*, Oxford University Press, pp.759 and *ff.*
[285] STEINER *et al*, p.760, *Ibidem*.
[286] The ECOSOC with resolution 9 (II) of June 1946 authorized the Commission to establish a Sub-Commission on the Protection of Minorities and another Sub-Commission on the Prevention of Discrimination. In 1947 the Commission decided to replace the two bodies with a unique Sub-Commission for on Prevention of Discrimination and Protection of Minorities, entrusted with functions linked to the promotion of human rights. More diffusely on this issue, see BOVA, (2011) pp.204-207, *supra*, footnote 258; RAMCHARAN, (2011) pp.22-25, *supra*, footnote 258.

consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms within the terms of reference of the Sub-Commission". The latter would then decide which of them deserved the attention of the Plenary of the Commission[287]. Resolution 1503 could also represent the legal basis for appointing an *ad hoc* committee of investigation, which would require the express consent of the State concerned[288].

The machinery of Special Procedures was recognized as a system only in 1993 during the World Conference on Human Rights held in Vienna, where it was affirmed that "[w]hile it may never have been conceived as a "system", the evolving collection of these procedures and mechanisms now clearly constitutes and functions as a system of human rights protection"[289]. During the '90s, the Special Procedures were also expanded and the terms of reference of each mechanism were spelled out in details. As a result, it became possible to divide into: a) Country Special Rapporteurs; b) Special Rapporteurs and Thematic Working Groups; c) Thematic Independent Experts; d) Geographic Independent Experts[290]. The term "Special Rapporteur" indicated that the mechanism was entrusted with investigative powers; on the contrary, "Independent Experts" were those mandated to provide the State concerned with cooperation in the matter at stake. This classification is still valid for the HRC, although States pushed for a "linguistic reform", so that "the name of the mandate did not provide information as for the powers of the procedure adopted […] which would confuse […] the nature of the individual mandates, […] reducing […] their role of protection of human rights"[291].

[287] STEINER, (2008) p.754, *supra*, footnote 285; BOVA, (2011) p.125, *Ibidem*. The procedure under resolution 1503 was subsequently amended in 1990, with the establishment of a Working Group on Situations mandated to select, among the situations referred by the Sub-Commission, only those deserving the exam of the Plenary of the Commission. In 2000 the filter of the Sub-Commission was dismissed so that the Working Group on Communications would refer directly to the Working Group on Situations.
[288] STAINER *et al*, p.755, *Ibidem*.
[289] See UN Doc. A/Conf.157/9.
[290] Each of these mechanisms found a direct legitimization in the two main resolutions on Special Procedures, above mentioned, resolutions 1235 and 1503. See BOVA, (2011) pp.130-131, *supra*, footnote 258.
[291] BOVA, p.131, *Ibidem* (my own translation).

4.2.3 *Ad Hoc* Fact-Finding Missions appointed by the UNHRC

The HRC has also the power to establish, independently from any other mechanism operating in the same thematic or geographical area, *ad hoc* missions in order to investigate specific events of concern for human rights. That has been the case, for instance, of the High-level Panel of Experts on Darfur (2007) and the FFMGC (2009). As it has been noted, this power is not provided for in the mandate of the HRC, but it is in this case that the link between the issue of Human Rights and the maintenance of international peace and security most clearly stems out. In fact, fact-finding missions are generally dispatched by the Council following episodes of intense violations of human rights, such as the FFMGC, deployed following the military operations carried out by the State of Israel, in response to alleged Palestinian rockets attacks, between December 2008 and January 2009. It is to be noted that these mechanisms have sometimes been mandated not only to investigate issues related to IHRL but also to IHL. Generally, enquiries into violations of the LoAC are, in fact, mandated by the Security Council[292], given its primary role in the maintenance of international peace and security[293].

4.3 Selectiveness: a Problem not only in International Criminal Justice

At its dusk, the former CHR was harshly criticized by many Governments for its policy. Both the lack of criteria for the selection of its members and its selectiveness in the choice of the situations to be scrutinized were on the agenda of the last sessions. However, dramatically, the criticisms varied, depending on the Governments, which may indicate a generalized intolerance to the actions carried out by the Commission[294]. Though, despite its undeniable achievements, the Commission could no more respond credibly to allegations of abuses of human rights, due to the hypocrisy generated by the presence among its members of systematic violators of human rights, especially among

[292] For instance, the Commission of Experts for the conflict in former Yugoslavia, mandated to present "conclusions on the evidence of grave breaches of the Geneva Conventions and other violations of international humanitarian law" (*Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)*); the International Commission of Inquiry on Darfur, entrusted with the task of investigating violations of IHL and IHRL (*Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General*).

[293] See POKEMPNER D., (2010) *Valuing the Goldstone Report*, in FARER T., *The Goldstone Report on the Gaza Conflict: An Agora*, in Global Governance, Vol.16, No.2, p.149.

[294] For an overview on the various positions of Governments, see STEINER *et al*, (2008) pp.791 and *ff*, *supra*, footnote 285.

those States ironically addressed by the Chinese Ambassador Wu Jianmin as "developed countries", and the consolidated practice of the Commission of addressing almost exclusively violations of human rights taking place in developing countries.

One of the reasons that led to the establishment of the HRC was precisely that of responding to these criticism. However, this is not the place were to analyze the negotiations that brought to the establishment of the Council[295]. What will be discussed in this paragraph is the selectiveness in the choice of the situations that deserve the deploying of fact-finding missions, an issue that threaten to undermine the credibility of the role played by the HRC in the promotion of human rights.

RAMCHARAN has noticed that the practice of the HRC in selecting the situations deserving the establishment of certain monitoring mechanisms tends to favor those States that maintain good diplomatic relations with its members. As an example, the author compared the struggles to establish the High-level Panel of Experts to investigate the situation of human rights in Darfur (2007) with the relatively easy setting up of the FFMGC (2009). The author underlines that, in the first case, the Sudanese Government held a special negotiating power, due to the support of the members of the Council, belonging to the Organization of the Islamic Conference. The negotiations for the selection of the members of the Panel were particularly complicated and, in the end, the final report with its recommendations were not endorsed by the Council, nor any follow up occurred. As a result, the situation in Darfur further deteriorated[296].

Obviously, the above mentioned argument should not impair the importance and the gravity of the findings collected in the *FFMGC Report*, rather than those regarding Darfur, but one thing should be noted: to enhance a process of legitimization of the procedures adopted by the Council to address massive violations of human rights, the adoption of a more transparent and unbiased approach is fundamental, in addition to common substantive and procedural rules.

[295] For a more profound discussion on the transition from the Commission to the Council, see BOVA, (2011) pp.39-113, *supra*, footnote 258.
[296] For a more detailed account of the negotiations, see RAMCHARAN, (2011) pp.93-95, *supra*, footnote 258.

Chapter II

A Case-Study: The Fact-Finding Mission on the Gaza Conflict

SUMMARY: Introduction – 1. The Establishment of the Fact-Finding Mission on the Gaza Conflict – 1.1 The Methodology adopted by the Fact-Finding Mission on the Gaza Conflict: An Overview – 1.1.1 The Standard of Proof adopted by the Fact-Finding Mission on the Gaza Conflict – 1.2 The Structure of the *Fact-Finding Mission on the Gaza Conflict Report* – 1.2.1 Part One: Methodology, Context and Applicable Law – 1.2.2 Part Two: Events occurred in the Occupied Palestinian Territories – *a) The Gaza Strip – b) The West Bank and East Jerusalem* – 1.2.3 Part Three: Events occurred in Israel – 1.2.4 Part Four: Accountability and Judicial Remedies – 1.2.5 Part Five: Conclusions and Recommendations – 2. Methodological Challenges through the Analysis of Substantial Issues: some Examples from the *Fact-Finding Mission on the Gaza Conflict Report* – 2.1 Preliminary Factual and Legal Findings: the Contention about the Status of Gaza – 2.1.1 The Concept of Belligerent Occupation – 2.1.2 Belligerent Occupation applied to the Gaza Strip – 2.1.3 The Consequences of the Qualification of the Conflict – 2.2 The Principle of Distinction, *Iyad al-Samouni* and the UNRWA School in Jabaliya – 2.2.1 Wilful Killing of Civilians: Building an Accusation for War Crimes – *a) The Killing of Iyad al-Samouni – b) Assessment of the Facts under IHL and IHRL – c) Assessment of the Facts under International Criminal Law: the Mens Rea Element – d) Corroboration of Trends* – 2.2.2 Military Necessity, Proportionality and Precaution – *a) The Facts – b) Assessing the Military Necessity of the Shelling – c) The Shelling at the Test of Proportionality – d) Precautions in the Attack* – 2.3 Allegations of Bias in the Choice of the Incidents to be investigated – 3. Some Final Thoughts

Introduction

The *FFMGC Report* fuelled great debate regarding the events occurred in Gaza during *Operation Cast Lead*. Among many others, Raji Sourani, founder and director of the Palestinian Centre for Human Rights (hereinafter PCHR), praised, in an open statement published on the PCHR website, the impartiality, integrity, and professionalism of the panel led by Justice Richard Goldstone[1]. Differently, the Israeli Authorities, the US Government as well as prominent scholars have accused both the members of the Commission and the UNHRC to be biased. Beyond academic and political reactions, the Report is paradigmatic of the problems outlined in the previous chapter. Harsh criticisms have been raised following the mere establishment of the Mission by the HRC, concerning the integrity of its members, the even-handedness of the mandate, etc. However, following the release of the Report, more substantial objections to the findings collected therein have been advanced by leading scholars in the field of IHL and IHRL as well as International Criminal Law. Accordingly, the work of the Commission has been judged as deeply flawed. Goldstone himself partially retracted the conclusions of the Report[2], although too often his statements have been misinterpreted as questioning the entirety of the findings presented to the HRC. On the contrary, I believe that those statements were aimed at debunking only some of the conclusions reached in the Report. However, the dispute raises a methodological question: how did the Commission reach the conclusions presented in the Report?

If in the previous chapter some formal and procedural aspects of the regulatory process of fact-finding have been touched, the present chapter is aimed at pointing out some challenges inherent to fact-finding in the field of IHL and IHRL, which international investigators are likely to encounter in carrying out their mandate. *Jus in bello* is, in fact, the result of a compromise between the necessities of war and the will to protect specific categories of individuals, such as civilians or prisoners, as well as specific objects. Hence, in evaluating the conduct of belligerents, it is fundamental to

[1] SOURANI R., *Injustice Anywhere is a Threat to Justice Everywhere*, of 7 October 2009, available at http://www.pchrgaza.org/portal/en/index.php?option=com_content&view=article&id=6004:injustice-anywhere-is-a-threat-to-justice-everywhere-&catid=137:articles&Itemid=233.

[2] GOLDSTONE R., (April 2, 2011) *Reconsidering the FFMGC Report on Israel and war crimes*, The Washington Post available at http://www.washingtonpost.com/opinions/reconsidering-the-goldstone-report-on-israel-and-war-crimes/2011/04/01/AFg111JC_story.html.

take into serious consideration all the circumstances of the case at stake. A lack of information may result in the impossibility to undisputedly ascertain a fact. The FFMGC further raised the possibility that war crimes and crimes against humanity may have been committed. Such conclusions bear heavy responsibilities for fact-finders. As it has been already outlined, an enquiry of this kind generally tends to limit itself to findings in fact. In the accusation-building process, however, this would correspond to the mere assessment of the material element of the crime. Although a report generally does not produce binding effects on the parties under scrutiny, such an accusation should be built carefully, also through an assessment of the mental element of the crime. Obviously, the circumstances in which the board is to work - limited time and resources -, have an influence on its capability to carry out this task.

1. The Establishment of the Fact-Finding Mission on the Gaza Conflict

In response to the military operation launched on the Gaza Strip between 27 December 2008 and 18 January 2009, upon request submitted by Egypt, on behalf of the Arab Group and the African Group, Pakistan, on behalf of the Organization of the Islamic Conference, and Cuba, on behalf of the Non-Aligned Movement, the UNHRC held its 9th Special Session on the Human Rights situation in Gaza[3].

On 12 January 2009 the Council adopted Resolution S-9/1, calling the appointment of a fact-finding mission on the conflict in Gaza. Subsequently, on 3 April 2009, the President of the Council dispatched the Fact-Finding Mission on the Gaza Conflict (FFMGC), appointing as its members Justice Richard Goldstone, Professor Christine Chinkin, Ms. Hina Jilani, and Colonel Desmond Travers[4].

[3] See HRC Press Release, (7 January 2009) *Human Rights Council to hold a Special Session on Human Rights Situation in Gaza on 9 January 2009*, available at www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspw?NewsID=9192&LangID=E.

[4] Justice Goldstone is a former member of the South African Constitutional Court and former Prosecutor of the ICTY and ICTR; Professor Chinkin is Professor of International Law at the London School of Economics and Political Science and former member of the High Level Fact Finding Mission to Beit Hanoun (2008); Ms. Jilani is Advocate of the Supreme Court of Pakistan and former Special Representative of the Secretary-General on Human Rights Defenders and former member of the International Commission of Inquiry on Darfur (2004); Colonel Travers is a former officer in the Irish Armed Forces and member of the Board of Directors of the Institute for International Criminal Investigations. See MELONI and TOGNONI (eds.), (2012) p.5, *supra*, Chapter I, footnote 4.

Although the UNHRC originally provided the Mission with the mandate to investigate "[…] all violations of international human rights law and international humanitarian law by the occupying Power, Israel, against the Palestinian people […]"[5], Justice Goldstone, in order to avoid criticisms of partisanship, pressured the President of the Council to adopt a different mandate, which was finally drafted as follows:

> "[...] 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"[6]

However, criticisms were not spared to the Mission both for its mandate and the inclusion, among its members, of alleged biased personalities. As for the mandate, it was argued that an implicit amendment of the original mandate was not sufficient for dispelling any doubt of partisanship. Thus, even-handedness had to be measured on the original mandate provided for in Resolution S-9/1[7]. Harsh criticism was also aimed at the inclusion, in the UN sponsored team, of Professor Christine Chinkin, as she had previously signed a letter accusing Israel of having committed an act of aggression. The Israeli Government expressed its deep concern that, having already pronounced an accusation for an international crime, she would have been likely to reach the same conclusions as for other findings. The circumstance that the petition was addressing a problem of *jus ad bellum* rather than *jus in bello* – the latter being the only subject matter of investigation – could not modify the position of the Government of Israel[8].

On 4 May 2009, the Mission convened for the first time in Geneva and commenced its enquiry, interpreting "[…] the [its] mandate as requiring it to place the civilian

[5] See the Resolution of the General Assembly calling for the establishment of the Mission, UN Doc. A/HRC/S-9/L. See also POKEMPNER, (2010) pp.139-143, *supra*, Chapter I, footnote 293.
[6] See the *FFMGC Report*, para.1.
[7] See for instance, COTLER I., (2009) *The Goldstone Mission – Tainted to the Core*, pp.23 and *ff*, in STEINBERG G.M., HERZBERG A. (eds.), *The FFMGC Report "Reconsidered". A critical Analysis*, NGO Monitor, Jerusalem Center of Public Affairs.
[8] The text of the open letter, which was published on the *Sunday Times* is available at the following address: http://www.goldstonereport.org/controversies/establishment-of-mission/190-israels-bombardment-of-gaza-is-not-self-defence-its-a-war-crime. For further details, see POKEMPNER, pp.146-147, *supra*, Chapter I, footnote 293.

population of the region at the centre of its concerns regarding the violations of international law"[9].

1.1 The Methodology adopted by the Fact-Finding Mission on the Gaza Conflict: An Overview

In the First Chapter credibility has been presented as the main source of legitimization for fact-finding, given the lack of a systematic discipline of the instrument. Explicitly setting in advance clear terms of reference, and a detailed account on the methodology that will be adopted in carrying out the mandate is essential to inspire confidence in the subjects of the enquiry. The *FFMGC Report* abides by these guidelines by addressing the issue of methodology in the first pages.

Firstly, the material and temporal scope of the investigation is spelled out in details, giving reason for the selectiveness in the choice of the episodes to be analysed[10]. The Commission further explains that the events considered exceeds the competence *ratione temporis*, due to its decision to contextualize the military activities in the broader Israeli-Palestinian conflict[11]. Secondly, the sources of law applied by the Mission are

[9] *FFMGC Report*, para.4.

[10] The Mission was originally entrusted with the mandate "[...] 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" (see *FFMGC Report*, para.151). In order to implement it, "[...] the Mission determined that it was required to consider any actions by all parties that might have constituted violations of international human rights law or international humanitarian law. The mandate also required it to review related actions in the entire Occupied Palestinian Territory and Israel" (para.152). However, "[t]he Mission considered that the reference in its mandate to violations committed in the context of the December–January military operations required it to go beyond violations that took place directly as part of the operations", including "[...] those that are linked to the December–January military operations in terms of time, objectives and targets, and include restrictions on human rights and fundamental freedoms relating to Israel's strategies and actions in the context of its military operations" (para.154). The Report further explains that "[i]n view of the time frame within which it had to complete its work, the Mission necessarily had to be selective in the choice of issues and incidents for investigation. The report does not purport to be exhaustive in documenting the very high number of relevant incidents" and that it will be "[...] illustrative of the main patterns of violations" (para.157).

[11] "With regard to temporal scope, the Mission's broad mandate includes violations before, during and after the military operations that were conducted in Gaza between 27 December 2008 and 18 January 2009. The Mission considered that, while the Gaza events must be seen in the context of the overall conflict and situation in the Occupied Palestinian Territory, in view of the limited time and resources available, it would be beyond its abilities to focus on conduct or actions that took place long before the military operation of December–January. The Mission therefore decided to focus primarily on events, actions or circumstances occurring since 19 June 2008, when a ceasefire was agreed between the Government of Israel and Hamas" (*FFMGC Report*, para.153).

listed[12]. Thirdly, the Mission spells out the sources of information it drew upon[13], giving priority to first-hand information gathering, through interviews, oral accounts, visits on the spot, etc[14]. However, the Mission deplores the lack of cooperation by the Israeli Authorities, which prevented it from entering Israel and meeting with victims, witnesses, military personnel, etc., as well as travelling to the West Bank, where it would have been able to meet with members of the Palestinian Authority[15]. Furthermore, the Mission declares to abide by the international recognized standards for fact-finding, *i.e.* independence and impartiality[16]. In addition, it states to have adopted the "[...] best practice methodology developed in the context of United Nations investigations"[17]. Finally and most interestingly for the purposes of this chapter, the Mission analytically reports the method adopted for the assessment of the information gathered, which it strictly applies throughout the Report, explicitly pointing out the cases and reasons for which it could not fully abide by this methodological approach.

The Mission's approach to evidence is developed on a double examination. The first step consists of a preliminary assessment of the credibility and reliability of the source of evidence. When the source is human, the Commission takes into account the demeanour of the interviewee and the plausibility of their accounts by cross-examining it with the information collected elsewhere. Differently, when the source is documental, it goes back to the "source of the source", *i.e.* the author of the document, with the intent to reconstruct the methodology adopted by the latter and to ask for clarifications,

[12] "The normative framework for the Mission has been general international law, the Charter of the United Nations, international humanitarian law, international human rights law and international criminal law" (*FFMGC Report*, para.155).
[13] See the extensive list of sources in the *FFMGC Report*, para.159.
[14] The Mission considers that "[...] no written word can replace the voice of victims" (*FFMGC Report*, para.166). The preference for first-hand gathered information is expressed in the following terms: "In establishing its findings, the Mission sought to rely primarily and whenever possible on information it gathered first-hand, including through on-site observations, interviews and meetings with relevant persons. Information produced by others, including reports, affidavits and media reports, was used primarily as corroboration". (para.168).
[15] "The Government of Israel, however, refused to cooperate with the Mission at three levels: (a) it refused to meet the Mission and to provide access to Government officials, including military, and documentation; (b) it precluded the Mission from travelling to Israel in order to meet with Israeli victims, witnesses, members of civil society and NGOs; and (c) it prevented the Mission from travelling to the West Bank, including East Jerusalem, to meet members of the Palestinian Authority and Palestinian victims, witnesses, non-governmental or civil society organizations living or located in the West Bank" (*FFMGC Report*, para.162)
[16] *FFMGC Report*, para.158.
[17] *Ibidem*, para.161.

whenever a doubt or problem arise[18]. The second step is aimed at making a finding in fact. The Mission considers a fact corroborated when all the information gathered passes the test of cross-examination. If there is a numerical preponderance of evidence in favour of the affirmation that a fact has actually occurred, this fact is considered "found", and consequently endorsed in the Report[19].

Interestingly, the Report explicitly refers to the *standard of proof* adopted in criminal trials. In fact, the findings collected in the Report often entail the criminal liability of individuals. The Mission is of the view that not only it could ascertain the material element of the crime but also the *mens rea*, inferred through an assessment of the events and their relation with the context in which they took place. However, a full endorsement of the presumption of innocence, requires the mission to carefully consider each finding. Nonetheless, the Commission never aimed at reaching "the same standard of proof applicable in criminal trials"[20]. Justice Goldstone himself remarked that not one of the findings collected would be considered proven before a court of law[21].

1.1.1 The Standard of Proof adopted by the Fact-Finding Mission on the Gaza Conflict

The *FFMGC Report*, conforming to the practice generally employed in international enquiries and endorsed by eminent scholars, adopted a "balance of probabilities" standard. That is not explicitly stated in the Report but can be inferred from the phrasing of paras.24-25. Accordingly, each finding in fact was made on the basis of sufficient corroboration of the information collected or received, once assessed their credibility and reliability.

[18] *Ibidem*, para.170. "Taking into account the demeanour of witnesses, the plausibility of their accounts and the consistency of these accounts with the circumstances observed by it and with other testimonies, the Mission was able to determine the credibility and reliability of those people it heard. Regarding the large amount of documentary information the Mission received or had access to as documents in the public domain, it tried as far as possible to speak with the authors of the documents in order to ascertain the methodologies used and to clarify any doubts or problems".

[19] *Ibidem*, para.171. "The final conclusions on the reliability of the information received were made taking all of these matters into consideration, cross-referencing the relevant material and information, and assessing whether, in all the circumstances, there was sufficient information of a credible and reliable nature for the Mission to make a finding in fact". See the following paragraph for further details regarding the standard of proof adopted by the FFMGC.

[20] *Ibidem*, para.172.

[21] See POKEMPNER, p.150, *supra*, Chapter I at footnote 293.

The word "sufficient" – which can be found in para.24, "[...] there was sufficient credible and reliable information [...]" – suggests that a fact can be considered as actually happened only when there is a preponderance of evidence in favour of that happening. To put it in numbers, it would correspond to a 50% plus 1 in favour of the happening. This criterion is strictly followed throughout the Report. Some examples are reported below.

Para.465 of the Report reads:

> "Although the Mission was not able to investigate the allegation of the use of mosques generally by Palestinian groups for storing weapons, it did investigate the incident of a missile attack by the Israeli armed forces against al-Maqadmah mosque on the outskirts of Jabaliyah camp, [...].The Mission found *no evidence* [emphasis added] that this mosque was used for the storage of weapons or any military activity by Palestinian armed groups. As far as this mosque is concerned, therefore, the Mission found no basis for such an allegation."

In this case, the Mission found no evidence as for the allegations made by Israel, regarding the military use of al-Maqadmah mosque[22]. On the contrary, it collected a number of testimonies confirming the unlawfulness of the attack, from witnesses, local organizations, medical certificates, etc., all considered of a reliable and credible nature[23]. Hence, there is no numerical issue, since all the reliable and credible evidence collected appears to be in favour of the finding.

Para.998 of the Report reads:

[22] See paras.831-833 of the *FFMGC Report*. In particular, as for the claim that the mosque was used to fire rockets against the IDF, see para.832: "[...] the Mission notes that the statement does not indicate in any way the nature of the inquiry, the source of its information or the reliability and credibility of such sources".

[23] Paras.822-837 of the *FFMGC Report*. For instance para.823 reads: "The Mission heard five eyewitnesses who had been in the mosque at the time it was struck. Two of them had been facing the door as the explosion occurred. Three of them had been kneeling facing the opposite direction and had been seriously injured. The Mission also heard from a number of relatives of those who died in the attack and has seen a number of sworn statements signed by them testifying to the facts they witnessed. The Mission also heard again from three witnesses it had interviewed earlier at the public hearings in Gaza. Finally, the Mission reviewed information received from TAWTHEQ." The Mission also visited itself the Mosque, thus being able to ascertain first-hand the damages caused to it (para.827: "On visiting the mosque, the Mission was able to observe the damage done to it"). Photos documenting the aftermath of the incident were analyzed (para.828: "The Mission has also viewed a number of photographs taken shortly after the strike and considers them to be reliable"). Also medical certificates were considered (para.830: "It has seen medical certificates that bear out the nature of those injuries related by the young men it interviewed").

> "From the facts gathered, the Mission concludes that, in a number of cases it investigated, the Israeli armed forces launched direct attacks against residential houses, destroying them. Although the Mission does not have complete information on the circumstances prevailing [...] when the houses [...] were destroyed, the information in its possession *strongly suggests* [emphasis added] that they were destroyed outside of any combat engagements with Palestinian armed groups."

Again, the evidence gathered by the Mission, emanating from witnesses' and victims' testimonies, satellite photos, even IDF soldiers' testimonies, is almost univocal in indicating that some houses were shelled by the IDF, although no military advantage could have been obtained[24]. It is important to stress the fact that the Mission differentiated between the houses of Hajaj, al-Samouni and Khalid Abd Rabbo families and the rest of the neighbourhood, since in the first case, it collected enough information to find with enough certainty ("strongly suggests") that the destruction was not justified by any military advantage, while in the second case, "[...] although the facts gathered by the Mission do not suggest that the residential houses were directly targeted, it doubts whether there were military objectives pursued by the shelling."[25] Hence, although a finding in fact can be made, since there is no doubt as for the shelling of the area, no legal finding can be issued, since it is not clear (*i.e.* sufficiently corroborated) whether the area was used for military purposes by Palestinian factions or not[26].

In conclusion, it must be noted that the Report provides a negative formulation of the standard of proof, in order to distinguish its purposes from those that may be proper of a criminal court. As a matter of facts, para.25 reads "[...] the findings in the report do not subvert the operation of that principle. The findings do not attempt to identify the

[24] See paras.991-997 and 1000-1004 of the *FFMGC Report*.
[25] Para.999 of the *FFMGC Report*.
[26] As a matter of facts, the only legal finding concerns the houses of the three families above mentioned, as spelled out in details in para.1005 of the Report: "From the facts ascertained by it, the Mission finds that the houses of the families of Saleh Hajaj, of Wa'el al-Samouni, of Khalid Abd Rabbo and of Muhammad Fouad Abu Askar were subjected to direct attacks in spite of their unmistakably civilian nature. They did not present any apparent threat to the Israeli armed forces. These attacks violated the principle of distinction in customary international humanitarian law as codified in article 52 of Additional Protocol I."

individuals responsible for the commission of offences nor do they pretend to reach the standard of proof applicable in criminal trials".

1.2 The Structure of the *Fact-Finding Mission on the Gaza Conflict Report*

The Mission released its final Report on 15 September 2009. The *FFMGC Report* is composed of five parts. The first part is aimed at outlining the methodology, context and applicable law of the Mission's work; the second part addresses the events occurred in the Gaza Strip and the West Bank, including East Jerusalem, during *Operation Cast Lead* and in connection with it; the third part is concerned with events occurred in Israel, during the same period; part four explores the possible avenues for enhancing accountability for the alleged violations of IHL and IHRL, focusing in particular on judicial remedies; in the fifth part, the Mission's conclusions and recommendations are presented.

1.2.1 Part One: Methodology, Context and Applicable Law

Methodology has already been analysed above as a general issue that characterized the whole work of the FFMGC.

The Report contextualizes the events occurred during *Operation Cast Lead*, briefly outlining the historical, political and military developments in the region since the Six-Day War in 1967, until the ceasefire agreed between the newly elected local government of the Gaza Strip, Hamas, and the Government of Israel, in 2008[27]. Subsequently, the Report analyses the effects produced by the Israeli policies, in particular the settlements construction and restrictions on the freedom of movement of Palestinians in the West Bank, the Gaza Strip and East Jerusalem, on the isolation of the Gaza Strip, which appears to have led to the election of Hamas as the legitimate political representative of the Palestinian people in the Gaza Strip[28]. Furthermore, the relevant administrative and political bodies in the West Bank and the Gaza Strip are considered, focusing in particular on the PNA and Hamas structures[29]. Also, the

[27] Paras.176-197 of the *FFMGC Report*.
[28] Paras.198-209 of the *FFMGC Report*.
[29] Paras.210-215 of the *FFMGC Report*.

political and administrative structures in Israel are outlined[30]. Following this general but accurate introduction of the background of the military operation in the Gaza Strip, the Report focuses on the events occurred since the ceasefire agreed between Hamas and the Government of Israel on June 2008. The Mission considered in particular the escalation of violence which broke out at the end of June 2008 and reported accurately the incidents occurred during the months preceding the launching of *Operation Cast Lead*[31]. For this last collection of events, the Mission relied in particular on several press releases and weekly reports published by different local NGOs, as well as UN statements and publications.

Lastly, the Report sets out the relevant legal framework, referring to the law applicable. In particular, the Mission adopted as terms of reference: the principle of self-determination, as encompassed by different legal documents and the relevant jurisprudence of international courts and tribunals; IHL, in particular the *Hague Conventions*, the *Fourth Geneva Conventions* and *Additional Protocol I*; IHRL, in particular the *ICCPR* as well as other Treaties and Conventions, such as the *Convention on the Rights of the Child*, and its interaction with the LoAC; International Criminal Law, in particular as far as the *mens rea* rules, which characterizes a certain act as an international crime, rather than as a mere breach of other relevant conventions or treaties[32].

1.2.2 Part Two: Events occurred in the Occupied Palestinian Territories

The second part of the *FFMGC Report* is concerned with the events occurred during and in connection with *Operation Cast Lead*, between 27 December 2008 and 18 January 2009. Two sub-sections may be identified. The first one is concerned with the military operations conducted in the Gaza strip, while the second focuses on the West Bank and East Jerusalem.

[30] Paras.216-222 of the *FFMGC Report*.
[31] Paras.223-267 of the *FFMGC Report*.
[32] Paras.268-310 of the *FFMGC Report*.

a) The Gaza Strip

First, the blockade imposed by the Government of Israel on the Gaza Strip is analysed, arguing that the military confrontation between Israel and, Hamas and other Palestinian armed factions, cannot be fully understood without referring to the effects produced by the increasing restrictions on the movement of goods and persons to and from the Strip[33].

Before analysing the single incidents which took place during *Operation Cast Lead*, the Mission outlined the different phases of the Israeli military offensive on the Gaza Strip, identifying two main stages: the air phase, which was directed against the different police stations in Gaza and the relevant government buildings, as well as the prison building; the air-land phase (commenced on 3 January 2009), during which Israeli ground troops entered the Strip from North and East.[34] The Mission subsequently considered the overall data on casualties among Palestinians and Israelis, probably the most controversial numerical data, since different sources provides different numbers[35].

Following this, the Report individually analyses certain incidents that the Mission considered in conducting its enquiry. Each episode is dealt with following a precise scheme. First, the incident is presented according to the sources of information employed; secondly, the Israeli stance, as emerging from different sources, is considered; thirdly, the factual circumstances reported are assessed in order to make a factual finding; finally, the factual finding is analysed from the legal point of view, reaching a legal finding.

The following incidents are analysed in detail:

i) The Israeli air strikes on the Gaza main prison and the Palestinian Legislative Council Building (paras.366-392);
ii) The attacks on the Police headquarters and other Police stations in Gaza City (paras.398-438);
iii) The launching of rockets from within civilian areas and from within or in the immediate vicinity of protected sites by Palestinian armed factions (paras.446-

[33] Paras.311-326 of the *FFMGC Report*.
[34] Paras.333-351 of the *FFMGC Report*.
[35] Paras.352-364 of the *FFMGC Report*.

460), the booby-trapping of civilian houses (paras.461-463), the use of mosques to launch attacks against Israeli forces and to store weapons (paras.464-465), the misuse of medical facilities such as ambulances and hospitals (paras.466-474), and the use of human shields (paras.475-481), which reveal a failure on part of Palestinian armed groups to comply with the obligation to protect its own civilian populations (paras.439-445);

iv) The failure in using telephone calls, "roof-knocking", radio broadcasts and leaflet dropping on part of Israeli forces as warnings, in order to comply with the obligation to take all feasible precautions to protect the civilian population and objects in Gaza (paras.499-542);

v) The shelling of the UNRWA compound with, among other weapons, white phosphorus projectiles (paras.543-595);

vi) The shelling with white phosphorus shells of al-Quds hospital (paras.596-629);

vii) The attacks on al-Wafa hospital (paras.630-652);

viii) The mortar shelling of al-Fakhura Street (paras.653-703);

ix) Different alleged deliberate attacks on civilians: the attacks on houses of Ateya al-Samouni and Wa'el al-Samouni, which resulted in the death of 23 members of the al-Samouni family (paras.706-735); the shooting of Iyad al-Samouni, who was attempting to leave his neighbourhood (paras.736-744); the attack on family Hajji's house, which resulted in the death of three people (paras.745-754); the shooting of Ibrahim Juha (paras.755-763); the killing of Majda and Rayya Hajaj (paras.764-769); the shooting of four members of Abd Rabbo family (paras.770-779); the shooting Rouhiyah al-Najjar (paras.780-787); the Abu Halima family case (paras.788-801);

x) The attack on al-Maqadmah mosque (paras.822-843);

xi) The attack on al-Daya family house (paras.844-866);

xii) The attack on Abd al-Dayem condolence tents (paras.867-885);

xiii) The use of certain weapons, such as white phosphorus, flechettes, DIME weapons, depleted and non-depleted uranium munitions (paras.886-912);

xiv) The attacks on and destruction of certain building contributing to the civilian life in Gaza, such as the el-Bader flour mill (paras.913-937), the Sawafeary chicken

farm (paras.942-961), the Gaza wastewater treatment plant in al-Sheikh Ejlin (paras.962-974), the Namar wells group (paras.975-989);

xv) The use of civilians as human shields: the case of Majdi Abs Rabbo (paras.1033-1063); the case of Abbas Ahmad Ibrahim Halawa (paras.1064-1075); the case of Mahmoud Abd Rabbo al-Ajrami (paras.1076-1085), other cases regarding individuals whose identity has been kept secret (paras.1086-1106);

xvi) The detention and abuse on certain Palestinians during the military operations (paras.1107-1176).

After the analysis of the individual cases, the Report addresses certain general issues, which reveal to be useful in determining the soldiers' mental element and the implications of the military operation in terms of high-level officials' responsibility[36]. The Mission further considers certain allegations of conducts carried forward by Palestinian factions: the continuing detention of Israeli soldier Gilad Shalit (paras.1336-1344); certain episodes of internal violence, such as the targeting of Fatah affiliates by members of the security services under the control of the Gaza Authorities (paras.1345-1372).

b) The West Bank and East Jerusalem

Secondly, the situation in the West Bank and East Jerusalem is analysed since the Mission is of the view that, despite exceeding its competence *strictu sensu*, the events occurred there are related to the situation in Gaza and to *Operation Cast Lead*. Due to the denial of access to the West Bank opposed by the Government of Israel, the Mission had to rely on information provided by local NGOs and testimonies of Palestinians and representatives of the same NGOs, who attended the hearing sessions held in Geneva.

The allegations considered by the Mission regard: first, the treatment of Palestinians by Israeli Security Forces, including the use of force during protests in the West Bank, Israeli settlers' violence, and the use of force by Israeli forces outside the context of demonstrations (paras.1381-1440); secondly, the detention of Palestinians in Israeli prisons, including the different treatment of Hamas prisoners, the increase in children detention, and the arrests (paras.1441-1507); the restrictions imposed by the Israeli Government to the right of free movement, including the settlements policy

[36] Paras.1177-1216 of the *FFMGC Report*.

(paras.1508-1549); internal violence between Palestinian factions, including the targeting of Hamas supporters and the restrictions imposed by the PNA to the freedom of association and expression (paras.1550-1589).

1.2.3 Part Three: Events occurred in Israel

The third part is concerned with the events which took place in Israel during and in connection with *Operation Cast Lead*. The lack of cooperation of the Israeli Authorities prevented the Mission from entering Israel. Hence, the findings contained in the Report are based on information received by local NGOs, individual witnesses, etc.

First, an analysis of the impact of rocket and mortar attacks on Israeli communities is provided. In particular, the Mission considered the launching of rockets since the ceasefire agreed in June 2008 between the parties, the Palestinian armed groups to which the attacks are attributable, the types of weapons used, as well as the effects that the rockets and mortars firing produced on communities in Southern Israel, including Palestinian living in the Negev[37]. Also in this case, the facts are analyzed under both IHL and IHRL. Secondly, the Report deals with the repression of dissent in Israel, the restrictions imposed on the right to access to information and the treatment of Human Rights defenders, focusing on Police misconducts against protesters, citing few individual cases, the treatment of protesters including the interrogations held by the relevant authorities and the detention conditions, and the treatment of international human rights monitors and NGOs promoting the respect for human rights[38].

1.2.4 Part Four: Accountability and Judicial Remedies

The fourth part is aimed at outlining the steps that have been taken to ensure accountability for the violations that may have been committed during the military operations in Gaza, as well as for other events that the Report considers. The analysis is undertaken both from the structural point of view, *i.e.* considering the suitability of the systems of investigation and prosecution set both in Israel and in the Palestinian Territories, and from the factual point of view, *i.e.* considering the steps actually undertaken by the relevant authorities, such as criminal trials and investigations

[37] See paras.1594-1691 of the *FFMGC Report*.
[38] See paras.1692-1772 of the *FFMGC Report*.

commenced, disciplinary actions adopted within the army, official enquiries dispatched etc[39].

A more detailed account of the accountability options will be provided in Chapter III of this work. Hence, in this paragraph, it is sufficient to underline that the Mission considered also the issue of accountability from the point of view of the right to a remedy, which, among other aspects, entails the right to reparation. The Report provides an extensive analysis of this right under International Law and scrutinize the esteems regarding the damages caused by the military operations, provided by different organizations, as well as the effectiveness of the steps undertaken to comply with the obligation to compensate for the damages suffered[40].

1.2.5 Part Five: Conclusions and Recommendations

The fifth part is concerned with presenting the conclusions reached through the enquiry and recommending that certain actions be undertaken by national and international institutions.

The Mission concluded that *Operation Cast Lead* "[...] fits into a continuum of policies aimed at pursuing Israel's political objectives with regard to Gaza and the Occupied Palestinian Territory as a whole"[41]. Notwithstanding the self-defence argument alleged by the Israeli Authorities, the Mission considered the military operations aimed, at least partially, at punishing the Gaza population for its apparent support for Hamas. In this sense, it is concluded that the attack had been planned well in advance[42]. Also, while acknowledging that the proportionality principle[43] may determine that certain casualties are not unlawful under IHL, the timing and conditions in which most of the strikes were carried out reveal a flagrant disregard for the basic principles of the LoAC. In addition, the principle of distinction requires that Israel does not transfer the risk to which its soldiers may be exposed, onto civilian persons, whatever the characteristics of the battlefield may be. Nor can the military advantage procured by civilian objects be broadly intended. Destruction of civilian property which

[39] See paras.1773-1857 of the *FFMGC Report*.
[40] See paras.1858-1873 of the *FFMGC Report*.
[41] Para.1877 of the *FFMGC Report*.
[42] See paras.1883-1885 of the *FFMGC Report*.
[43] See *infra*, pp.116 and 118.

does not substantially contribute to weaken the military opponent, while rendering civilian life more difficult, entail a breach of IHL. In the light of these circumstances and the fact that, from public official statements as well as from testimonies of individual soldiers, a thorough planning of the entire operation appears, "[...] the Mission concludes that what occurred [...] was a deliberately disproportionate attack designed to punish, humiliate and terrorize a civilian population, radically diminish its local economic capacity both to work and to provide for itself, and to force upon it an ever increasing sense of dependency and vulnerability"[44]. After tracing other features of *Operation Cast Lead* in connection with the political, military and historical context, the *FFMGC Report* provides a summary of its legal findings, which are briefly listed hereinafter:

i) Israel failed in a number of cases to comply with its duty to take feasible precautions in conducting attacks, including the failure to effectively warning the civilian population of the upcoming attack. Such failure would amount to a breach of customary law as reflected in art.57 of *Additional Protocol I* to the *Geneva Conventions* (paras.1919-1920);

ii) Israel failed in numerous occasions to comply with the fundamental principle of distinction between civilians and combatants, deliberately attacking civilian persons and objects or employing certain weapons whose use is restricted or prohibited under International Law by virtue of the principles of proportionality and precaution in the attacks. Violations of both IHL and IHRL are found in such cases (artt.27 of the *Fourth Geneva Convention*, 51 and 75 of the *Additional Protocol I*, 6 and 7 of the ICCPR (see paras.1921-1924));

iii) Israel breached both IHL (artt.27, 31 and 33 of the *Fourth Geneva Convention*, 76 of the *Additional Protocol I*) and IHRL (artt.6, 7 and 10 of the ICCPR) by forcing Palestinian residents to act as human shields, and unlawfully detaining them, given their protected *status* (paras.1925-1927);

iv) Israel breached IHL (art.54 of the *Additional Protocol I*) and IHRL (artt.11 and 12 of the ICCPR), by causing unlawful and wanton destruction to civilian property not justified by military necessity (paras.1928-1930);

[44] Para.1893 of the *FFMGC Report*.

v) A number of other violations of IHL and IHRL perpetrated by Israel in the Gaza Strip, the West Bank, and Israel itself, and not directly linked with *Operation Cast Lead*, have been found by the Mission (see paras.1931-1934, 1937-1949);

vi) The Mission found that many of the findings it reached amount to grave breaches of the *Geneva Law*, which entail the individual criminal responsibility of the perpetrator. In particular, the Mission found that the war crimes of "[...] wilful killing, torture or inhuman treatment, wilfully causing great suffering or serious injury to body or health, and extensive destruction of property, not justified by military necessity and carried out unlawfully and wantonly"[45], as well as the war crime of using human shields, as provided for in art.8(2)(b)(xxiii) of the *Rome Statute of the ICC*, may have been committed. It also found that "[...] the series of acts that deprive Palestinians in the Gaza Strip of their means of subsistence, employment, housing and water, that deny their freedom of movement and their right to leave and enter their own country, that limit their rights to access a court of law and an effective remedy, could lead a competent court to find that the crime of persecution, a crime against humanity [under art.7(1)(h) of the *Rome Statute of the ICC*], has been committed"[46];

vii) Palestinian groups may have committed war crimes and crimes against humanity, by way of launching rockets and mortar shells on Israeli communities in Southern Israel. As a matter of facts, launching rockets and mortars which cannot be aimed with sufficient precision at military targets, and the absence of intended military targets, while mortars and rockets are fired upon civilian areas, constitute deliberate attacks on civilian population, which is a war crime (art.8(2)(b)(i) of the *Rome Statute of the ICC*). In addition, the same acts may amount to crimes against humanity when they are intended to spread terror among the civilian population, causing loss of lives, physical and mental injuries, as well as affecting the economic and social rights of the civilian population[47];

[45] Para.1935 of the *FFMGC Report*.
[46] Para.1936 of the *FFMGC Report*.
[47] Paras.1950-1951 of the *FFMGC Report*.

viii) The Mission found also that Palestinian armed group should treat Corporal Gilad Shalit according to the provisions set forth in the *Third Geneva Convention*, since his status is that of prisoner-of-war[48];

ix) Palestinian armed groups were also found to have failed to take constant care to minimize the risk of harm to the population of Gaza. In particular, the Mission held the view that Palestinian armed groups unnecessarily exposed the population to the military operations, due to the fact that they launched rocket and mortar attacks from within civilian areas on in their vicinity. Such conduct would amount to a breach of the obligation to take all feasible precautions to spare the civilian population[49];

x) A number of further allegations regarding episodes of internal violence among Palestinian factions have been found to be credible[50].

The Mission also highlighted a need for accountability, underlining the importance vested by the respect for justice and the rule of law in building a climate of peace, especially in light of the failures of the domestic justice systems[51].

Finally, the Report presents certain recommendations that the Mission addressed to national and international institutions, as well as to other States[52]. However, the content of the recommendations and the status of their implementation will be addressed in the following chapter.

2. Methodological Challenges through the Analysis of Substantial Issues: some Examples from the *Fact-Finding Mission on the Gaza Conflict Report*

In this section I will turn to more substantial issues concerning the case-study at stake, the *FFMGC Report*. The panel of experts led by Justice Goldstone faced a hard task in ascertaining the facts of a bloody chapter of a much broader and more complex issue, which is both political and juridical, the Israeli-Palestinian conflict. However, fact-finding does not have a political aim, but that of ascertaining facts as accurately and even-handedly as possible, as it has been repeatedly underlined in this paper. Much

[48] Para.1952 of the *FFMGC Report*.
[49] Para.1953 of the *FFMGC Report*.
[50] Paras.1955-1956 of the *FFMGC Report*.
[51] See paras.1957-1966 of the *FFMGC Report*.
[52] Paras.1967 and *ff* of the *FFMGC Report*.

criticism has been raised following the release of the Report, but also much praise for the integrity and professionalism that animated the fact-finders in carrying forward their mandate[53]. The Government of Israel has first denied any cooperation to the Mission and, later, has harshly criticized its members and the UNHRC, alleging that they were biased and had already condemned Israel[54]. Subsequently, criticisms have targeted the method adopted by the Commission, attacking it on various fronts. Nevertheless, facts are undeniable. In fact, the UNHRC FFMGC was not the only one, but one of the many, that dealt with the tremendous episodes that have occurred, even though probably the one that attracted more attention from the public opinion[55]. This could be sufficient to dismiss any criticism regarding the verifiability of facts. However, a look into the finding-building technique employed by the Mission can easily demonstrate that the criticism is groundless. According to the author, it is also important to identify the most challenging issues when conducting fact-finding activities, outlining the main constraints that can affect the work of non-judicial bodies compared to that of tribunals and courts, which enjoy more resources and time in order to discharge their functions.

[53] See the accurate analysis of BARNETTE J., *Initial Reaction to the FFMGC Report and Reflections on Israeli Accountability*, in MELONI and TOGNONI (eds.), (2012) pp.123-141, *supra*, Chapter I, footnote 4.

[54] The Israeli Government first accused the mandate of the Fact-Finding Mission of being one-sided. Justice Goldstone, in particular, accurately responded to the criticism, claiming its groundlessness, since the original mandate, originally formulated by the President of the UNHRC, had been subsequently modified on Goldstone's advice, granting an even-handed investigation into both parties' behaviours during the military operation. Nevertheless, the criticism was further reiterated also by U.S. officials. In addition, Israel carried on a campaign of delegitimization of the members of the Commission, by questioning their integrity, professionalism and impartiality, arguing that some of them had already signed petitions claiming that Israel had committed war crimes and that its response to the launch of rockets by Palestinian factions was not justified by the right to self-defence. See, for further details, pp.127-130, *Ibidem*.

[55] Among the other enquires that have been carried out on the incidents occurred during *Cast Lead Operation*, one may recall: the Fact-Finding Committee on Gaza, deployed by the Arab League and conducted by professor John Dugard; and the Board of Inquiry established by the UN Secretary-General into attacks on UN infrastructures during the military operation, lead by the former head of Amnesty International, Ian Miller. In addition, different NGOs have conducted enquires and subsequently released reports on the War on Gaza. In addition, reports enquiring the facts related to *Operation Cast Lead* have been released by several NGOs such as: *Israel/Gaza: Operation "Cast Lead": 22 Days of Death and Destruction*, Amnesty International, published on 2 July 2009 (available at http://www.amnesty.org/en/library/info/MDE15/015/2009); *Rain of Fire. Israel's Unlawful Use of White Phosphorus in Gaza*, Human Rights Watch, published on 25 March 2009 (available at http://www.hrw.org/reports/2009/03/25/rain-fire); *Turning a Blind Eye. Impunity for Laws-of-War Violations during the Gaza War*, Human Rights Watch, published on 11 April 2010 (available at http://www.hrw.org/reports/2010/04/11/turning-blind-eye-0); *Targeted Civilians: A PCHR Report on the Israeli Military Offensive against the Gaza Strip (27 December 2008 – 18 January 2009)*, Palestinian Centre for Human Rights, published on 21 October 2009 (available at http://www.pchrgaza.org/portal/en/index.php?option=com_content&view=article&id=5132:targeted-civilians-a-pchr-report-on-the-israeli-military-offensive-against-the-gaza-strip-27-december-2008-18-january-2009&catid=74:war-reports&Itemid=217).

In this sense, standards of proof serve the specific purpose of establishing propositions on the basis of the evidence collected. The judicial reasoning proceeds through three steps: (a) collection of evidence; (b) evaluation and corroboration of evidence; (c) formulation of the final proposition. The proof of more propositions may determine the making of a legal finding, which is generally more complex than a factual one. As claimed by KLAMBERG, legal findings are, in fact, complex propositions made of different factual propositions. One complex proposition constitutes a charge in a criminal trial[56]. The same author provides a useful example. In order to charge somebody with the crime under art.7(1)(g) of the *Rome Statute* – rape as a crime against humanity -, the type of offence has to be fragmented into its elements, which are suggested by the ICC *Elements of Crimes*. In the case at stake, the *Elements of Crimes* partition the conduct described in the Statute, requiring that the following elements are matched:

i) Invasion, which can be carried out in different manners;
ii) Force or threat of force and coercive environment;
iii) Part of widespread or systematic attack against the civilian population;
iv) Intent, which can be inferred from circumstantial evidence.[57]

Each of these elements represents an individual simple proposition, which can be matched by the facts in issue. If all the factual propositions are matched, the charge can be formalised with the legal characterisation as rape under art.7(1)(g) of the *Rome Statute*. This latter operation constitutes the legal finding (*i.e.* the complex proposition to which I referred above).

In the following pages, some of the findings collected in the *FFMGC Report* will be analysed, adopting the pattern described above. The aim will be mainly that of pointing out some of the most critical issues that may have been encountered by the Commission rather than examining in depth the underlying substantial dilemmas. It is on these points that the methodology of the Report has been most harshly criticized. It is argued that

[56] KLAMBERG, (2011) p.6, *supra*, Chapter I, footnote 202.
[57] See art.7(1)(g)-1 of the *Elements of Crimes* of the ICC; art.7(1)(g) of the ICC *Rome Statute*. See also KLAMBERG, *Ibidem*.

such criticism is ill-founded, both for statistical and methodological arguments, which will be spelled out hereinafter.

2.1 Preliminary Factual and Legal Findings: the Contention about the Status of Gaza

One of the first concerns of the FFMGC was that of establishing "[...] whether there was exercise of authority by Israel in the Gaza Strip during the period under investigation"[58], in order to determine the relevant applicable law. The contention is not as plain as it could seem, as Israel claims that, since its unilateral disengagement of the Gaza Strip, it does not exercise any control over the area.

The Report maintains that, despite the withdrawal of the Israeli ground troops, the Gaza Strip remains an occupied territory, due to the fact that Israel still exercises a *de facto* control over it. The Mission adopted an inclusive approach, considering the Israeli Government submissions, national and international jurisprudence and the most widely accepted interpretations of the relevant norms of International Law.

Although the issue is dealt with in the part of the Report where the terms of reference and the applicable law are set, it carries much broader implications. As the above mentioned finding-building system shows, the fact that an armed conflict exists represents the *conditio sine qua non* for alleging war crimes, being the required contextual element[59].

2.1.1 The Concept of Belligerent Occupation

The Report firstly deals with the positive definition of belligerent occupation, stemming from art.42 of the *Regulations Annexed to the IV Hague Convention*[60].

A situation of belligerent occupation determines the existence of an international armed conflict as opposed to non-international armed conflicts[61]. According to the

[58] Para.274 of the *FFMGC Report*.
[59] See art.8 of the *Rome Statute of the ICC* and art.8 of the *Elements of Crimes*.
[60] Paras.273-275 of the *FFMGC Report*.
[61] More diffusely on the distinction between international armed conflicts and non-international armed conflicts see GREEN L.C., (2000) *The contemporary law of armed conflict*, II edition, Manchester University Press, pp.54 and *ff*; RONZITTI, (2011) pp.135-138, *supra*, Chapter I, footnote 41; KOLB R., HYDE R., (2008) *An introduction to the International Law of Armed Conflicts*, Hart Publishing, pp.65

Hague Regulations[62], such situation arises from the taking and maintenance of *effective and exclusive control*[63] over a territory originally belonging to the occupied party. The principle of effectiveness requires that the situation of control does not stem from a subjective perspective of the parties. On the contrary, it has to emerge as an objective element[64]; in other words, the *de facto* subjection of a territory to the authority of the occupying power shall appear evident, being irrelevant the qualification that the parties to the conflict might have issued from their point of view. With respect to the second requisite, *i.e.* the exclusiveness of the control:

> "it must be clear that in the affected territory there is no longer any semblance of authority other than that imposed or tolerated by the occupant, that the local forces are no longer effective in the area, that the population is to all intents and purposes disarmed, and that it is the occupying authority which is effectively maintaining law and order with troops available or easily secured to assist in this task if needed"[65].

However, the Mission interpreted the requisite of *effective and exclusive control* in the light of the humanitarian purposes of the *Fourth Geneva Convention*, thus applying less rigid requirements. Para.275 of the Report reads:

> "[...] the drafters of the Fourth Geneva Convention sought to guarantee the protection of civilians ("protected persons") in times of war regardless of the status of the occupied territories. That the Fourth Geneva Convention contains requirements in many respects more flexible than the Hague Regulations and thus offering greater protections was recognized by the International Criminal Tribunal for the former Yugoslavia in the Naletelic case, [...]. The Trial Chamber concluded that: "the application of the law of occupation as it effects 'individuals' as civilians

and *ff*. In the latter publication the authors highlight the illogical approach emerging from this distinction, as far as in situations of "mixed armed conflicts" both bodies of rules apply, often determining different standards in the protection provided especially to civilians. The same position has been held by the UN Security Council in UNSC Res.771 (13 August 1992) UN Doc. S/RES/771 para.1. The same process of "bridging the gap between the two types of conflict", in the authors' opinion, is confirmed by art.8 of the ICC *Rome Statute*, which includes a list of war crimes applicable to both international and non-international armed conflicts.

[62] *Hague Convention (IV) respecting the Laws and Customs of War on Land, Annexed Regulation respecting the Laws and Customs of War*, art.42.

[63] See KOLB R., HYDE R.,(2008) p.230, *supra*, footnote 61.

[64] See KOLB R., VITE' S., (2009) *Le droit de l'occupation militaire. Perspectives historiques et enjeux juridiques actuels*, Bruylant, p.62 and *ff*.

[65] See GREEN, (2000) p.257 and *ff*, *supra*, footnote 61.

> protected under Geneva Convention IV does not require that the occupying Power have actual authority""

This interpretation of the notion of belligerent occupation, aside from being widely recognized by both authoritative jurisprudence and doctrine, adapts to the terms of reference of the Mission. In the First Chapter of this paper, it has already been underlined that, despite the requirement of even-handedness of the mandate, fact-finding missions generally act in accordance with the values shared by their parent body. Impartiality lays in the methodology adopted, not in the approach[66]. As far as the FFMGC is concerned, the focus was on the civilian population, not on the necessities of the belligerent parties.

2.1.2 Belligerent Occupation applied to the Gaza Strip

According to the Mission:

> "Israel has without doubt at all times relevant to the mandate of the Mission exercised effective control over the Gaza Strip. The Mission is of the view that the circumstances of this control establish that the Gaza Strip remains occupied by Israel. The provisions of the Fourth Geneva Convention therefore apply at all relevant times with regard to the obligations of Israel towards the population of the Gaza Strip."[67]

This holds true despite the "disengagement plan" approved by the Knesset in 2004. Accordingly, a unilateral removal from the Gaza Strip of Israel security forces and Israeli civilians living in the settlements would have been carried out. The disengagement was accomplished by September 2005[68]. Since then, Israel rejected any obligation arising from the law of belligerent occupation with respect to the Gaza Strip, "including the basic maintenance of the welfare of the civilian population"[69]. The same view is supported also by the Israeli High Court of Justice, in the *Gaza Fuel and*

[66] As a matter of facts, it is with fact-finding in the field of Human Rights that the present work is dealing, and not with means for the settlement of international disputes, as it would be the case if fact-finding missions under the Hague Conventions of 1899 and 1907 were considered (see *supra*, Chapter I, p.9).
[67] Para.276 of the *FFMGC Report*.
[68] Government of Israel, Decision of 6 June 2004 on the Revised Disengagement Plan, available at http://www.mfa.gov.il/MFA/Peace+Process/Reference+Documents/Revised+Disengagement+Plan+6-June-2004.htm.
[69] See REYNOLDS J., (2010) *Legitimising the Illegitimate? The Israeli High Court of Justice and the Occupied Palestinian Territories*, Al-Haq, p.31.

Electricity judgement, according to which the State of Israel is bound by the obligations arising upon a party to an armed conflict, and not by the stricter duties imposed upon an occupying power under the law of occupation[70]. Moreover, in September 2007, the Government of Israel issued a declaration defining the Gaza Strip as a "hostile territory"[71]. This definition is unknown to the LoAC and, according to various NGOs reports, was used in order to justify the imposition of harsh restrictions on the Strip[72].

According to the UN FFMGC and a Palestinian Independent Commission[73], the approach adopted by both the Government of Israel and the Israeli High Court of Justice fails to take properly into account the issue of *effective control*. Despite the absence of military personnel within the territory of the Gaza Strip, both Commissions highlighted that the Israeli security forces are still exercising effective control, by mean of:

> "[...] (1) Israel's unilateral control of the airspace and territorial waters of Gaza, (2) Israel's continued military presence in the Philadelphi Corridor along the border between the Gaza Strip and Egypt, (3) Israel's continued control of all border crossings with Gaza, (4) Israel's continued military land incursions, and air and naval strikes against Gaza, and (5) Israel's insistence that the entry and exit of any persons or goods be with its consent"[74]

The underlying "triggering" notion for the applicability of the law of occupation is that of *effective control*, which stems out of art.42 of the *Regulation Annexed to the IV Hague Convention*[75]. Under the law of unilateral termination of occupation[76] the test to

[70] See *Jaber al-Bassiouni Ahmed et al. v Prime Minister*, HCJ 9132/07 (the *Gaza Fuel and Electricity* case), judgement of 30 January 2008, para.12, "In this regard, we note that since September 2005 Israel no longer has effective control over what takes place within the territory of the Gaza Strip [...]. Under these circumstances, the State of Israel bears no general obligation to concern itself with the welfare of the residents of the Strip or to maintain public order within the Gaza Strip, according to the international law of occupation."

[71] Israel Ministry of Foreign Affairs, Press Release of 19 September 2007: *Security Cabinet declares Gaza hostile territory*.

[72] See, for instance, REYNOLDS, (2010) p.31, *supra*, footnote 69.

[73] A Palestinian Independent Investigation Commission was established following the GA Resolution 64/10, by a Palestinian Presidential Decree issued by the President of the Palestinian National Authority, Mahmoud Abbas, on 25 January 2010.

[74] *Palestinian Independent Investigation Commission established pursuant to the FFMGC Report: violations allegedly committed by Palestinians*, Appendix II to the Attached Letter dated 12 July 2010 from the Permanent Observer of Palestine to the United Nations addressed to the Secretary-General, p.7; see also para.278 of the *FFMGC Report*.

[75] The article provides that "Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised".

ascertain the persistence of a situation of occupation can be carried out in accordance with two different standards. On the one hand, the test of *actual control*[77], which requires "proof that the foreign army has actually substituted its own authority for that of the ousted government"[78]. On the other hand, the Trial Chamber of the ICTY, in the *Naletilic* case (2003)[79], has applied the test of *potential control*, which is shaped on the potential exercise of control over a territory, even through indirect influence over the local authorities[80]. The specificities of the application of these tests cannot be pointed out in this context, but it is to be noted that the latter has been employed also by the Israeli Supreme Court of Justice, following the disengagement of the Gaza Strip[81]. Some scholars have endorsed the same position of the Court[82]. According to SHANY, Israel's incapability to exercise *effective control* over the Gaza Strip emerges from the presence of a local government, carrying out administrative and legislative duties, which is not sanctioned by the Government of Israel, alongside the "existence of locally organized military forces"[83]. However, according to GISHA[84], the test of *potential control* has been too narrowly interpreted by the Israeli High Court of Justice. The main failure of the above mentioned reasoning lies in the absence of any reference to one of the general aim of IHL – *i.e.* the protection of certain categories of individuals, mainly civilians -. Indeed, the *Martens clause* and the principle of humanity[85] require an

[76] The subject has been upgraded to autonomous field of study only recently. See, for instance, BENVENISTI E., (2008) *The Law on the unilateral termination of occupation*, Veröffentlichungen des Walther-Schücking-Instituts für Internationales Recht an der Universität Kiel, Andreas Zimmermann and Thomas Giegerich (eds.).

[77] A judicial application of this test can be found in the case concerning *Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo v. Uganda*), ICJ Reports 2005.

[78] See BENVENISTI, (2008) *supra*, footnote 76.

[79] *Prosecutor v. Naletilic*, Case no. IT-98-34-T, 31, ICTY T. Ch., March 2003.

[80] See BENVENISTI, (2008) *supra*, footnote 76. As the author outlines, the same test has been applied by the Israeli High Court of Justice in 1982 in the case of the occupation of Southern Lebanon.

[81] See *Ibidem*.

[82] SHANY Y., (2005) *Faraway So Close: The Legal Status of Gaza after Israel's Disengagement*, Yearbook of International Humanitarian Law, Vol.8, p.359.

[83] SHANY Y., (2009) *The Law applicable to Non-Occupied Gaza: A Comment on Bassiouni v. Prime Minister of Israel*, International Law Forum of the Hebrew University of Jerusalem Law Faculty, Research Paper No.13-09.

[84] Gisha is an Israeli not-for-profit organization, whose main aim is to protect the freedom of movement of Palestinians.

[85] The *Marten clause* was included in the preamble to the 1899 *Hague Convention II* and to the 1907 *Hague Convention IV*, following the proposal of the Russian delegate, Frederic de Martens, at the Hague Peace Conference, as well as in the denunciation clauses of the 1949 *Geneva Conventions* and *Additional Protocol I*. In its original formulation in the *Hague Conventions*, it declares that " Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under

expansive interpretation of the rules provided by the LoAC. Thus, also the concept of occupation shall be interpreted so as to expand its scope of application in the manner most consistent with the above mentioned general principle. Consequently, the test of *potential control*, as endorsed by the Israeli Supreme Court of Justice and by some scholars, appears to be shaped too narrowly, or at least, in a manner which is inconsistent with the purposes of IHL[86]. As pointed out in a paper issued by GISHA, art.42 of the Regulation Annexed to the IV Hague Convention must be made object of an "evolutive interpretation"[87]. In other words, it must be taken into account that nowadays *effective control* can be exercised through non-conventional means, which does not alter in substance the definition of a situation of occupation. This is the case of the Gaza Strip. Although at present Israel is not exercising control in a traditional manner, it possesses instruments capable of affecting the civilian population's life. "In particular, the humanitarian law of occupation should be interpreted in light of changes in technology and in the use of force"[88].

The same finding had been previously reached also by the Independent Fact-Finding Committee on Gaza, led by John Dugard. According to para.403 of the Report:

> "Israel's effective control is demonstrated by the following factors:
>
> (1) Effective control of Gaza's six land crossings;
> (2) Complete control of Gaza's airspace and territorial waters;
> (3) Control through military incursions, rocket attacks and sonic booms: sections of Gaza have been declared "no-go" zones in which residents will be shot if they enter;

the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of public conscience." In KOLB and HYDE, (2008) p.63, *supra*, footnote 61, the authors point out that the clause "serves as a basis for interpreting the LoAC in a humanitarian sense. Moreover, it can be seen as a call to apply IHRL in order to complement the LoAC and eventually fill in its gaps." On the *Martens clause*, see also RONZITTI, (2011) p.150, *supra*, Chapter I, footnote 41.

[86] For a discussion on the necessity of adapting the rules pertaining to the Law of Occupation to the new challenges, see the *Report of the 31st International Conference of the Red Cross and Red Crescent, International Humanitarian Law and the challenges of contemporary armed conflicts*, Report 31IC/11/5.1.2 available at http://www.icrc.org/eng/assets/files/red-cross-crescent-movement/31st-international-conference/31-int-conference-ihl-challe nges-report-11-5-1-2-en.pdf.

[87] BASHI S., MANN K., (2007) *Disengaged Occupiers: the Legal Status of Gaza*, Gisha: Legal Centre for Freedom of Movement, p.69.

[88] *Ibidem*. See also DARCY S., REYNOLDS J., (2010) *An Enduring Occupation: The Status of the Gaza Strip from the Perspective of International Humanitarian Law*, Journal of Conflict & Security Law, Oxford University Press, Vol.15, No.2, pp.211-243.

> (4) Control on the Palestinian Population Registry which determines who may reside in Gaza and who may leave and enter the territory."[89]

In the light of the jurisprudence of the ICJ[90] and the consolidated opinion of an important part of the doctrine[91], the legal *régime* of belligerent occupation entails two consequences in terms of applicable law:

i) On the one hand, it follows that IHL applies. In particular, the FFMGC[92], the Israeli Supreme Court of Justice[93] and the Government of Israel[94] share the view according to which the *Annexed Regulations to the Fourth Hague Convention*, the *Fourth Geneva Convention* and some of the norms of *Additional Protocol I* – due to the fact that Israel is not a party to the Protocol, only those rules of a customary nature – apply;

ii) On the other hand, also IHRL applies. According to the ICJ in its *Advisory Opinion on the Wall*, "[…] the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation […]"[95]. In particular, the FFMGC recalled the opinion of the Human Rights Committee, according to which "a State party must respect and ensure the rights laid down in the Covenant [*ICCPR*] to anyone within the power or effective control of that State party, even if not situated within the territory of the State party"[96]. The same view is shared by the Independent Fact-Finding Committee on Gaza, which dealt with only three of the relevant Human Rights conventions, namely the *ICCPR*, the *International Covenant on Economic*,

[89] *Report of the Independent Fact-Finding Committee on Gaza: No Safe Place. Presented to the League of Arab States*, 30 April 2009 (hereinafter *Arab League Report*), para.403.
[90] *Legal consequences of the construction of a wall in the Occupied Palestinian Territory* (ICJ, 9 July 2004), paras.111 and *ff*; *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda)*, (ICJ, 19 December 2005), paras.181 and *ff*.
[91] See, for instance, KOLB and VITE', (2009) pp.304 and *ff*, *supra*, footnote 64; RONZITTI, (2011) pp.254 and *ff*, *supra* Chapter I, footnote 41; DARCY S., REYNOLDS J., (2010) *supra*, footnote 88.
[92] Paras.270 and *ff* of the *FFMGC Report*.
[93] *Public Committee against Torture in Israel v. Government of Israel*, HCJ 769/02, judgment of 11 December 2005, paras.19 and *ff*.
[94] *The Operation in Gaza, 27 December 2008 – 18 January 2009. Factual and Legal Aspects*, The State of Israel (July 2009), paras.27 and *ff*.
[95] *Legal Consequences...*, (ICJ, 9 July 2004), para.106.
[96] UN Human Rights Committee, General comment No. 31 (2004), para.10, cited in para.297 of the *FFMGC Report*.

Social and Cultural Rights (hereinafter *ICESCR*) and the *Convention on the Rights of the Child*[97].

In this sense, the *FFMGC Report*, as well as other reports before, pointed out that the legal obligations that Israel had rejected after the accomplishment of the unilateral "disengagement" of the Gaza Strip are still binding. Consequently, Israel cannot refuse to abide by the relevant obligations arising from IHRL *vis-à-vis* Gaza, and the withdrawal of military personnel from the ground itself appears to be an attempt to escape the heavier responsibilities deriving from the maintenance of *effective control* over the life in Gaza, while preserving the possibility to militarily intervene when the security of Israel is at risk[98].

2.1.3 The Consequences of the Qualification of the Conflict

From the perspective of IHL, establishing the legal nature of the conflict is fundamental to determine which bodies of law apply. Thus, the fact that Gaza remains still occupied is not devoid of relapses in terms of applicable law.

It is generally acknowledged that the military confrontation between Hamas - and other Palestinian factions – and Israel qualifies as an international armed conflict, being irrelevant the fact that Gaza is occupied[99]. However, the issue may not be so plain. As a matter a facts, several factors could lead to different conclusions. Occupations are generally regulated by IHL and IHRL, the latter applying extraterritorially. When the occupation marks the cessation of hostilities, certain fundamental rights must receive the broader protection afforded by Human Rights Law. This implies that the occupying forces shall adopt the stricter law enforcement standards, at least until hostilities of a certain intensity breaks out. Even in the latter case, according to Amnesty International, the applicable legal framework should be evaluated on a case-basis[100]. This poses the problem of prolonged military occupations: what is the applicable legal *regime* at the

[97] Paras.427 and *ff* of the *Arab League Report*.
[98] ANNONI A., (2010) *L'applicazione del regime giuridico dell'occupazione nei Territori palestinesi occupati*, DEP Rivista telematica di studi sulla memoria femminile, Nos.13-14, pp.171-173; DARCY and REYNOLDS, (2010) pp.223-242, *supra*, footnote 88.
[99] See ANNONI, (2010) p.173, *Ibidem*; CASSESE, (2005) *International Law*, Second Edition, Oxford University Press, p.420.
[100] *The conflict in Gaza. A briefing on applicable law, investigations, and accountability*, Amnesty International Publications 2009, p.7.

outbreak of hostilities? What is the legal framework applicable to cross-border military confrontation? What if the insurgents are a different group from the one which originally confronted the occupying forces? Some scholars have attempted to answer to these questions by means of the law on non-international armed conflicts[101].

Both the FFMGC and the Government of Israel share the view according to which, due to the increasing convergence between the law of international and non-international armed conflicts, the legal qualification of the confrontation may not be fundamental for assessing the events occurred during the military operation in the Gaza Strip[102]. The same position is supported by part of the doctrine. One author claims that qualifying the conflict is not important in the light of the breaches of IHL that have been committed, since they contravene the most fundamental principles of IHL, which apply notwithstanding the international or non-international character of the conflict[103].

Whatever the classification of the conflict may be, the aforementioned norms of IHL enjoy the *status* of Customary International Law and, thus, are applicable to the military confrontation between Israel and the Palestinian factions[104].

2.2 The Principle of Distinction, *Iyad al-Samouni* and the UNRWA School in Jabaliya

Despite the heading, which seems to concentrate on two specific events accounted by the *FFMGC Report*, the following paragraphs aim at considering the technique employed by the FFMGC to build its findings, through the methodological and substantive analysis of some case-studies selected within the Report. It is not the aim of

[101] See, for instance, ANNONI, (2010) p.173-175, *supra*, footnote 98; KRETZMER D., (2005) *Targeted Killings of suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?*, European Journal of International Law, Vol.16, No.2, pp.208-212.

[102] Paras.281-282 of the *FFMGC Report* ("The developments that have taken place in the past two decades, in particular through the jurisprudence of international tribunals, have led to the conclusion that the substantive rules applicable to either international or non-international armed conflicts are converging. [...] Nonetheless, as the Government of Israel suggests, the classification of the armed conflict in question as international or non-international, may not be too important as "many similar norms and principles govern both types of conflicts""). Paras.29-30, *The Operation in Gaza... Factual and Legal Aspects* ("[...] At the end of the day, classification of the armed conflict between Hamas and Israel as international or non-international in the current context is largely of theoretical concern, as many similar norms and principles govern both types of conflicts").

[103] PERTILE M., (2009) *Le violazioni del diritto umanitario commesse da Hamas durante l'operazione Piombo fuso*, Diritti Umani e Diritto Internazionale, Vol.2, pp.337-338.

[104] Para.283 of the *FFMGC Report*.

this work to provide the reader with details of the substantial legal issues arising from the facts considered. Rather, the substantial arguments employed by the Mission will be used in order to understand how the law has been applied and to dispel the allegations of misapplication of IHL.

2.2.1 Wilful Killing of Civilians: Building an Accusation[105] for War Crimes

In a number of incidents the Mission found that the IDF violated the fundamental principle of distinction, stemming from IHL and aiming at protecting the civilian population from direct attacks[106]. Different arguments have been raised to justify the flagrant violation of this principle. Among them, the fact that the IDF had to confront an enemy whose tactic was that of hiding among civilians[107]. According to these

[105] The term "accusation" is improperly used, since I am referring here to the findings collected in the *FFMGC Report*, which is not judicial.

[106] The principle of distinction is deeply rooted in IHL. Hague Law, which regulates the means and methods of warfare, provides that "any belligerent, whether in an IAC [International Armed Conflict] or a NIAC [Non-International Armed Conflict], must distinguish between military objectives on the one hand and civilian persons and goods on the other". Accordingly, "[...] war must be conducted by limited means; it cannot engage in attacks without giving considerations to whether the target actively participates in the armed conflict [...] One of the most important aspects [...] is the duty to distinguish between military and civilian objectives" The principle is clearly expressed in art.48 of the *First Additional Protocol* to the *Geneva Conventions* and it was further affirmed by the ICJ in the *Nuclear Weapons* Advisory Opinion (ICJ, 8 July 1996) at paras.135-138. A negative definition of civilian is provided for in art.50 of the *Additional Protocol I*. A civilian is any person who is not a combatant (thus "who does not belong to one of the categories of persons referred to in Article 4 (A) (1), (2), (3) and (6) of the Third Geneva Convention and in Article 43 of this Protocol", art.50 of the *Additional Protocol I*). By means of this definition, the drafters of the Protocol wanted to avoid any loophole in the law. In fact, there is no space for a third *genus* apart from civilians and combatants and, most importantly, "*in case of doubt whether a person is a civilian, that person shall be considered to be a civilian*" (art.50 of the Additional Protocol I) [emphasis added]. The presence within a civilian population of individuals whose definition does not fall within the scope of the notion of civilian does not alter the character of the population (art.50(3) of the *Additional Protocol I*). However, the protection provided for by the principle of distinction come to an end when the civilian takes part in the hostilities and for as long as the participation lasts, including the period of time employed to carry out preparatory acts (art.51 of the *Additional Protocol I*). Since the cessation of the direct participation in the hostilities, the civilian re-acquire the protection deriving from their status, although they may be arrested and tried for their participation in the hostilities (see KOLB and HYDE, (2008) pp.125-129, *supra*, footnote 61). For a profound and exhaustive discussion on the issue of direct participation in the hostilities, see *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law Adopted by the Assembly of the International Committee of the Red Cross on 26 February 2009*, Reports and Documents, International Review of the Red Cross, Vol.90, No.872. On the principle of distinction, see also RONZITTI, (2011) pp.181-182, *supra*, Chapter I, footnote 41; BISHARAT G.E. *et al.*, (2010) *Israel's Invasion of Gaza in International Law*, Denver Journal of International Law and Policy, Vol.38, No.1, pp.70-71; BLANK L.R., (2009) *The Application of IHL in the Goldstone Report: a Critical Commentary*, Yearbook of International Humanitarian Law, Vol.12, pp.354-356.

[107] See, for instance, BLANK, (2009) p.353 and *ff*. "Traditionally, one could distinguish between soldiers – who wore uniforms – and civilians – who typically did not venture near the battlefield – in most circumstances. Similarly, identifying military and civilian objects was usually feasible. Contemporary conflicts introduce a whole set of new challenges in this area, however, and Operation Cast Lead was no

arguments, the law should be folded to the necessities of war. These attempts to justify the conduct of Israel and to dispel the findings collected in the *FFMGC Report* are forgetful of the fact that, in case of doubt as for its nature, the presumption stands in favor of the target of the attack[108]. Matters of methodology and substance arise in attempting to ascertain whether this tenet of IHL has been fully respected.

a) The Killing of Iyad al-Samouni

The *FFMGC Report*, at paras.736-801, deals with the killing of some civilians attempting to leave their homes to safer areas. The first incident the Mission considered concerns the death of Iyad al-Samouni, a resident of Samouni Street neighborhood in Gaza City[109]. The Mission gathered the initial relevant information through the testimonies of two Palestinian residents of the same area and a staff member of the Palestinian Red Crescent Society (PRCS). In assessing the credibility and reliability of the witnesses, the Mission proceeded through the declared method of corroboration of evidence:

> "The Mission found the witnesses it heard in relation to the shooting of Iyad al-Samouni to be credible and reliable. It has no reason to doubt the veracity of the main elements of their testimony, which is corroborated by the testimony of the PRCS ambulance driver."[110]

The facts reveal that IDF soldiers penetrated Iyad al-Samouni's house in the heart of the night between the 3rd and 4th of January and, after having asked for Hamas militants, forced his whole family into a room, handcuffed and blindfolded. On the 5th of January, following the shelling of nearby Wa'el al-Samouni's house[111], Iyad al-Samouni's family was allowed to leave the house and reach Gaza City. The men were still handcuffed and they were warned that they would have been shot if they had tried to remove the handcuffs. On the way to Gaza City, one or more Israeli soldiers opened fire on the

exception. Fighters dressed in civilian clothing and fighting from civilian areas introduce massive uncertainties that dramatically complicate the implementation of IHL."

[108] Art.50 of the *Additional Protocol I* to the *Geneva Conventions*, *Ibidem*.

[109] See the satellite images collected in the *Satellite image analysis in support to the United Nations Fact Finding Mission on the Gaza Conflict*, 31 July 2009, UNITAR Operational Satellite Applications Programme (UNOSAT), p.19, available at http://www2.ohchr.org/english/bodies/hrcouncil/specialsession /9/factfindingmission.htm.

[110] Para.741 of the *FFMGC Report*.

[111] Incident described at paras.706-735 of the *FFMGC Report*.

group, striking Iyad al-Samouni in the leg. The other members of the group were forced to abandon him, under threat of being shot. When the remaining group reached al-Shifa hospital, they reported the event. Members of the PRCS were allowed to evacuate Iyad al-Samouni three days later, but when they reached the place where they were told the man would be, they found him dead, still handcuffed and wounded, from which they could infer that he had been left bleeding to death[112].

The Mission correctly noted that, given the credibility and reliability of the witnesses, the Israeli soldiers should have been aware of the fact that Iyad al-Samouni did not represent a threat for them, since he was handcuffed. Moreover, the denial of any lifesaving medical help shows the intention to cause his death[113].

b) Assessment of the Facts under IHL and IHRL

The FFMGC found that the above described facts entail the violation of the fundamental principle of distinction.

> "809. The fundamental principles applicable to these incidents, which are cornerstones of both treaty-based and customary international humanitarian law, [...] The Israeli Government refers to the principle of distinction as "the first core principle of the Law of Armed Conflict." It [...] was also directly incorporated into the rules of engagement for the Gaza Operation." [...] in the following terms: "Strikes shall be directed against military objectives and combatants only. It is absolutely prohibited to intentionally strike civilians or civilian objects [...]."
>
> 810. In reviewing the above incidents the Mission found in every case [among them the shooting of Iyad al-Samouni] that the Israeli armed forces had carried out direct intentional strikes against civilians. [...]
>
> 811. [...] in none of the cases reviewed were there any grounds which could have reasonably induced the Israeli armed forces to assume that the civilians attacked were in fact taking a direct part in the hostilities [...]

[112] For a detailed account of the incident, see paras.736-740 of the *FFMGC Report*.
[113] Paras.742-743 of the *FFMGC Report*.

> 812. The Mission therefore finds that the Israeli armed forces have violated the prohibition under customary international law and reflected in article 51 (2) of Additional Protocol I [...]"[114]

It is important to stress that the described incident is not isolated. As noted by the Mission, "[...] Iyad al-Samouni was part of a large group of civilians who were leaving their homes and walking towards Gaza City in an area under the complete control of the Israeli armed forces"[115]. Consequently:

> "This finding [violation of the principle of distinction] applies to the attacks on the houses of Ateya and Wa'el al-Samouni, the shooting of Iyad al-Samouni, of Shahd Hajji and Ola Masood Arafat, of Ibrahim Juha, of Rayya and Majda Hajaj, of Amal, Souad, Samar, and Hajja Souad Abd Rabbo, of Rouhiyah al-Najjar, and of Muhammad Hekmat Abu Halima and Matar Abu Halima. In these incidents, 34 Palestinian civilians lost their lives owing to Israeli fire intentionally directed at them. Numerous others were injured, some very severely and with permanent consequences."[116]

In the light of the factual circumstances that characterize these events, also the methodological argument, advanced by some scholars[117], concerning the misapplication of the principle of distinction, can be easily dispelled. The killing of Iyad al-Samouni does not even pose a problem of distinction, since it is obviously clear that he was a civilian. Nor it could be argued that he was posing a threat to the Israeli soldiers or that he was taking direct part in the hostilities. The evidence, in this case, is represented by the witnesses' accounts. No element reveals or even slightly suggests that Iyad or any of his companions were engaging in hostile attitudes. On the contrary, it appears unlikely that a man handcuffed could pose a threat to the life of the Israeli soldiers. In the absence of elements suggesting the contrary, the Mission found more probable that the shooting was not justified by any military necessity and, thus, considered proved the breach of the principle of distinction.

[114] Paras.809-812 of the *FFMGC Report*.
[115] Para.742 of the *FFMGC Report*.
[116] Para.812 of the *FFMGC Report*.
[117] See generally BLANK, (2009) *supra*, footnote 106; BLANK, (2010) *supra*, Chapter I, footnote 87.

The incident also amounts to a violation of the right to life, since the Israeli soldiers caused the death of Iyad al-Samouni in the absence of the circumstances that can justify a derogation of this fundamental right, as provided for in art.6 of the *ICCPR*[118].

The concomitant finding that a killing represents both a violation of the principle of distinction under IHL and a breach of the right to life under IHRL has been contested, arguing on the basis of the different aims of IHL and IHRL. According to one author[119], although the two bodies of law apply concomitantly during armed conflicts, IHL should prevail and, since it does not absolutely prohibit the killing of civilians but allows for an evaluation in the light of the tests of military advantage and proportionality, the incidents involving civilians should be accordingly assessed. In addition, the same author allows for an assessment of the facts under IHRL but only individually, with the alleged result that, due to the high number of incidents, this may further jeopardize the protection of civilians[120]. In the author's view, this argument is not founded. Firstly, it must be noted that there is no denial that both IHL and IHRL apply in times of armed conflict. Yet, it is not clear how they interact, although the most accredited solution indicates that IHL represents the *lex specialis* and, thus, should be granted larger application in times of armed conflicts[121]. However, the incident considered does not pose any issue of proportionality or military necessity, as it would be the case for a lawful deprivation of life under IHL. On the contrary, under IHL, it constitutes a flagrant violation of the principle forbidding targeted attacks on civilians, individually or as a group. Moreover, according to the witnesses' accounts, Iyad al-Samouni and the rest of the group walking towards Gaza City were clearly in an area under the complete

[118] See para.816 of the *FFMGC Report*.

[119] See BLANK, (2009) pp.394-397, *supra*, footnote 106. "Although human rights law applies in times of war as well as in times of peace, IHL, as *lex specialis*, is the dominant legal framework in armed conflict. [...] IHL does not categorically forbid all killing in armed conflict and that the taking of life in armed conflict can only be an arbitrary deprivation of life if it violates IHL".

[120] P.396, *Ibidem*. "Similarly, although human rights law plays an important role in times of armed conflict, the practical ramifications of applying a human rights framework to individual attacks in hostilities are challenging [...] The concomitant obligations of this 'law-enforcement' approach would overwhelm the system and result, perhaps, in diminished protection for civilians and other protected persons in the zone of combat. Any human rights analysis of hostilities and attacks on civilians must therefore account for the 'shoot to kill' paradigm of IHL within the parameters of lawful killing during armed conflict."

[121] For a more extensive and profound analysis of the issue, see the study commenced by the Geneva Academy of international humanitarian law and human rights: SIATITSA I., TITBERIDZE M., (2011) *Human Rights in Armed Conflicts from the Perspective of the Contemporary State Practice in the United Nations: Factual Answers to Certain Hypothetical Challenges*, ADH Research Papers, available at: http://www.geneva-academy.ch/RULAC/international_human_rights_law.php.

control of the IDF. This should be sufficient to argue in favour of the extraterritorial application of IHRL[122].

c) Assessment of the Facts under International Criminal Law: the Mens Rea Element

The FFMGC found that:

> "From the facts ascertained, the Mission finds that the conduct of the Israeli armed forces in these cases would constitute grave breaches of the Fourth Geneva Convention in respect of wilful killings and wilfully causing great suffering to protected persons and as such *give rise to individual criminal responsibility*."[123] [emphasis added]

According to the ICC *Elements of Crime*, the crime of wilful killing requires the fulfilment of five elements in order to be established:

i) The fact that the perpetrator killed or caused the death of one or more persons;
ii) The fact that such person was entitled with the protection provided by the Geneva Conventions;
iii) The perpetrator's awareness of the factual circumstances that established the protected *status*;
iv) The link with an international armed conflict;
v) The perpetrator's awareness of the factual circumstances establishing the existence of an armed conflict.[124]

Following the analysis of the facts contained in the *FFMGC Report*, propositions i), ii) and, in the previous section, iv) have been already considered. Since war crimes are shaped on the basis of grave breaches of IHL[125], while the material element of the crime has been dealt with, the mental element has to be considered.

[122] See the case law; for instance, *Bankovic & Others v. Belgium, the Czech Republic, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, the Netherlands, Norway, Poland, Portugal, Spain, Turkey and the United Kingdom*, ECtHR, App. No. 52207/99; *Legal consequences of the construction of a wall in the Occupied Palestinian Territory* (ICJ, 9 July 2004). See also the practice of various body within the framework of the United Nations: see SIATITSA an TITBERIDZE, p.13, *Ibidem*.
[123] Para.815 of the *FFMGC Report*.
[124] See art.8(2)(a)(i)-1 of the *Elements of Crime.*
[125] On the interplay between grave breaches of IHL and war crimes law, see ÖBERG M.D., (2009) *The absorption of grave breaches into war crimes law*, International Review of the Red Cross, Vol.91, No.873.

The FFMGC, in establishing the required mental element, relied on what is known, under the law of evidence, as circumstantial evidence, *i.e.* "facts from which the existence or non-existence of a fact in issue may be inferred"[126]. It assumed that, on the basis of the factual information available to the soldiers that shot at Iyad al-Samouni, they should have known that he was a protected person under the Geneva Law. In particular, they should have been aware of the fact that he was not posing any threat to them, if not for the fact that he was handcuffed, at least on the basis of the information that they should have received from their companions stationed in the house of Iyad, a few hundred meters from their position[127].

The finding has been directly challenged on the basis of the knowledge that the perpetrators should have had prior to the shooting[128]. Again the argument seems ill-founded. According to the ICTY, in the *Prosecutor v Galić* judgement:

> "For the *mens rea* recognized by Additional Protocol I to be proven, the Prosecution must show that the perpetrator was aware or should have been aware of the civilian status of the persons attacked. In case of doubt as to the status of a person, that person shall be considered to be a civilian. However, in such cases, the Prosecution must show that in the given circumstances a reasonable person could not have believed that the individual he or she attacked was a combatant."[129]

[126] KEANE A., MCKEOWN P., (2012) *The Modern Law of Evidence*, Ninth Edition, Oxford University Press, p.12.

[127] Para.742 of the *FFMGC Report*, "The Mission finds that Iyad al-Samouni was part of a large group of civilians who were leaving their homes and walking towards Gaza City in an area under the complete control of the Israeli armed forces. His hands were tied with white plastic handcuffs. The soldier who opened fire on him should have known, on the basis of the plastic handcuffs if not of coordination with his fellow soldiers stationed in Asaad al-Samouni's house a few hundred metres away, that he had been searched and detained by the Israeli armed forces. In opening fire on Iyad al-Samouni, the Israeli armed forces shot deliberately at a civilian who posed no threat to them". See also para.811, "The Mission found that, on the basis of the facts it was able to ascertain, in none of the cases reviewed were there any grounds which could have reasonably induced the Israeli armed forces to assume that the civilians attacked were in fact taking a direct part in the hostilities and had thus lost their immunity against direct attacks".

[128] BLANK, (2009) pp.390-394, *supra*, footnote 106. According to the author "The FFMGC Report's standard is a lower requirement of acting on grounds that 'reasonably induced them to assume' the persons killed were legitimate tar-gets, which does not appear to be drawn from any international criminal jurisprudence. More importantly, it enables a determination of criminality without any grasp of what the alleged perpetrator knew or intended at the time of the attack. Since the time of the Nuremberg Tribunals, the law has required that 'an individual should not be charged or convicted on the basis of hindsight but on the basis of information available to him or information he recklessly failed to obtain at the time in question'".

[129] *Prosecutor v Stanislav Galić*, (Case No. IT-98-29-T), ICTY Tr. Ch.I, Judgement and Opinion, 5 December 2003, para.55. Also quoted in BLANK, p.391, *Ibidem*.

In the case at stake, although the information available to the Israeli soldiers has not been considered, due to the lack of cooperation of the Government of Israel, if the facts presented are not contested, it seems quite unlikely that the soldiers were not aware of the civilian status of Iyad al-Samouni. First of all, from the facts alleged, it appears that the group of civilians was not even aware of the presence of the Israeli soldiers that subsequently shot at them. Secondly, all the men of the group were handcuffed and they had been "detained" by other Israeli soldiers beforehand. It seems apparent that Iyad al-Samouni was not posing any threat to the soldiers, nor he was directly taking part in the hostilities. The same consideration applies to the other civilians walking to Gaza City.

Art.30 of the ICC *Rome Statute* requires for an individual to be criminally liable that the crime is committed with "intent and knowledge". According to para.2 of the same article:

> "[...] a person has intent where:
> (a) In relation to conduct, that person means to engage in the conduct;
> (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events."[130]

Hence, not only the intent to perpetrate the conduct needs to be demonstrated but also the intent to cause the consequence. As for this last element of the *mens rea*, the Mission noted that:

> "While the fire directed at Iyad al-Samouni could have been intended to incapacitate rather than to kill, by threatening his family members and friends with lethal fire, the Israeli armed forces ensured that he did not receive lifesaving medical help. They deliberately let him bleed to death."[131]

It appears that the Israeli soldiers must have been at least aware of the possible outcome of leaving Iyad al-Samouni wounded and severely bleeding on the ground, denying any lifesaving medical help.

[130] Art.30(2) of the *ICC Rome Statute*.
[131] Para.743 of the *FFMGC Report*.

d) Corroboration of Trends

Some scholars as well as Israeli governmental sources criticized the *FFMGC Report* on the ground that the Fact-Finding Mission did not consider information emanating from the Israeli side, due to its decision not to cooperate.

> "The report fails to recognize that lack of such information limits its ability to make determinations about violations of the law. Accountability for violations of IHL is critically important, but justifies neither a relaxed standard of analysis nor elimination of the element of *mens rea*."[132]

Despite this last argument, that seems to point out the limits of non-judicial fact-finding, it must be underlined that the facts collected by the Mission are supported by the reports of several other enquiries carried out by NGOs or panels of experts. Obviously, it might be difficult to find evidence of the same individual incidents, since fact-finding is inherently selective in the episodes to investigate. For this reason, it may be better to address the issue from a more general perspective. What can in fact be corroborated is the evidence showing the existence of trends in the conduct of hostilities. In the type of offence I dealt with in the previous paragraphs, this would amount to ask oneself: could a trend of wilfully killing civilians be identified?

The answer to this question is hard to find, due to the fact that it is based merely on numbers. However, it may come useful to the probabilistic approach that is adopted in establishing whether certain facts actually happened. As far as the Gaza Conflict is concerned, one authoritative source can be found in the Report of the Independent Fact-Finding Committee on Gaza dispatched by the Arab League. The Mission found evidence of a series of incidents that could amount to wilful killings[133]. Interestingly, the Committee noted that "[...] there was no apparent military necessity for the majority of the incidents described above [...] [and] there was no evidence that any of the victims or their families were directly associated with Hamas or were themselves fighters"[134]. In addition, also an *ex post* evaluation of the operations conducted shows that "[t]he

[132] BLANK, (2009) p.392, *supra*, footnote 106.
[133] Paras.227-259 of the *Arab League Report*.
[134] Para.254 of the *Arab League Report*.

shooting attacks [...] appear to have served no military advantage"[135]. The specific incident involving the death of Iyad al-Samouni is not dealt with in the Report. However, many of the episodes accounted in both the *Arab League Report* and the *FFMGC Report* coincide[136], revealing that the wilful killing of civilians did not take place in an isolated case. In addition, although in the absence of Israeli direct sources of information, it seems much more difficult to dispel the allegations of certain facts.

Interestingly, the FFMGC also relied on the testimonies of Israeli soldiers collected by an NGO called "Breaking the Silence"[137]. Such accounts, although not specifically aimed at uncovering the circumstances of specific events, reveal the attitude adopted by the IDF in the conduct of hostilities, conferring credibility to the testimonies of the witnesses heard by the Mission. In addition, they represented a valuable source for assessing the mental element associated with the conducts described in the Report[138], due to the detailed accounts of the orders imparted to the soldiers[139].

The Committee dispatched by the Arab League also cross-checked the testimonies received with those rendered by the same witnesses to NGOs or international bodies, as it emerges clearly from the Report:

> "Having reviewed other versions provided by the same witnesses to various international bodies (United Nations, Human Rights Watch and Amnesty International), Palestinian human rights organisations (PCHR and Al Mezan), the

[135] Para.257 of the *Arab League Report*.
[136] For instance, see: the Abu Halima family case (paras.788-811 of the *FFMGC Report*; paras.237-239 of the *Arab League Report*); the Abd Rabbo case (paras.770-779 of the *FFMGC Report*; paras.229-230 of the *Arab League Report*); and others.
[137] Paras.802-808 of the *FFMGC Report*.
[138] See *Soldiers' Testimonies from Operation Cast Lead, Gaza 2009*, Breaking the Silence, available at: www.breakingthesilence.org.il.
[139] See, for instance, paras.802 and *ff* of the *FFMGC Report*. "[...] These testimonies suggest in particular that the instructions given to the soldiers conveyed two "policies". Both are an expression of the aim to eliminate as far as possible any risk to the lives of the Israeli soldiers. 803. The first policy could be summarized, in the words of one of the soldiers: "if we see something suspect and shoot, better hit an innocent than hesitate to target an enemy." [...]"If you are not sure – shoot. If there is doubt then there is no doubt." [...] "No one actually said 'shoot regardless' or 'shoot anything that moves.' But we were not ordered to open fire only if there was a real threat." [...] While they disagreed about the legitimacy and morality of the policy, they had little doubt about the terms of the instructions: each soldier and commander on the ground had to exercise judgement, but the policy was to shoot in case of doubt. [...] The second policy clearly emerging from the soldiers' testimonies is explained by one of the soldiers as follows: "One of the things in this procedure [the outpost procedure, which is being applied in areas held by the Israeli armed forces after the Gaza ground invasion] is setting red lines. It means that whoever crosses this limit is shot, no questions asked. […] Shoot to kill."".

> PNA Central Commission for Documentation and Pursuit of Israeli War Criminals, and international media outlets, the Committee is of the view that the witnesses provided consistent accounts to all groups."[140]

2.2.2 Military Necessity, Proportionality and Precaution

As pointed out above, the fundamental principle of distinction requires the parties to a conflict to distinguish civilian persons and objects from military objectives, such as combatants and buildings used for military purposes, in carrying out attacks[141]. However, the prohibition to target civilian persons and objects is not absolute, since IHL allows for the targeting of civilians when they directly participate in the hostilities, losing their protected status[142]. In addition, civilian losses may be tolerated in the event of a legitimate attack on a military target as collateral damages, assumed that the attack is carried out in full observance of the principles of military necessity, proportionality and precaution[143].

It is also on this ground that the *FFMGC Report* has been harshly criticized. Since an extensive analysis of the findings collected by the Mission would be practically impossible in few pages, this work will deal with these problems in a limited manner, referring in particular to an incident documented by the Report, which involved al-Fakhura Street in Gaza City and the UNRWA School in Jabaliya.

a) The Facts

According to the accounts collected by the FFMGC, on 6 January 2009, al-Fakhura junction was shelled with at least four mortar bombs. The bombs hit the al-Deeb family's courtyard, al-Fakhura Street, where, according to the witnesses, at least 150

[140] Para.254 of the *Arab League Report*.
[141] See *supra*, footnote 106.
[142] Art.52(3) of the *Additional Protocol I* to the *Geneva Conventions*.
[143] See KOLB and HYDE, (2008) pp.46-49, *supra*, footnote 61; RONZITTI, (2011) pp.196-198 and 250-253, *supra*, Chapter I, footnote 41. The principle of *military necessity* requires the belligerents to undertake only such measures that are strictly necessary to overpower the enemy, thus limiting the acts that a party can perpetrate, and allows, when positively provided for in a specific rule, for a derogation of a general prohibition. The principle of *proportionality* requires the parties to undertake an attack against a legitimate military target only when the civilian losses – both persons and objects – are not disproportionate compared to the effective military advantage that could be gained. The principle of *precaution* requires the parties to adopt such measures that may be necessary to avoid civilian losses and suffering, in conducting attacks.

people were present, and damaged, although did not directly strike, part of the UNRWA School of Jabaliya, where, according to some sources, 1368 people were seeking shelter. At least 35 people were killed and several others were injured[144].

b) Assessing the Military Necessity of the Shelling

According to the Government of Israel, the shelling of al-Fakhura Street was carried out in response to the "effective barrage of 120mm mortars launched" from a site allegedly located 80 meters from the school upon a force of IDF soldiers operating in a nearby area[145]. The Israeli Government maintains that the operation succeeded in the aim of putting an end to the Palestinian fire. According to it, five Hamas operatives were killed and, consequently, it can be said that an indisputable military advantage was achieved[146].

The Mission found the account provided by Israeli officials to be inconsistent with previous statements emanating from other governmental sources[147]. In addition, the panel of experts led by Justice Goldstone relied also on other sources, mainly witnesses' accounts, according to which it does not emerge clearly whether militants of Hamas were actually firing at the Israeli unit that carried out the attack[148]. However, in the absence of sufficient ground to exclude that the Israeli strike was in response to Palestinian fire, it accepted that:

> "[...] the attack may have been in response to a mortar attack from an armed Palestinian group but considers the credibility of Israel's position damaged by the series of inconsistencies and factual inaccuracies."[149]

[144] For a more detailed account of the shelling of al-Fakhura Street, see paras.653-666 of the *FFMGC Report*.
[145] See *The Operation in Gaza, 27 December 2008 – 18 January 2009. Factual and Legal Aspects*, The State of Israel (July 2009), paras.336-340.
[146] Paras.339-340 of *The operation in Gaza ...*
[147] Paras.667-673 of the *FFMGC Report*.
[148] Para.674 of the *FFMGC Report*. "No witness stated that he had heard any firing prior to the Israeli armed forces' mortars landing. On the other hand, the Mission is aware of at least two reports that indicate local residents had heard such fire in the area". In the footnotes (n.390) the Report indicates the nature of the two sources confirming firing prior to the mortar shelling. One is from Associated Press, and the other one comes from a correspondent of the British Channel 4.
[149] Para.690 of the *FFMGC Report*.

Accordingly, the attack would have been justified by the military necessity. In this case, as it is suggested by the dubitative formula "may have been", the Mission adopted a cautious approach. The evidence is numerically in favour of the unlawfulness of the attack on the ground of military necessity, but there is room for a different conclusion. Consequently, the Mission did not exclude the possibility that the Israeli allegations were founded. However, the legitimacy of an attack has to be evaluated not only on the ground of necessity.

c) The Shelling at the Test of Proportionality

The principle of proportionality prohibits attacks, even when directed at military targets, if they "[...] may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be *excessive in relation to the concrete and direct military advantage anticipated*"[150] [emphasis added]. As it can be easily noted, the principle of proportionality is probably the "most challenging norm to apply in practice"[151]. Consequently, fact-finding into alleged violations of this fundamental tenet of IHL is very complicated. In order to assess the proportionality of an attack, three elements have to be considered: "the 'incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof'; the nature of the 'military advantage anticipated'; and the relationship between the first two elements"[152].

The most controversial aspect of the proportionality test stems from the fact that it must be carried out following an *ex ante* perception, as it clearly emerges from the wording of art.51 of the *Additional Protocol I*[153]. Thus, the evaluation will have to be

[150] Art.51(5)(b) of the *Additional Protocol I* to the *Geneva Conventions*. This principle entails two consequences: on the one hand, it prohibits the undertaking of 'indiscriminate' attacks (as defined by the article itself) and imposes to interrupt any attack whose disproportion compared to the military advantage becomes apparent (see VENTURINI G., (1988) *Necessità e Proporzionalità nell'Uso della Forza Militare in Diritto Internazionale*, Studi di Diritto Internazionale e Comparato, Università degli Studi di Milano, Dott. A. Giuffré Editore, p.146).

[151] BOUTRUCHE, (2011) p.26, *supra*, Chapter I, footnote 11.

[152] VITE' S., (2009) *L'expertise au service du droit: comment la norm façonne le processus d'enquête dans la mise en œuvre des droits de l'homme et du droit des conflits armés*, in DEBONS D. *Et al.*, (eds.) *Katyn et la Suisse*, p.257 cited in BOUTRUCHE, p.26, *Ibidem*.

[153] See BOUTRUCHE, p.27 *ibidem*; BLANK, (2009) pp.371-377, *supra*, footnote 106; VENTURINI, (1988) pp.146-147, *supra*, footnote 150; BARBER R.J., (2010) *The Proportionality Equation: Balancing Military Objectives with Civilian Lives in the Armed Conflict in Afghanistan*, Journal of Conflict & Security Law, Vol.15, No.3, p.477.

carried out considering the information available to the perpetrator at the time of the attack, following the standard of the "reasonable commander"[154].

The *FFMGC Report* was repeatedly criticized for an alleged misapplication of the proportionality test, which considered the facts at the time of the enquiry, meaning that an *ex post facto* rather than an *ex ante* perspective was adopted[155]. However, it is to be born in mind the context in which fact-finding missions work and, to be more specific, the context in which the FFMGC carried out its enquiry. One problem was represented by the lack of information available to the IDF prior to the attack, an issue that only the Israeli Government cooperation could have solved. Secondly, although the proportionality test might be difficult to be applied in practice, there are "cases where reasonable military commanders will agree that the injury to non-combatants or the damage to civilian objects was clearly disproportionate to the military advantage gained"[156]. In the episode at stake, it seems that the evaluation concerning the proportionality of the attack was indeed very accurate. The Mission adopted a "balance of probabilities" standard, as outlined above in this paper, and often relied on circumstantial evidence for making a finding in fact. The shelling of al-Fakhura Street and the alleged military necessity, which has been accepted by the Mission despite the inconsistencies in the accounts of different Israeli officials, did not convince the panel of experts. In particular, the statements issued to the press and in official documents by Israeli sources give rise to doubts as for the genuineness of the Israeli position. As a matter of facts, according to the Israeli view, the strike was intended to kill some Hamas militants firing at an IDF unit operating nearby. In the aftermath of the strike, Israel declared to have reached its objective of neutralizing the threat posed to its soldiers by the Hamas militants. However, it seems that information regarding the precise position of the targets was not completely clear.

> "The Mission notes that the statement of the Israeli armed forces on 22 April did not indicate where the Hamas fire came from, only stating it was 80 metres away.

[154] A generic standard borrowed from the domestic criminal law's notion of "reasonable person". See BLANK, p.373, *Ibidem*. See also *Prosecutor v Stanislav Galić*, (Case No. IT-98-29-T), ICTY Tr. Ch.I, Judgement and Opinion, 5 December 2003, para.58.
[155] See BLANK, pp.375-377, *Ibidem*.
[156] *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, ICTY Committee, para.50, cited in BOUTRUCHE, (2011) p.27, *supra*, Chapter I, footnote 11.

> The Mission finds it difficult to understand how the Israeli armed forces could have come to this view without having the information at the same time that Hamas operatives had been firing mortars for almost one hour. It regards these new allegations as lacking credibility."[157]

This inaccuracy in locating the targets of the attack, alongside the crowd present in al-Fakhura junction, not to speak of the proximity of the UNRWA school, where more than 1300 people were seeking shelter[158], should have brought to a different decision.

> "Even if there were people firing mortars near al-Fakhura Street, the calculation of the military advantage had to be assessed bearing in mind the chances of success in killing the targets as against the risk of firing into a street full of civilians and very near a shelter with 1,368 civilians and of which the Israeli authorities had been informed."[159]

In addition, according to the Israeli view, one of the targets of the attack was Imad Abu Askar, Mr. Abu Askar's 13-year-old son, allegedly a senior Hamas official. Mr. Abu Askar's house had already been targeted by an attack, several hours before the shelling of al-Fakhura Street[160]. Abu Askar family received a phone call prior to the strike, warning him to evacuate the house, since it would have been bombed. According to the Fact-Finding Mission, the combination of the two accounts suggests that if the target of the strike were Imad, the IDF would have been likely not to warn the family to leave the house, and thus neutralizing the target there, rather than waiting him to be in the middle of a crowd. A number of further allegations by the Government of Israel are analyzed in the Report but none of them seem to have been confirmed by the facts uncovered by the Mission[161].

Whatever the correct answer to the issue of proportionality may be in the case at stake, the purpose of this work is not to undertake a very accurate substantial analysis of the facts. Rather, it is aimed at pointing out how the Mission employed the notion of

[157] Para.675 of the *FFMGC Report*.
[158] A circumstance that was known to Israeli officials, as it can be inferred from the *FFMGC Report* (para.657) and the Report issued by the Government of Israel, *The Operation in Gaza* ... (para.336).
[159] Para.696(b) of the *FFMGC Report*.
[160] For a detailed account of the incident, see paras.658-659 of the *FFMGC Report*.
[161] See, for further details, paras.680-686 of the *FFMGC Report*.

proportionality and on which standard it relied in assessing whether the attack is to be considered lawful.

d) Precautions in the Attack

To briefly conclude the analysis of the incident reported by the FFMGC, it should be added that the last argument that the Mission considered is that of precaution in carrying out the attack. IHL requires the belligerent parties to take "constant care" in conducting military operations[162]. Art.57 of the *Additional Protocol I* to the *Geneva Conventions* spells out in details the obligations arising from this general duty imposed on the parties to an armed conflict[163]. The Mission considers the IDF to have breached the principle of precaution in the choice of the weapon to be employed to shell al-Fakhura Street.

> "The Mission does not say that the Israeli armed forces had to accept the risk to themselves at all cost, but in addressing that risk it appears to the Mission that they had ample opportunity to make a choice of weapons that would have significantly limited the risk to civilians in the area. According to the position the Government has itself taken, Israeli forces had a full 50 minutes to respond to this threat […]. Given the mobilization speeds of helicopters and fighter jets in the context of the military operations in Gaza, […] The choice of weapon – mortars – appears to have been a reckless one. […] Even if the version of events presented now by Israel is to be believed, the Mission does not consider that the choice of deploying mortar weapons in a busy street with around 150 civilians in it (not to mention those within the school) can be justified. The Mission does not consider that in these

[162] Art.57(1) of the *Additional Protocol I* to the *Geneva Conventions*. See also BLANK, (2010) p.295, *supra*, Chapter I, footnote 87.

[163] Art. 57 reads: "1. In the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects. 2. With respect to attacks, the following precautions shall be taken: (a) Those who plan or decide upon an attack shall: (i) Do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives within the meaning of paragraph 2 of article 52 and that it is not prohibited by the provisions of this Protocol to attack them; (ii) Take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects; (iii) Refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated; (b) An attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated; (c) Effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit. […]"

> circumstances it was a choice that any reasonable commander would have made."[164]

2.3 Allegations of Bias in the Choice of the Incidents to be investigated

To conclude this chapter, the choice of the incidents the Mission decided to deal with will be briefly considered. The issue is of crucial importance, due to the criticism that has been raised by "Israel's defenders" "that the incidents examined by the Goldstone Mission appeared to have been selected for political effect"[165].

However, the allegation of bias advanced by the Israeli authorities seems to be ill-founded. On the one hand, the problem of the even-handedness of the mandate to which the FFMGC was entrusted has already been dealt with. On the other hand, as a scholar has already noted, "[i]t is hardly surprising that discussion [regarding the incidents caused by Palestinian factions] is fairly brief because there is little factual dispute about whether the Gaza authorities tolerated firing of rockets onto Israel's civilian areas, and no legal ambiguity to discuss"[166]. Besides, the Report dedicates an entire section to the obligations binding the Palestinian factions and the breaches of IHL committed by those groups[167]. In particular:

> "The Mission focused on allegations that Palestinian fighters had launched attacks from within civilian areas and from protected sites (such as schools, mosques and medical units); used civilian and protected sites as bases for military activity; misused medical facilities and ambulances; stored weapons in mosques; failed to distinguish themselves from the civilian population and, in so doing, used the Gazan civilian population as a shield against Israeli attack. The Mission further sought information concerning allegations that Palestinian armed groups had booby-trapped civilian property."[168]

In carrying out its enquiry concerning these incidents, the Mission relied primarily on testimonies of civilians living in Gaza, NGOs reports, allegations made by Israel in

[164] Paras.698-700 of the *FFMGC Report*.
[165] *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 (27 November 2009), Chatham House, p.9; see also POKEMPNER, p.153, *supra*, Chapter I, footnote 293.
[166] POKEMPNER, *Ibidem*.
[167] See extensively paras.439-498 of the *FFMGC Report*.
[168] Para.443 of the *FFMGC Report*.

official documents or reports. In addition, extensive debate was left to discuss both the captivity of Gilad Shalit[169] and the impact of rockets attacks on the civilian population in Israel[170]. As for this last topic, the Mission encountered serious difficulties in assessing precisely the effect of rocket attacks on Israeli civilian population, due to the lack of cooperation by the Government of Israel.

It is not essential, for the purposes of this paper, to consider the substantial issues arising from each of these allegations, nor there is enough space to analyze the methodology adopted in verifying whether the allegations of certain facts were founded and assessing whether they entail breaches of the relevant applicable law[171]. However, it appears of some importance that the conclusions of the Report, as for the individual incidents in which Palestinian factions took active part, qualify those incidents as giving rise to individual criminal responsibility[172]. Indeed, a serious allegation, if we consider the criticism of one-sidedness alleged by Israel.

On the other hand, it has to be noted that at least in one case, the accusation of using a "double standard" in assessing some of the allegations presented to the Mission may not be completely unfounded. It seems so when the Mission considers the statements of some Hamas officials, such as Mr. Fathi Hammad, whose declaration were not considered to have probative value in relation with the Hamas alleged use of civilians to shield military objectives against Israeli strikes[173]. On the contrary, as it has already been underlined above, several statements of Israeli officials and soldiers were considered to constitute circumstantial evidence of the policy of massive civilian destruction[174].

[169] Paras.1336-1344 of the *FFMGC Report*.
[170] Paras.1594-1691 of the *FFMGC Report*.
[171] For a detailed analysis of the Hamas conduct of hostilities, see PERTILE, (2009), *supra*, footnote 103.
[172] See, for instance, para.1691 of the *FFMGC Report*, where it is stated that "From the facts available, the Mission finds that the rocket and mortars attacks, launched by Palestinian armed groups in Gaza, have caused terror in the affected communities of southern Israel and in Israel as a whole. Furthermore, it is the Mission's view that the mortars and rockets are uncontrolled and uncontrollable, respectively. This indicates the commission of an indiscriminate attack on the civilian population of southern Israel, a *war crime*, and may amount to *crimes against humanity*. These attacks have caused loss of life and physical and mental injury to civilians and damage to private houses, religious buildings and property and have eroded the economic and cultural life of the affected communities." [emphasis added].
[173] See paras.477-478 of the *FFMGC Report*. "Although the Mission finds this statement morally repugnant, it does not consider it to constitute evidence that Hamas forced Palestinian civilians to shield military objectives against attack".
[174] See also POKEMPNER, pp.153-154, *supra*, Chapter I, footnote 293.

3. Some Final Thoughts

To sum up, the main aim of this chapter was to outline the methodology adopted by the Mission in analysing the factual data collected. In the author's view, at least three main general observation can be made.

Firstly, the standard of proof adopted highlights the basic dilemma of any fact-finding mission in the field of human rights. On the one hand, the need for credibility pushes for the adoption of the higher standard, also in the light of the serious allegations that may arise from a particular situation, as it was the case of the FFMGC. On the other hand, time and resource constraints, and the lack of cooperation from the actors involved in the investigation do not tolerate the same standard adopted by judicial fact-finding, as very demanding in terms of truth-seeking efforts.

Secondly, the relevant norms of IHL and IHRL cannot but be applied consistently with the fundamental values that inform the activity of the fact-finding missions' parent body. The interpretative trend adhered to has to be spelled out in the final report as part of the methodology, in order to dispel criticisms of bias. For instance, the *FFMGC Report* clearly states its concern for the civilian population, which has the effect to prioritize the humanitarian aspect of IHL in the face of the necessities of war. Coherently, legal notions such as that of belligerent occupation are applied in the most favourable way to civilians.

Lastly, reliance on circumstantial evidence compensates for the lack of time, resources and coercive powers, typical of many courts of law, in assessing the criminality of certain acts. This is particularly apparent when it comes to establishing the required mental element for allegations of international crimes, such as the *mens rea* for determining whether a war crime may have been committed. Obviously, fact-finding cannot be expected to profuse the same efforts as a tribunal in determining such critical element. Yet there is room for evaluations of this kind if direct evidence is not the only admitted. After all, the determinations of any fact-finding tool are not judicial.

Chapter III

Accountability after the Fact-Finding Mission on the Gaza Conflict

SUMMARY: Introduction – 1. The *Fact-Finding Mission on the Gaza Conflict Report*: a Call for Accountability – 1.1 Follow-up – 1.1.1 Israeli Military Investigations and Prosecutions in the Aftermath of *Operation Cast Lead – a) The Israeli Military Justice System – b) The Fact-Finding Mission on the Gaza Conflict Report's Assessment of the Military Justice System in Israel – c) Investigations and Prosecutions in Israel in the Aftermath of Operation Cast Lead – d) Corroboration of the Information regarding Investigations and Prosecutions* – 1.1.2 Further Developments in the Investigations carried out by the Israeli Authorities – 1.1.3 The Palestinian Investigations into Violations of IHL and IHRL occurred in the Context of *Operation Cast Lead* – 1.1.4 The Endorsement of the *Fact-Finding Mission on the Gaza Conflict Report* – 1.1.5 The Establishment of the UN Committee of Independent Experts – *a) The Interpretation of the Mandate and the Methodology adopted – b) The Committee's Findings – c) The Second Committee of Independent Experts Report – d) An Evaluation of the Committee's Work* – 1.1.6 Developments in the Investigations after the Second UN Committee's Report – 2. The International Community and the Principle of Universal Jurisdiction – 2.1 Universal Jurisdiction – Attempts and Failures – *a) Attempts in the UK – b) Attempts in South Africa – c) Failures or Achievements?* – 2.2 Third States Responsibilities in the Context of International Crimes – *Al-Haq v. UK* – 2.3 European Union Obligations – 3. The International Criminal Court – 3.1 Jurisdiction, Triggering Mechanisms and Admissibility before the ICC – 3.2 The Palestine Declaration recognizing the ICC Jurisdiction – 3.2.1 Palestinian Statehood – 3.2.2 Functional Interpretation of Article 12(3) of the *Rome Statute of the International Criminal Court* – 3.3 The Prosecutorial Discretion *vis-à-vis* the Case of Gaza – 3.4 Overcoming the *impasse*. Implications of the newly accorded "Observer State" Status to Palestine

Introduction

The *FFMGC Report*, issued by the UNHRC FFMGC on 15 September 2009[1] and endorsed by the Council on 16 October 2009, concludes with a set of recommendations addressed to the Government of Israel, the Palestinian Authorities, the international community, and the relevant bodies of the United Nations, calling for the initiation of a genuine process of accountability for the breaches of IHL and IHRL perpetrated during *Operation Cast Lead*.

The follow-up to the Report has been overall disappointing. Four years after the bloody episodes described therein, impunity is still the main feature of this conflict. The Prosecutor of the ICC has determined, three years after the submission of a declaration accepting the jurisdiction of the Court by the Palestinian National Authority[2], that it does not have the competence to make a determination as for the statehood of Palestine. Both Israel and the competent Palestinian Authorities have initiated internal enquiries that do not meet international recognized standards of investigation. Few criminal trials have been triggered in Israel, but their outcome has been regarded as unsatisfying in terms of sanctions, gravity of the offences prosecuted, effectiveness, and promptness. In addition, the exercise of universal jurisdiction for the purpose of trying the Israeli top-officials, who might have been involved in the decision-making process regarding the military operation, has not been fruitful.

In this context, one may question the legal value of the fact-finding missions' reports. If, on the one hand, it is true that "[p]art of the functions of reports such as this is to attempt, albeit in a very small way, to restore the dignity of those whose rights have been violated [...]"[3], it is equally true that they can play a role in pushing forward the accountability process. To what extent can this succeed? It appears that, in carrying forward a process of accountability for human rights atrocities triggered by international enquiries, a leading role is played by political actors. An example may be the Security Council, clearly a political body but, at the same time, entrusted with the power of referral to the ICC. However, the judicial branch of any modern legal system should enjoy full independence from the political branch, in order to deliver justice for the sake

[1] See *supra*, Chapter II, for extensive details on the FFMGC and the structure of the Report.
[2] See *infra*, pp.186-190.
[3] Para.1885 of the *FFMGC Report*.

of justice and not filtered by politics. This resulted in the attribution of discretion to the ICC Prosecutor. How is it to be exercised? The analysis carried out up to this point, in the author's view, revealed the suitability of mechanisms, such as the FFMGC, to serve as a sound *notitia criminis*, both for national and international prosecutions.

In this light, it may be useful to strengthen the ties between international judicial bodies and mechanisms for the collection of evidence, also in light of the difficulties experienced by the former in conducting fact-finding activities. In addition, a more precise value should be attached to international enquiries and their recommendations. This does not imply that, at present, they serve no purpose. Indeed, in the case of Gaza, the recommendations were partially implemented, with the deployment of an enquiry committee mandated to monitor the internal investigations and prosecutions carried out by Israel and the Palestinian Authorities. Also, some criminal trials –very few indeed – have been initiated in Israel, although their outcome is still, for most part, unknown.

In this chapter, the avenues for accountability that have been undertaken in the aftermath of *Operation Cast Lead* and following the release of the *FFMGC Report* will be explored. More general observations will follow the analysis of the present case-study, focusing in particular on the relationship between international non-judicial fact-finding and international criminal justice.

1. The *Fact-Finding Mission on the Gaza Conflict Report*: a Call for Accountability

An evaluation of the impact generated by the *FFMGC Report* requires, in the first place, that the legal value of its recommendations be spelled out. In general, recommendations are the typical interlocutory acts employed, within the UN system, to dialogue with States and among UN bodies and institutions[4]. Recommendations generally urge the recipients to conform to international recognized standards, even though they are not binding instruments. Thus, the latter can decide whether to conform to the content of the recommendation or not[5]. However, it cannot be argued, on the ground of the lack of binding effects, that the content of a recommendation could be easily disregarded. In contrast, it is common opinion to link the effectiveness of such instruments with the obligation to cooperate in good faith with the organs of the UN

[4] CONFORTI B., FOCARELLI C., (2012) *Le Nazioni Unite*, Nona Edizione, CEDAM, pp.428-429.
[5] P.428, *Ibidem*.

system, stemming from art.2 of the UN Charter. Such obligation implies that the disregard of a recommendation must be motivated[6].

As for fact-finding, despite the initial States' opinions, contrary to the empowerment of enquiry missions with the task of making recommendations, it has been underlined in Chapter I that practice has shown an increasing tendency to include such clauses within the reports[7]. Their legal force, according to VITE', depends on their content. Thus, disregarding a recommendation would mean disregarding the law assumed as the term of reference in whose light the conduct of the State under scrutiny is to be investigated[8].

In the case at stake, the Mission's recommendations regarding accountability can be summarized as follows:

i) In the first place, the duty to investigate and, when appropriate, to prosecute the perpetrators of the acts that were committed in the context of *Operation Cast Lead*, belongs to the domestic institution of the forum State. Thus, both Israel and the Palestinian Authorities should undertake those steps that may be necessary to reinstate justice;

ii) In the second place, the International Community is called upon to participate in the accountability process through the exercise of universal jurisdiction in order to try those who are responsible for the grave breaches of Geneva Law;

iii) In the third and last place, the Prosecutor of the ICC should determine whether Palestine could be considered a State for the purposes of the ICC Statute, following the declaration accepting the ICC jurisdiction issued by the Palestinian National Authority. A formal investigation should be initiated, in response to a referral of the Security Council, or *motu proprio*, if the Court is to be considered as having jurisdiction *ratione loci*.[9]

[6] P.430, *Ibidem*.
[7] See pp.45-48, *supra*.
[8] See VITE', (1998) pp.380-385, *supra*, Chapter I, footnote 20.
[9] See paras.1967 and *ff* of the *FFMGC Report*. See also WEILL S., *The Follow up to the FFMGC Report and its Legal Impact in Israel and Beyond*, in MELONI and TOGNONI (eds.), p.107, *supra*, Chapter I, footnote 4.

1.1 Follow-up

The term "follow-up" indicates the use that is made of the information gathered during an enquiry. "The most prominent form of follow-up involves seeking corrective action by national and local authorities"[10]. This section will outline to what extent international non-judicial institutions and the Israeli and Palestinian Authorities have implemented the recommendations of the FFMGC.

1.1.1 Israeli Military Investigations and Prosecutions in the Aftermath of *Operation Cast Lead*

The primary responsibility to investigate and, where appropriate, prosecute the allegations of serious violations of International Law, in particular international crimes, rests upon the Israeli Authorities[11]. *Additional Protocol I* to the *Geneva Conventions*, according to the ICRC interpretation, places the obligation to initiate an investigation, when a breach of IHL occurs, upon the military commander[12]. In this way, the commander would act as an "investigating magistrate"[13]. Thus, the implementation of IHL within the military forces seems to revolve around the figure of the military commander. Such interpretation was opposed by some States with the argument "[...] that these provisions would result in an unjustified transfer of responsibilities from the level of the government to that of commanders in zones where military operations are taking place"[14]. However, the practice has shown that commanders often turn to courts when war crimes may have been committed, from which it can be inferred that the State is not relieved from its responsibilities, that "extend throughout the chain of command"[15].

[10] See the definition provided for in the *Training Manual on Human Rights Monitoring*, p.366, *supra*, Chapter I, footnote 109, which is specifically addressed to Human Rights Officers, but in principle reflects the general definition of "follow-up" in International Law.
[11] See WEILL, (2012) p.108, *supra*, footnote 9; SCHMITT, (2011) pp.36 and *ff*, *supra*, Chapter I, footnote 45; para.1773 of the *FFMGC Report*; *Genuinely Unwilling* ..., pp.11 and *ff*, *supra*, Chapter I, footnote 63. See also Rule 158, *Study on Customary International Humanitarian Law*, International Committee of the Red Cross, 2005.
[12] See SANDOZ *et al.*(eds.), (1987) pp.1022-1023 at para.3562, *supra*, Chapter I, footnote 34.
[13] *Ibidem*.
[14] *Ibidem*. See also SCHMITT, (2011) p.42, *supra*, Chapter I, footnote 45.
[15] SCHMITT, *Ibidem*.

At the national level, the acts carried out by the military personnel are generally adjudicated by military courts[16], which retain a competence over crimes committed in times of peace and in times of armed conflicts. In the latter event, military courts apply both national military codes and customary principles as recognized by International Law, such as the Geneva Law[17].

In the aftermath of *Operation Cast Lead*, Israel resorted to its military justice system to address some allegations of breaches of *jus in bello*. The release of the *FFMGC Report* pushed forward the accountability process, although, as it will be noted later on in this work, the investigations subsequently undertaken were criticized on the grounds of "promptness, impartiality, and level of victim participation", which overshadowed their impartiality[18].

a) The Israeli Military Justice System

At the time of *Operation Cast Lead*, any allegation of wrongdoings committed by the Israeli armed forces would be investigated and, if appropriate, prosecuted within the same military justice system, according to four different procedures:

i) *Disciplinary proceedings*. Proceedings employed for minor infractions, thus not applying to investigations into serious violations of IHL and IHRL;[19]

ii) *Operational debriefings* (also known as *command investigations*). "[...] a procedure held by the army, according to the army orders and regulations, with respect to an incident that has taken place during a training or a military operation or with connection to them". According to the Military Justice Law, these investigations are held by soldiers pertaining to the "same unit or line of command together with a superior officer". They are based on confidential field investigations, whose results are transmitted to the Military Advocate General' office (hereinafter MAG), where it is decided whether there is grounds to

[16] See *Genuinely Unwilling ...*, p.15, *supra*, Chapter I, footnote 63; by way of example as for the national competence over war crimes, see extensively LAMBERTI ZANARDI P., VENTURINI G., (eds.) (1998) *Crimini di Guerra e Competenza delle Giurisdizioni Nazionali*, Università degli Studi di Milano, Dott. A. Giuffré Editore. For a concrete example, see also art.232 of the *Codice Penale Militare di Guerra* (Italian Military Criminal Code in times of War), which attributes the competence over war crimes, falling under the spatial scope of the Italian military jurisdiction, to the Italian Military Tribunals.
[17] *Genuinely Unwilling ..., Ibidem*.
[18] WILKINSON, p.33, *supra*, Chapter I, footnote 16.
[19] See paras.1790-1793 of the *FFMGC Report*.

suspect that a crime has been committed. On the basis of this evaluation, the case can be taken to court, but the evidence collected with the debriefing cannot be used in the trial;[20]

iii) *Special investigations*. Carried out by a high-ranking officer, appointed by the Minister of Defence and the Chief of the General Staff, following a confidential procedure, they are used to address sensitive matters and can bring to criminal investigations, although the evidence collected by the appointed officers cannot be employed in the trials;[21]

iv) *Criminal Investigations*. These investigations are triggered by the MAG, although a negative decision may be appealed to the Attorney General. Both the decisions of the MAG and the Attorney General can be reviewed by the Supreme Court. The investigations brought about by the Criminal Investigation Division should be reported to the MAG, who has the power to close the file, return it for further investigations or issue an indictment, thus taking the case to a court martial, whose members are mainly officers. The decisions of a court martial may be appealed to the Military Court of Appeals, whose final decisions have to be confirmed by the Chief of the General Staff, after consultation with the MAG. Victims may appeal decisions not to indict to the MAG and, if not successful, to the High Court of Justice.[22]

In order to fully understand the functioning of the Israeli Military Justice system, it is fundamental to spell out the role played by the MAG (also referred to as the JAG, *i.e.* the Judge Advocate General[23]). According to the Military Justice Law[24], the MAG must be a career military officer with at least six years of legal experience and is appointed by the Minister of Defence, by recommendation of the Chief of the General Staff of the IDF[25]. The MAG serves two main functions: on the one hand, it serves as legal advisor

[20] Paras.1794-1797 of the *FFMGC Report*. On operational debriefings, see also *Genuinely Unwilling ...*, pp.43-48, *supra*, Chapter I, footnote 63.
[21] Para.1798 of the *FFMGC Report*.
[22] Paras.1799-1803 of the *FFMGC Report*. See also, for further details, CAVANAUGH K., (2007) *The Israeli Military Court System In The West Bank And Gaza*, Journal of Conflict & Security Law, Vol.12, No.2, pp.205 and *ff*.
[23] *Genuinely Unwilling ...*, p.29, *supra*, Chapter I, footnote 63.
[24] *Military Justice Law 5715-1955*. It regulates the military justice system in Israel.
[25] CAVANAUGH, (2007) p.206, *supra*, footnote 22. See also *The Operation in Gaza ...*, para.287, *supra*, Chapter II, footnote 94.

to the military; on the other hand, it is empowered with enforcing criminal laws[26]. The first function is well described in the Report issued by the Government of Israel in the aftermath of *Operation Cast Lead*:

> "Leading up to and during the recent operations in Gaza, the IDF Military Advocate General's Corps provided legal advice on the Law of Armed Conflict to commanders at the General Staff, Regional Command and Divisional levels. [...] Legal advisors also assisted in drafting operational orders and procedures and in preparing legal annexes to such orders. [...] All legal advisers belong to the MAG Corps and are not subordinate to the commanders they advise."[27]

The second function is carried out through the power to open criminal investigations, as described above, for military offences, as well as through the arraignment of soldiers for any offence under general criminal law[28].

To conclude this concise analysis of the Israeli Military Justice, the role of the Military Police Criminal Investigation Division (hereinafter MPCID) and the Office of the Military Advocate for Operational Affairs have to be briefly outlined. The former body is entrusted with investigating "violations of military laws and the conduct of military personnel"[29] on orders of the MAG[30]. According to the PCHR, the new policy followed by the MPCID and the MAG requires to open a criminal investigation only "in those cases in which soldiers "severely violate the open-fire regulations and cause bodily injury or loss of life""[31]. When a complaint is presented, the Military Prosecution within the MPCID generally relies on information emanating from operational debriefings and the complaint itself[32]. The recently-born Office of the Military Advocate for Operational Affairs, a specialized unit within the military prosecution, is, instead, charged with the investigation of cases of operational misconducts by IDF soldiers against Palestinian civilians. Apart from its specific competence, this body can

[26] *Genuinely Unwilling* ..., p.30, *supra*, Chapter I, footnote 63. On the dual function of the MAG, see also FINKELSTEIN Major General M., TOMER Major Y., (2002) *The Israeli Military Legal System – Overview of the Current Situation and a Glimpse into the Future*, The Air Force Law Review, Vol.52, pp.140 and *ff*.
[27] *The Operation in Gaza* ..., paras.216-217, *supra*, Chapter II, footnote 94. See also the website of the MAG Corps, at: http://www.law.idf.il/14-en/Patzar.aspx.
[28] FINKELSTEIN and TOMER, (2002) pp.142 and *ff*, *supra*, footnote 26.
[29] *Genuinely Unwilling* ..., p.48, *supra*, Chapter I, footnote 63.
[30] FINKELSTEIN and TOMER, (2002) p.140 at footnote 15, *supra*, footnote 26.
[31] *Genuinely Unwilling* ..., p.48, *supra*, Chapter I, footnote 63.
[32] P.49, *Ibidem*.

bring to criminal investigations automatically, *i.e.* in all cases, due to the fact that the misconducts investigated can never be justified by military necessity[33].

b) The Fact-Finding Mission on the Gaza Conflict Report's Assessment of the Military Justice System in Israel

The FFMGC considered the Israeli Military Justice System in order to assess whether the violations of IHL and IHRL allegedly perpetrated in the context of *Operation Cast Lead* had been thoroughly investigated and, where appropriate, prosecuted. As noted in the first chapter, a failure to investigate alleged violations of IHL and IHRL entails separate breaches of both bodies of law[34].

The Mission further recalled the universally recognized principles of independence, effectiveness, promptness and impartiality of investigations, which have already been spelled out in this work, and affirmed the need for an evaluation of the investigations carried out by the Israeli Authorities in the light of these principles[35]. As a matter of facts, there is no denial of the obligation to investigate and prosecute breaches of IHL and IHRL by the Israeli Government[36].

However, the Mission concluded "[...] that the system put in place by Israel, [...] does not comply with all those principles"[37]. In particular, the Mission questioned the effectiveness of operational debriefings, relying on the declarations of a former Deputy Military Advocate General. According to his declarations, this tool for investigations is employed with the intent of avoiding criminal investigations. The MAG's decision to open a criminal investigation is often impaired by the fact that it is not possible to reconstruct the scene of the crime, nor to find evidence as for the alleged facts, due to

[33] *The Operation in Gaza ...*, para.294, *supra*, Chapter II, footnote 94.
[34] See *supra*, Chapter I, pp. 17-18. See also paras.1804-1808 of the *FFMGC Report*. "Both international humanitarian law and international human rights law establish a clear obligation for States to investigate and, if appropriate, prosecute allegations of serious violations by military personnel whether during military operations or not. [...] International humanitarian law contains an obligation to investigate grave breaches of the Geneva Conventions. [...] There is a parallel obligation to investigate under international human rights law. [...] This obligation to investigate under human rights law applies equally to actions that take place during armed conflict. [...]".
[35] Paras.1809-1814 of the *FFMGC Report*.
[36] Para.1813 of the *FFMGC Report*. See also *The Operation in Gaza ...*, paras.283 and *ff*, *supra*, Chapter II, footnote 94. "[...] Israel is committed to fully investigating alleged violations of Israel's legal obligations (including the Law of Armed Conflict), and to taking appropriate and effective action, including penalising IDF commanders or soldiers found to have committed offences."
[37] Para.1815 of the *FFMGC Report*.

the misuse of the pre-judicial investigative mechanism, which tends to alter the environment where the prosecution has to gather information. The Mission noted that the Government of Israel did not contradict the above mentioned statements[38].

c) Investigations and Prosecutions in Israel in the Aftermath of Operation Cast Lead

The Government of Israel alleged to have examined 100 complaints, regarding incidents occurred during *Operation Cast Lead*, by July 2009, *i.e.* before the release of the *FFMGC Report*[39]. According to the Government of Israel, following the military operation in Gaza, five Colonels were appointed in order to carry out field investigations concerning:

- Claims regarding incidents where U.N. and international facilities were fired upon and damaged during the Gaza Operation;
- Incidents involving shooting at medical facilities, buildings, vehicles and crews;
- Claims regarding incidents in which civilians not directly participating in the hostilities were harmed;
- The use of weaponry containing phosphorous; and
- Destruction of private property and infrastructure by ground forces.[40]

Israel claimed that the procedures employed by the appointed panel allowed it to abide by the best practices adopted within IDF investigations, which involved the access to the relevant information and documentation, interviews with military personnel and officers, etc[41]. However, the FFMGC correctly noted that "[...] methods of criminal investigations such as visits to the crime scene, interviews with witnesses and victims, and assessment by reference to established legal standards have not been adopted"[42]. As a matter of facts, in the first report released by the Government of Israel, no reference was made to sources of information different from the IDF itself.

In addition, the Israeli Government reported that the MAG, at the time of the Report, was awaiting the findings of sixty other field investigations, originating from

[38] Paras.1816-1819 of the *FFMGC Report*.
[39] The *FFMGC Report* was in fact released on 15 September 2009.
[40] *The Operation in Gaza* ..., para.318, *supra*, Chapter II, footnote 94.
[41] See more extensively para.319, *Ibidem*.
[42] Para.1819 of the *FFMGC Report*.

complaints brought about by international and local NGOs[43]. The FFMGC opposed the same argument to rebut the adequacy of such actions undertaken by the IDF. In addition, it recalled the structural deficiencies of operational debriefings[44].

Furthermore, the Government of Israel claimed that thirteen IDF Military Police investigations, thus criminal investigations, were ongoing at the time of the Report's release. The Report refers to only one case to have resulted in the indictment of a soldier for theft[45]. In addition, it is submitted that Military Police investigations into some

[43] See *The Operation in Gaza* ..., para.321, *supra*, Chapter II, footnote 132. For the sake of completeness I hereafter report the list of individual complaints allegedly under investigation at the time of the release of the Report: "Allegations regarding an air strike on a bus station near an UNRWA college which killed 12 civilians (Gaza, 27 December). Allegations regarding a missile attack against residential premises that killed 3 civilians and wounded 4 civilians, all members of the Al-Abasi family (Rafah refugee camp, 29 December). Allegations regarding an air strike that killed three children, members of the Al-Astal family (Al-Karara village, 2 January). Allegations regarding an air strike that damaged the Al-Raya medical centre (Gaza, 4 January). Allegations regarding the firing of shells and shootings that killed and wounded members of the Samouni family (Zeitun, 4 January). Allegations regarding artillery strike, including shells containing white phosphorous, and additional shootings, that killed and injured members of the Al-Halima family (Safiya area, 4 January). Allegations regarding the firing of tank shells on civilians carrying white flags that killed two civilians (Johar A-Dic, 4 January). Allegations regarding the firing of Flechette rounds on an ambulance that killed one medical personnel and wounded another (Beit Lahia, 4 January). Allegations regarding the shooting of women carrying white flags, killing one of them (4 January). Allegations regarding an air strike that killed five members of the Abu-Ayisha family (A-Nasser neighbourhood, Gaza, 5 January). Allegations regarding the firing of Flechette rounds that killed two civilians (Izbat Beit Hanoun, 5 January). Allegations regarding the shooting of civilians carrying white flags, that killed one civilian (Beit Lahia, 5 January). Allegations regarding the firing of Flechette rounds that killed three civilians (Mugharka/Nezarim, 7 January). Allegations regarding the shooting of civilians carrying white flags that killed two civilians (Jabaliya, Abed Rabu neighbourhood, 7 January). Allegations regarding an artillery strike that damaged the European hospital (Khan Younis, 10 January). Allegations regarding the shooting of civilians carrying white flags that killed four civilians (Khuzaa', 13 January). Allegations regarding an air strike that killed 2 civilians members of the Al-Kurdi family (Gaza, 14 January). Allegations regarding an artillery strike, including by munitions containing white phosphorous, and tank shelling that damaged al-Quds hospital (Tel al-Hawa, 15 January). Allegations regarding an artillery strike, including by munitions containing white phosphorous, which killed 4 members of the Al-Khadad family. Allegations regarding a missile that struck the residence of the Batran family and killed 6 civilians (Al Bureij, 16 January). Allegations regarding an air strike on the residence of the Banar family that killed 10 civilians (Sajaiya, 16 January)."

[44] Para.1819 of the *FFMGC Report*. See also, *supra*, pp. 132-133.

[45] *The Operation in Gaza* ..., para.323, *supra*, Chapter II, footnote 94. Hereafter the list of complaints under criminal investigation, as of 1 July 2009: "Allegations regarding pillage (Zeitun, 3 January). Allegations regarding violence and maltreatment of a Palestinian detainee (Beit Lahia, 3 January). Allegations regarding the use of civilians as human shields (Jabaliya, 4 January). Allegations regarding violence and pillage (Al-Atatra, 5 January). Allegations regarding the use of a civilian as a human shield (Beit Lahia, 5 January). Allegations regarding the use of civilians as human shields (Azbet Abed Rabu, 5 January). Allegations regarding the use of minors as human shields (Al-Atatra, 5 January). Allegations regarding violence and ill-treatment of Palestinian detainees (Al-Atatra, 5 January) (2 separate investigations). Allegations regarding damage to property and pillage (Al-Atatra, 5 January). Allegations regarding violence and maltreatment of a civilian (Zeitun, 8 January). Allegations regarding the use of a child as a human shield (Tel al-Hawa, 15 January). Allegations regarding maltreatment and use as human shields of detainees (Jabaliya, date unknown). Allegations regarding the use of civilians as human shields (Asmouni, date unknown)." See also footnote 258 of the Report.

allegations of serious misconducts, levelled by IDF soldiers, were immediately dispatched by the MAG, without prior field investigations, due to their *prima facie* gravity. However, these investigations did not result in any indictment since, according to the Government of Israel, they revealed that the allegations were not founded[46]. The FFMGC criticized the investigations on the ground of promptness, alleging that "[...] a delay of six months to start these criminal investigations constitutes undue delay in the face of the serious allegations that have been made by many people and organizations"[47].

To sum up, the Mission concluded that:

> "On the basis of the information before it and the above considerations the Mission finds that the failure of Israel to open prompt, independent and impartial criminal investigations even after six months have elapsed constitute a violation of its obligation to genuinely investigate allegations of war crimes and other crimes, and other serious violations of international law."[48]

d) Corroboration of the Information regarding Investigations and Prosecutions

Since the conclusion of *Operation Cast Lead*, several international and local NGOs began dealing with individuals' allegations of serious misconducts by IDF soldiers. Complaints were filed to the competent IDF authorities on behalf of the victims in order to trigger procedures for accountability.

The PCHR issued a position paper, criticizing the Israeli Military Justice system on the same grounds as the FFMGC[49]. First, the MAG was criticized for its lack of independence, both from the structural and decision-making viewpoints. As a matter of facts, it was submitted that, due to the rules for its appointment that place such power in the hands of the Chief of Staff, the MAG was likely to be influenced by the military hierarchy[50]. The argument was sharpened by the dual role that the MAG was called to

[46] Paras.324-328, *Ibidem*.
[47] Para.1820 of the *FFMGC Report*.
[48] Para.1823 of the *FFMGC Report*.
[49] *Genuinely Unwilling ..., supra*, Chapter I, footnote 63.
[50] P.30, *Ibidem*. Quoting B'Tselem, an Israeli NGO (website available at: http://www.btselem.org/), the PCHR underlined that "no system can investigate itself". In addition, it is submitted, again quoting B'Tselem, that "it [the MAG] depends on the military system for budgets, personnel complements, and promotions".

perform within the IDF, that of legal advisor and responsible for law enforcement[51]. As underlined also by the *FFMGC Report*[52], the MAG and the MAG corps were involved in drafting the guidelines to be followed by the IDF in the conduct of military operations in Gaza. In addition, the fact that the MAG was involved almost in every stage of the investigations and retained the power to decide for the prosecution of alleged perpetrators of misconducts during military operations[53], together with the upholding of a policy of "not opening criminal investigations into the killings and injury of Palestinian civilians" unless for "intentional" acts[54], illustrated the unwillingness or at least the inability to pursue the accountability for egregious violations of IHL and IHRL. The same conclusions were reached in a Briefing Paper, issued by Adalah[55], which stressed the incompatibilities of the two roles performed by the MAG, quoting Israeli officials' statements[56].

Furthermore, the Israeli Government's unwillingness to genuinely investigate the IDF soldiers' conduct during *Operation Cast Lead* could also be deduced from the nature of MPCID investigations, which only rarely were triggered by the MAG, due to the then-new policy enhanced within the Israeli Military Justice System to open an investigation only when "severe violations" were alleged[57]. This threshold for opening an investigation was, however, very vague, as B'Tselem pointed out[58].

Adalah maintained that, despite the alleged decision by the Israeli Government to appoint a committee of examination, and the conduct of operational debriefings into individual episodes of alleged misconducts, "[n]on-prosecutorial mechanisms [...] are not considered "genuine" investigations as they do not involve criminal proceedings". The non-genuineness can be inferred, according to the Paper, from three alleged factors:

[51] The Position Paper recalls a letter jointly submitted by ACRI, B'Tselem, GISHA, PCATI, Binkom, Hamoked, Yesh Din, and Physicians for Human Rights. See p.31 at footnote 119, *Ibidem*.
[52] See *supra*, p.132.
[53] See the graph at p.33, *Genuinely Unwilling ...*, *supra*, Chapter I, footnote 63.
[54] P.28, *Ibidem*. This policy was first enhanced by the Attorney General, in flagrant disrespect for the general principles of criminal law which allow for the attribution of individual criminal liability for intentional, reckless and negligent acts, as noted by the PCHR.
[55] Adalah, The Legal Centre for Arab Minority Rights in Israel, is an Israeli NGO based in Haifa. English website available at: http://www.adalah.org/eng/.
[56] *Israeli Military Probes and Investigations Fail to Meet International Standards or Ensure Accountability for Victims of the War on Gaza*, (January 2010) Adalah Briefing Paper, p.2.
[57] *Genuinely Unwilling ...*, p.48, *supra*, Chapter I, footnote 63. The same view is held by B'Tselem, whose statements are quoted in the PCHR Position Paper.
[58] *Ibidem*.

"(i) prosecuting only lower ranking soldiers; (ii) imposing lower sentences for crimes than typically ordered; and (iii) presuming the legality of regulations and planning of military operations"[59].

In conclusion, it is to be noted that both Adalah and B'Tselem provided a list of individual complaints submitted to the Israeli Authorities jointly with Al-Mezan and Al-Haq[60]. Most of them were issued in the immediate aftermath of *Operation Cast Lead* or by the end of 2009[61].

1.1.2 Further Developments in the Investigations carried out by the Israeli Authorities

In January 2010, the State of Israel released a second report of its internal investigations, which was subsequently submitted to the Office of the High Commissioner of Human Rights.

The Report was intended as a supplement and an update of the first Report issued before the release of the *FFMGC Report*. According to the update, the number of investigations undertaken by the Israeli Authorities had reached 150 by January 2010[62]. As for the special command investigations undertaken by the panel of five colonels appointed by the Government of Israel[63], it was submitted that only two of the thirty commenced investigations had resulted in disciplinary proceedings against the soldiers who carried out them. The majority of the claims were dismissed on the ground of lack of sufficient elements to initiate criminal investigations. As for the alleged unlawful use of white phosphorus and the policy of extensive destruction of civilian properties, the investigations ended up with the dismissal of each of these allegations, claiming that the IDF abided by the rules of engagements, which are, according to the Report, fully

[59] *Israeli Military Probes* ..., p.5, *supra*, footnote 56.
[60] Two local NGOs providing Palestinians with advocacy service. See the websites at: http://www.mezan.org/en/ and http://www.alhaq.org/.
[61] See *Israeli Military Probes* ..., Appendix I, *supra*, footnote 56. See also *List of B'Tselem's demands for investigation of harm to unarmed civilians in Operation Cast Lead*, (January 31, 2012) published on B'Tselem website (http://www.btselem.org). Also the PCHR brought before Israeli Courts numerous cases. For further details regarding the cases advocated by the PCHR, see *infra*.
[62] See para.91 of *Gaza Operation Investigations: An Update* (January 2010), The State of Israel (hereinafter *First Update)*.
[63] See *supra*, p.134.

consistent with IHL[64]. The Report also referred to the commencement of three additional special command investigations into three incidents alleged by the FFMGC in the *FFMGC Report*[65]. In addition, 90 claims regarding various incidents involving several civilians' death or injury and destruction of civilian properties were referred to as being under investigation. According to the Government of Israel, while half of these claims were still ongoing at the time of the release of the Report, the other half had resulted in the MAG's referral for criminal investigation in seven cases. The remaining investigations did not uncover sufficient evidence to suspect that criminal offences had been committed[66]. As for criminal investigations, it was submitted that 36 cases had been referred for criminal enquiries. One year after the end of *Operation Cast Lead*, only in one case the investigations resulted in the prosecution and conviction of a soldier for the theft of a credit card[67]. Overall, the Israeli Authorities carried out more than 150 investigations. However, only 36 resulted in criminal enquiries and only one led to conviction, for an offence of minor gravity, compared to the allegations of extensive destruction of civilian properties and of civilian deaths and injuring.

A *Second Update* of the first Report, issued by the Government of Israel, was released in July 2010[68]. The content can be divided into three parts: firstly, the Report updated the data on investigations and prosecutions undertaken by the Israeli Authorities; secondly, it presented two new procedures adopted for implementing certain recommendations issued by the MAG as a result of the investigations into certain incidents occurred during *Operation Cast Lead*; thirdly, it reported the establishment of the *Turkel Commission* for the purpose of revising the military justice system in Israel. As for the first part, the Report accounted of 47 criminal investigations (34 directly referred for criminal investigations with no prior operational debriefing)[69]. However, it was submitted that, by the date of the Report release, only three of these

[64] See paras.96-123 of the *First Update*.
[65] Paras.124-127. The incidents involved the shelling of Al-Samouni residence, the IDF mistreatment of Palestinian detainees, the attack on the al-Maquadma Mosque. The investigations were ongoing at the time of the Report release.
[66] Paras.128-130 of the *First Update*.
[67] Paras.131-137 of the *First Update*. See also *IDF Military Prosecutor v. Sergeant A.K.*, S/153/09 (11 August 2009). See also *Genuinely Unwilling ...*, pp.61-62, *supra*, Chapter I, footnote 63.
[68] See *Gaza Operation Investigations: Second Update* (July 2010), The State of Israel (hereinafter the *Second Update*).
[69] See para.24 of the *Second Update*.

investigations had resulted in indictments against IDF soldiers[70]. The majority of the enquiries conducted resulted in the dismissal of the case for lack of elements confirming the criminal intent, lawfulness of the attacks, lack of elements substantiating the criminality of the offence. Few cases ended up with disciplinary proceedings. The second part was concerned with outlining two new procedures designed for the purpose of taking into consideration more effectively the civilians' needs during military operations:

i) Written procedures regarding the protection of civilian in urban warfare. These procedures mandate for advanced research and identification of civilian infrastructure in future combat locations. They also provide for means to effectively protect civilians and the establishment and assignment of a Humanitarian Affairs Officers to each combat unit, in order to provide soldiers with specific training aimed at reducing the risk of collateral damages and enhancing the principle of distinction[71];
ii) New order regulating the destruction of private property for military purposes. A new standing order aimed at spelling out when and under what circumstances civilian infrastructure may be demolished for imperative military necessities[72].

Finally, the Report addressed the establishment of the *Turkel Commission*[73]. This committee of enquiry, set up in the aftermath of the Flotilla maritime attack of 31 May 2010, was mandated with examining the Israeli investigative system in the light of the obligations arising from International Law[74].

[70] Two indictments were issued following the MAG's referral to criminal investigations into a case involving the use of a Palestinian boy as human shield by two IDF soldiers (paras.39-42 of the *Second Update*); the third indictment was issued against an IDF soldier charged with manslaughter, for having shot and killed a civilian in the village of Juhr ad-Dik, "in deviation from orders" (paras.99-102 of the *Second Update*).
[71] Paras.150-153 of the *Second Update*.
[72] Paras.154-156 of the *Second Update*.
[73] Website available at: http://www.turkel-committee.com/index-eng.html.
[74] See paras.158 and *ff* of the *Second Update*; see also WEILL, (2012) p.108 at footnote 9 and pp.110-111, in MELONI and TOGNONI (eds.), *supra*, footnote 9.

1.1.3 The Palestinian Investigations into Violations of IHL and IHRL occurred in the Context of *Operation Cast Lead*

On 25 January 2010, the President of the Palestinian National Authority (hereinafter PNA), Mr. Mahmoud Abbas, appointed a commission of enquiry mandated with following-up the implementation of the *FFMGC Report*'s recommendations[75]. The Commission approved its own statute, in accordance with the internationally recognized standards for enquiries into IHL and IHRL issues[76].

The mandate of the Commission was clearly established in the Statute:

> "The Commission shall perform its mandate to investigate the Palestinian contraventions and violations referred to in the report of the Fact-Finding Mission that was established by the Human Rights Council and headed by Justice Richard Goldstone."[77]

The framework for carrying out the mandate attributed to the Commission was spelled out in art.7, which referred to:

> "[...] provisions of international human rights law, international humanitarian law, the firmly established and definitive principles of international law, the obligations of Palestine arising from its membership of the United Nations, the unilateral obligations of Palestine to respect and apply the four Geneva Conventions of 1949 and the body of domestic legislation in force in the Occupied Palestinian Territory."[78]

As spelled out by art.6 of the Statute, the Mission was allowed to make use of the most common powers of internal investigative committees, such as interviewing victims and witnesses, as well as officials, requesting the exhibit of documents, visiting

[75] *Decree of the President of the Palestinian National Authority establishing the Commission*, Decree n.() 2010, 25 January 2010, Annex 2 to the *Report of the Palestinian Independent Investigation Commission established pursuant to the FFMGC Report: violations allegedly committed by Palestinians* (hereinafter the *PNA Report*). See also the website of the Commission, available at: http://www.picigr.ps/ (Arabic).
[76] See the Preamble of the *Statute of the Palestinian Independent Investigation Commission established pursuant to the FFMGC Report*, Annex 3 to the *PNA Report*.
[77] Art.3(2) of the *Statute of the Palestinian Independent Commission*.
[78] Art.7, *Ibidem*.

detention centres and Governmental buildings, taking possession of any item or document that may be relevant to the investigations, etc[79].

The Statute also provided rules for ensuring the independence, impartiality and integrity of the members of the Commissions[80]. Extensive rules for carrying out the investigations were detailed in Part III of the Statute. In particular, hearings and interviews were regulated in conformity with the internationally recognized principles for international enquiries. For instance, meetings where witnesses or victims were to be examined should have been held in close sessions[81]. Curiously, the preliminary assessment on witnesses and interviewees had to determine whether they were "*acceptable* and reliable"[82] [emphasis added]. The meaning of the term "acceptable" is not clear, as it does not seem to refer to the credibility of the witness, usually employed to determine preliminarily the extent to which it is possible to exclude that the witness is not lying[83]. Other provisions of the Statute aimed at providing for the video and sound recording of the hearings[84]. Furthermore, the Commission was committed to maintain the full confidentiality of its investigations[85]. Part IV of the Statute was concerned with the protection of witnesses and informants.

Finally, the Statute provided detailed rules for regulating the drafting of the final report; empowered the members of the Commission to make recommendations, including providing practical solutions for implementing the findings of the report; and allowed for the disclosure of evidence only after the release of the final document[86].

The Mission dealt mainly with cases of internal violence, between Palestinian factions, namely *Hamas* and *Fatah*. The allegations included in particular:

i) Cases of unlawful detention and tortures;
ii) Violations of the right to assume public offices;

[79] For further details, see art.6, *Ibidem*. As shown by the Statute, it is noticeable that the Commission, being an internal one as opposed to international enquiries, retains powers typical of judicial authorities such as the power to seize items and documents for evidentiary purposes.
[80] See artt.9, 10, 11, 12, 13, *Ibidem*.
[81] Art.20(1), *Ibidem*.
[82] Art.22(3), *Ibidem*.
[83] See *supra*, Chapter I, pp.52-54.
[84] Art.30 of the *Statute of the Palestinian Independent Commission*.
[85] Artt.33-34, *Ibidem*.
[86] See Part V, *Ibidem*.

iii) Violations of the freedom of press;

iv) Violations of the freedom of association;

v) Violations of the right to life.[87]

The Report understandably gives account only of the most serious violation of IHRL occurred in the West Bank, since, as pointed out therein, an extensive enquiry into the allegations regarding the Gaza Strip would have required the full cooperation of both the Israeli Authorities and the *de facto* Government in the Strip. Yet, the efforts undertaken to set up an independent body for investigating the serious allegations contained in the *FFMGC Report* and the thoroughness of the methodology adopted, as testified by the detailed rules of procedure and the findings, which do not appear to shield the local authorities from their responsibilities, are without doubt remarkable. However, the Mission addressed the allegations from a factual and legal perspective, leaving the task of implementing the recommendations formulated in the Conclusions of the Report to the competent authorities in the West Bank and the Gaza Strip. No reference is made to the prosecution of individuals allegedly involved in the violations reported. On the contrary, the Gaza Authorities did not seriously address the alleged violations of IHRL and IHL committed within or from within the Gaza Strip[88]. The few accounts that the FFMGC was able to collect emanate from media sources[89]. In addition, the internal fact-finding committees allegedly launched by the Gaza Authorities in the aftermath of *Operation Cast Lead* failed to make public their findings, which was denounced by different NGOs such as Al-Mezan and the PCHR[90]. The Palestinian Independent Commission also stressed that it was unable to thoroughly

[87] For further details on each allegation, see extensively the full *PNA Report*.

[88] Here the reference is both to internal violence and to the conduct of hostilities by militant groups during *Operation Cast Lead*. For an insightful analysis of the acts carried out by Palestinian armed groups during the military operations, see PERTILE, (2009) *supra*, Chapter II, footnote 103. The allegations of breaches of IHL regard, in particular, the use of human shields, the use of booby-traps, suicide bomber attacks within the boundaries of perfidy and directed to civilian targets, the indiscriminate launch of rockets on cities in South Israel, which could amount to indiscriminate attacks or a direct violation of the principle of distinction substantiating the war crime of intentionally directing attacks against the civilian population, the holding of a prisoner of war, corporal Gilad Shalit, in contravention of this *status* as defined in the Geneva Law.

[89] See the newspaper articles cited in the *FFMGC Report*, at footnotes 1172-1176.

[90] See PCHR Press Release, (25 March 2009), *PCHR Demands Investigation into Death of a Civilian Tortured by Members of the Intelligence Services in Gaza*, available at: http://www.pchrgaza.org/portal/en/index.php?option=com_content&view=article&id=1079:pchr-demands-investigation-into-death-of-a-civilian-tortured-by-members-of-the-intelligence-services-in-gaza&catid=36:pchrpressreleases&Itemid=194. See also the *FFMGC Report*, footnote 1171.

verify the allegations of indiscriminate rocket attacks, due to the lack of cooperation of the Israeli Authorities.

To sum up, as it can be noted, while the Israeli Authorities have been criticized by the FFMGC on the grounds of their reticence in dealing with a great number of allegations concerning serious violations of International Law, and the structural deficiencies of their military justice system, the Palestinian Authorities, as far as the Gaza Strip is concerned, provided "[...] no evidence of any system of public monitoring or accountability for serious IHL and IHRL violations"[91]. Conversely, the PNA Committee appeared to have been sincerely committed to the cause for accountability, providing a Report which addressed independently the allegations of violations and succeeded in uncovering the facts of certain episodes that deserved the intervention of judicial authorities. Nevertheless, as noted later by the UN Committee of Independent Experts, the recommendations of the PNA Committee were not effectively addressed by the competent authorities in the West Bank[92].

1.1.4 The Endorsement of the *Fact-Finding Mission on the Gaza Conflict Report*

The call for accountability was reiterated in different international *fora*. It is not the purpose of this work to extensively deal with such endorsement. Hence, a list of the most important bodies or institutions that have officially backed the *FFMGC Report* will be broadly outlined [93].

On 16 October 2009, the UNHRC held a special session endorsing the Report with Resolution S-12/1[94]. The Council recalled the need for accountability on both parties and recommended the UN General Assembly to consider the Report during its next session. In addition, it called upon the Secretary-General to report to the Council itself on the status of implementation of the *FFMGC Report*'s recommendations. It further

[91] Para.1838 of the *FFMGC Report*.
[92] See *infra*, pp.151-152.
[93] For an accurate history of the events see MELONI and TOGNONI, (eds.) (2012) pp.5-8, *supra*, Chapter I, footnote 4.
[94] See UN Doc. A/HRC/RES/S-12/1.

requested the High Commissioner for Human Rights to submit a report on the status of implementation of the resolution itself[95].

Subsequently, on 5 November 2009 the UN General Assembly endorsed the *FFMGC Report*, requesting the Secretary-General to transmit the Fact-Finding Mission's Report to the Security Council. In addition, it called both parties, Israel and the Palestinian Authorities, to undertake within a period of three months:

> "[…] investigations that are independent, credible and in conformity with international standards into the serious violations of international humanitarian and international human rights law reported by the Fact-Finding Mission, towards ensuring accountability and justice"[96]

Also the European Union took active part in the dissemination of the *FFMGC Report*'s findings through the endorsement in a resolution, on 4 March 2010, of the Report itself[97]. The European Parliament urged both parties to implement the recommendations on accountability and alleged violations of International Law, including war crimes. Furthermore, it called upon the EU Member States to closely monitor, through the EU's external agencies and the NGOs working on the field, the investigations.

1.1.5 The Establishment of the UN Committee of Independent Experts

In pursuing the aim of accountability, a fundamental role was played by the UN Committee of Independent Experts, established by the UNHRC as the monitoring body on the internal investigations and prosecutions conducted by the Israeli and Palestinian authorities, in compliance with the recommendations of the *FFMGC Report* and the GA resolutions calling for justice.

[95] See also, UN Press Release, (16 October 2012) *Council concludes special session after adopting a resolution calling for the implementation of the recommendations in the FFMGC Report* http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNew s.aspx?NewsID=9530&LangID=E.
[96] See UN Doc. A/RES/64/10.
[97] See European Union, *European Parliament resolution on implementation of the Goldstone recommendations on Israel/Palestine*, 10 March 2010, P7_TA(2010)0054, available at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2010-0054+0+DOC+XML+V0//EN.

The Committee was established with Resolution 13/9 of the UNHRC on 25 March 2010[98]. The mandate provided by the Council required it:

> "[...] 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."[99]

a) The Interpretation of the Mandate and the Methodology adopted

The Committee read its mandate as requiring it to take any proceeding into account, both of civil and military nature, carried out starting from the immediate aftermath of *Operation Cast Lead*, thus not limiting to judicial investigations *strictu sensu*, but including "[...] investigations, disciplinary proceedings and prosecutions [...]"[100]. In addition, the Committee did not limit itself to the episodes referred in the *FFMGC Report*[101].

As for the methodology and the terms of reference by which the Committee abided, it is spelled out in the Report that it relied on the various reports issued by the local authorities, both Israeli and Palestinian, and the *FFMGC Report*. Furthermore, the Committee held interviews with military justice experts, members of the civil society and NGOs both in Geneva and Brussels; it also carried out a field visit in the Gaza Strip, with the purpose of meeting with victims and witnesses. In addition, several formal requests to cooperate were submitted to the Israeli and Palestinian delegations, obtaining fruitful responses only from the Palestinian side[102].

The *Committee of Independent Experts Report* also spells out in details its terms of reference, by setting the standard for investigations to the internationally recognized

[98] See UN Doc. A/HRC/RES/13/9.
[99] Para.9, *Ibidem*.
[100] See para.6 of the *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* (hereinafter the *Committee of Independent Experts Report*).
[101] *Ibidem*. See also MURRAY D., (2012) *Investigating the Investigations: A Comment on the UN Committee of Experts Monitoring of the 'Goldstone Process'*, in MELONI and TOGNONI (eds.), p.147, *supra*, Chapter I, footnote 4.
[102] Paras.8-16 of the *Committee of Independent Experts Report*.

model of independent, impartial, thorough, prompt and effective investigations and prosecutions, which have been analysed earlier in this work. The applicable legal framework is that of IHRL and IHL, as well as soft law, mainly declarations issued by the UN bodies[103].

b) The Committee's Findings

The Committee divided its analysis into two parts, the first addressing the Israeli investigations, the second dealing with the Palestinian side.

As for the Israeli investigations, the Committee found out that, despite the limited positive developments referred to by the Government of Israel in its second update to investigations[104], there were several aspects that undermined the genuineness of those carried out up to the release of the Report. In particular, the lack of cooperation by the Israeli Authorities prevented the Committee from ascertaining the information it gathered from the various reports it considered. The only alternative sources of information were represented by NGOs and witnesses' accounts[105]. In some cases, this resulted in the Committee's inability to verify whether the Israeli Authorities had complied with the duty to investigate, stemming from IHL and IHRL. In other cases, instead, it could not ascertain whether the recognized standards for enquiries into egregious violations of IHL and IHRL had been matched by the enquiries launched. In a third category of cases, the Committee found itself in front of apparent contradictions between the account provided by the Israeli Authorities and those documented by the *FFMGC Report*, or stemming from other sources[106]. The lack of cooperation by the

[103] See paras.17-34 of the *Committee of Independent Experts Report*. The *soft law* it makes reference to is mainly represented by: *Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions* (ECOSOC Resolution 1989/65); *Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (GA Resolution 55/89); *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* (GA Resolution 60/147).

[104] See *supra*, pp.139-141.

[105] Para.44 of the *Committee of Independent Experts Report*.

[106] Paras.44-49 of the *Committee of Independent Experts Report*. As for those cases where conflicting accounts were to be dealt with, the Committee reports, for instance, the Abd al-Dayem incident, described in details in the *FFMGC Report*, where the Mission alleged that Israeli forces had launched a deliberate attack on civilians. The command and criminal investigations carried out by the Israeli Authorities, differently, suggested that the incident took place in the context of armed clashes between IDF soldiers and Palestinian combatants launching Grad rockets. Accordingly, the Israeli soldiers did not detect the presence of any civilian in the area. Clearly, the Committee could not verify the reasons for such

Israeli Authorities also undermined the Committee's capability to ascertain allegations of technical flaws in the conduct of investigations, as stemming from the *FFMGC Report*[107]. However, the Committee reiterated the criticism regarding the dual role of the MAG and the lack of promptness in commencing the investigations[108]. The Report also mentioned the hurdles Palestinian generally encounter in seeking justice in front of the Israeli Authorities. In particular, the Committee focused on the civil claims submitted to the Israeli Ministry of Defence by some NGOs of behalf of Palestinian claimants[109], which only rarely received adequate considerations by the competent authorities. Finally, and probably most importantly for the purposes of the present paper, the Committee underlined that investigations did not involve the highest level of command, which allegedly planned and ordered *Operation Cast Lead*. As noted in the Report and by MURRAY[110], the responsibility for the conduct of hostilities goes beyond the culpability of the individual combatant. It "lies in the first place with those who designed, planned, ordered and oversaw the operations"[111]. Indeed, the *FFMGC Report* names at least three high-level officials, whose declarations confirms the deliberate policy of causing disproportionate destruction and violence against the civilian population of the Gaza Strip. Then-Minister of Foreign Affairs, Tzipi Livni, is quoted by the *FFMGC Report*, for having said that Israel would respond harshly to any threat to its citizens[112]. Also then-Deputy Chief of Staff, Major-General Dan Harel's statements were included in the Report as an element confirming the intentional targeting of civilian infrastructure[113]. Then-Deputy Prime Minister Eli Yishai's statements also enhanced this thesis[114].

discrepancy, due to the lack of cooperation by Israeli Authorities. In particular, the Report reads as follows: "Owing to the lack of cooperation from Israel, it is unable to confirm that extensive efforts were taken by investigators to reconcile these conflicting accounts" (see para.48).

[107] Para.50 of the *Committee of Independent Experts Report*.

[108] See paras.51-56 of the *Committee of Independent Experts Report*.

[109] Para.58 of the *Committee of Independent Experts Report*. The Committee referred in particular to the claims issued by the PCHR. There is an apparent disproportion between the claims submitted and those that have found an acknowledgement by the Israeli Authorities.

[110] Para.64 of the *Committee of Independent Experts Report*; see also MURRAY, (2012) p.156, in MELONI and TOGNONI (eds.), *supra*, footnote 101.

[111] Para.1895 of the *FFMGC Report*.

[112] See para.1206 of the *FFMGC Report*. "We have proven to Hamas that we have changed the equation. Israel is not a country upon which you fire missiles and it does not respond. It is a country that when you fire on its citizens it responds by going wild – and this is a good thing."

[113] Para.1212 of the *FFMGC Report*. "This operation is different from previous ones. We have set a high goal which we are aiming for. We are hitting not only terrorists and launchers, but also the whole Hamas

As for the Palestinian side, the Committee underlined the professionalism and thoroughness of the investigations undertaken by the Palestinian Independent Investigation Commission, on the grounds of three considerations. In the first place, the Committee praised the independence of the Commission, which did not only stem from the rules of procedures set forth in the Statute, but emerged also from the fact that the members appointed were not in any way linked with the PNA structure[115]. The Report also stressed that another marker of independence was represented by the investigative powers to which the Commission was entitled, which, as underlined above[116], allowed it to undertake certain activities without the assistance of governmental authorities, which reduced the risk of evidence tampering[117]. The Committee also focused on the Palestinian Commission's ability to hold interviews with victims, witnesses and governmental authorities, including high-level officials accused of violations, as well as on the steps undertaken to protect witnesses[118]. The Committee also accepted that the submission of the *PNA Report* was reasonably timely, despite its doubts on the promptness of the investigations undertaken, commenced only after the GA Resolution 64/10[119] endorsing the *FFMGC Report*, and not in following-up to the same Report's recommendations[120]. Nonetheless, the Committee pointed out that in the process for

government and all its wings. […] We are hitting government buildings, production factories, security wings and more. We are demanding governmental responsibility from Hamas and are not making distinctions between the various wings. After this operation there will not be one Hamas building left standing in Gaza, and we plan to change the rules of the game".

[114] See paras.1204-1205 of the *FFMGC Report*. "On 6 January 2009, during the military operations in Gaza, Deputy Prime Minister Eli Yishai stated: "It [should be] possible to destroy Gaza, so they will understand not to mess with us". He added that "it is a great opportunity to demolish thousands of houses of all the terrorists, so they will think twice before they launch rockets". "I hope the operation will come to an end with great achievements and with the complete destruction of terrorism and Hamas. In my opinion, they should be razed to the ground, so thousands of houses, tunnels and industries will be demolished". He added that "residents of the South are strengthening us, so the operation will continue until a total destruction of Hamas [is achieved]". On 2 February 2009, after the end of the military operations, Eli Yishai went on: "Even if the rockets fall in an open air or to the sea, we should hit their infrastructure, and destroy 100 homes for every rocket fired."

[115] See para.71 of the *Committee of Independent Experts Report*. The appointed members of the Commission were: "Issa Abu Sharar, Chair and former Head of the Supreme Court and former President of the Supreme Judicial Council; Judge Zuhair al-Surani, former Head of the Supreme Court and former President of the Supreme Judicial Council; Ghassan Farmand, Professor of Law at Birzeit University; Yasser al-Amuri, Professor of International Law at Birzeit University" (see the *Committee of Independent Experts Report*, footnote 100).

[116] See *supra*, footnote 79.

[117] Para.71 of the *Committee of Independent Experts Report*.

[118] Para.21 of the *Committee of Independent Experts Report*.

[119] See *supra*, p.141.

[120] Para.74 of the *Committee of Independent Experts Report*.

accountability, "[...] investigations are only the first step [...]"[121] to hold the perpetrators of egregious violations of International Law responsible. The Report recalled the provisions regarding the right to an effective remedy and the duty to prosecute, noting that, at the time of its release, no information regarding prosecutions undertaken in pursuant of the *PNA Report*'s recommendations had been provided, despite the official reassurances issued by the PNA[122]. Differently, the Committee criticized the steps undertaken by the Gaza Authorities as for the allegations presented in the *FFMGC Report*:

> "100. The report of the first Committee, made up of officials of the de facto Gaza authorities, makes no serious effort to address the allegations detailed in the FFM report against the de facto authorities in Gaza; it focuses primarily on the allegations directed against Israel.
>
> 101. The second report, prepared by three national and three international legal experts, provides some information about the actual measures taken to redress the violations that were alleged, but fails to substantiate assertions that all political prisoners have been released and criminal prosecutions have taken place in response to the FFM report. On the basis of the information before it, the Committee cannot conclude that credible and genuine investigations have been carried out by the de facto authorities in the Gaza Strip."[123]

Two reports were submitted to the Committee by the *de facto* Authorities in Gaza. The first one failed to consider the allegations of IHL and IHRL violations against Hamas and other Palestinian armed factions. As a matter of facts, the Gaza Authorities-appointed commissioners rather focused on allegations made by the FFMGC against Israel, thus avoiding to engage in a genuine process for accountability involving the Gaza *de facto* governmental authorities[124]. Differently, the second Independent Legal

[121] Para.75 of the *Committee of Independent Experts Report*.
[122] *Ibidem*. See also para.98 of the *Committee of Independent Experts Report*. "The Commission has laid the groundwork for the commencement of proceedings against the perpetrators and other measures suited to provide redress to the victims. Its Chair has received written assurances from the Prime Minister concerning the implementation of all its recommendations, but the Committee is unaware of any criminal proceedings that may have been initiated since the Commission filed its report."
[123] Paras.100-101 of the *Committee of Independent Experts Report*.
[124] Paras.77-79 of the *Committee of Independent Experts Report*. According to the Committee "The report is not an investigative report, but simply a description of what, in the view of the *de facto* Gaza authorities, the situation currently is in the Gaza Strip. It primarily reiterated the allegations of the FFM report against Israel."

Committee, whose composition was mixed, with three national experts based in Gaza and three international lawyers from Egypt and Saudi Arabia, addressed the allegations perhaps more seriously than the first one, but, according to the Committee of Independent Experts failed, to impartially assess the issues at stake[125]. It is submitted that it also failed to provide evidence as for the national criminal proceedings regarding violations of IHL and IHRL allegedly perpetrated by Hamas or other armed factions' affiliates[126]. Furthermore, some arguments used in the second Committee's report appear to confirm rather than disprove serious allegations regarding the violation of the principle of distinction by means of the launch of rockets[127]. Finally, the Committee noted the lack of promptness in the investigations undertaken by the second investigative Committee, although it reckoned the hurdles that it might had encountered, due to the context of extensive destruction in the aftermath of *Operation Cast Lead*[128].

c) The Second Committee of Independent Experts Report

On 29 September 2010, the UNHRC decided "[...] to renew and resume the mandate of the Committee of independent experts, established pursuant to Council resolution 13/9 […]"[129] with Resolution 15/6. The final Report was submitted on 18 March 2011 to the HRC, which subsequently endorsed it[130]. The aim of the Report was of updating the available information regarding the accountability process triggered by the Israeli and Palestinian Authorities, and assess whether the investigations and prosecutions undertaken were in conformity with the internationally recognized standards[131].The Committee resumed the methodology and terms of reference spelled out in the first Report[132].

As for the Israeli side, the Committee noted that, up to the release of the Report, 400 command investigations had been conducted, of which 52 were referred by the MAG for criminal investigations. Three had been submitted for prosecutions and only one of

[125] Para.86 of the *Committee of Independent Experts Report*.
[126] Paras.83-85 of the *Committee of Independent Experts Report*.
[127] Para.87 of the *Committee of Independent Experts Report*.
[128] Para.88 of the *Committee of Independent Experts Report*.
[129] UN Doc. A/HRC/RES/15/6.
[130] See UNHRC Resolution 16/32, 25 March 2011 (UN Doc. A/HRC/RES/16/32).
[131] See paras.6-8 (Mandate) of the *Second Committee of Independent Experts Report*.
[132] Paras.9-23 of the *Second Committee of Independent Experts Report*.

them resulted in conviction[133]. The Report further provides accounts of the *status* of investigations and prosecutions into specific incidents mentioned in the previous Report. For most of them, the Committee either was unable to assess their *status*, due to a lack of information, or ascertained that the proceedings involving the alleged perpetrators had been dismissed on different grounds, which according to the Israeli Authorities would confirm the lawfulness of the IDF soldiers' conduct[134]. Reference is made to some incidents mentioned in the *FFMGC Report* and an updated table of all the 36 episodes referred to therein was alleged to the Committee's Report in Annex II. The investigations into six of them were still ongoing at the time of the Report, 19 had resulted in the conclusion that there had been no violation, three had led to disciplinary actions, two were discontinued, one was under review of the MAG, and the remaining investigations' *status* was not clear[135]. Finally, the allegations of using human shields, not mentioned in the *FFMGC Report*, were addressed. The Committee noted that, despite the conviction of two soldiers charged with using a child as human shield[136], both of them "[…] were demoted and received suspended sentences of three months each"[137]. In addition, "[…] a former IDF deputy chief of staff reportedly said that the soldiers' criminal records should be cleared and that such events should be probed inside the units and not in interrogation rooms"[138]. The judges who condemned the soldiers allegedly gave weight to circumstances such as the soldiers' contribution to the security of Israel, the exceptional circumstances of the case, etc[139]. The Committee noted the absurdity of such ruling compared to the sentencing of an IDF soldier to seven-month and a half imprisonment for stealing a credit card, an act "[…] that did not

[133] Para.24 of the *Second Committee of Independent Experts Report*.
[134] Paras.25 and *ff* of the *Second Committee of Independent Experts Report*. By way of example, para.25 of the Report refers to the killing of Matar Abu Halima Muhammad and Hekmat Abu Halima, and the wounding of Omar Abu Halima, on 4 January 2009 (also referred to in the *FFMGC Report* at paras.788-797). The Committee was informed that, despite the "difficulties created by discrepancies in testimonies given by IDF soldiers, the MAG ultimately concluded that the soldiers "acted lawfully in light of a perceived threat"". Similar conclusions were drawn for the alleged shelling with white phosphorus of Abu Halima family's home, since it was not clear from the evidence collected what kind of ammunition had hit the house. For further details on the Israeli investigations into these cases see the interview to the Deputy Military Advocate for Operational Affairs available at: http://www.mag.idf.il/163-4544-en/patzar.aspx. As for the case of Iyad al-Samouni (which was analysed in Chapter II, see *supra*, pp.106-115), "[t]he Committee does not have sufficient information to establish the current status of the on-going criminal investigations [...]" (para.27 of the *Second Committee of Independent Experts Report*).
[135] See Annex II to the *Second Committee of Independent Experts Report*.
[136] See *supra*, footnote 70.
[137] Para.30 of the *Second Committee of Independent Experts Report*.
[138] Para.31 of the *Second Committee of Independent Experts Report*.
[139] *Ibidem*.

entail danger to the life or physical integrity of a civilian […]"[140]. Furthermore, the Committee dealt with the investigations and prosecutions launched into certain episodes occurred in the West Bank, for an overall number of 14 investigations (of which 11 were referred to in the *FFMGC Report*). Only in two cases criminal indictments were issued, while of the remaining 12 cases, six were dismissed and six were still under investigation[141]. The Committee also assessed the process and methodology of the *Turkel Commission*[142]. It noted that the Commission was able to interview Israeli high-level officials, NGOs staff, legal experts, etc, and that it thoroughly addressed the issues under the scope of its mandate[143].

As for the Palestinian side, the Committee was informed of the establishment of a Ministerial Committee "[…] mandated to issue recommendations to the Council of Ministers [of the PNA] for the implementation of the PIIC [Palestinian Independent Investigation Commission] report […]"[144]. The Ministerial Committee proposed a set of short-term and long-term recommendations which are spelled out in details in the Report[145]. Despite the efforts of the Palestinian Independent Investigation Commission and the Ministerial Committee, the UN Committee did not receive any information regarding criminal investigations and prosecutions regarding the episodes contained in

[140] Para.32 of the *Second Committee of Independent Experts Report*.
[141] Paras.33-37 of the *Second Committee of Independent Experts Report*.
[142] See *supra*, pp.140-141.
[143] Paras.38-39 of the *Second Committee of Independent Experts Report*.
[144] Para.50 of the *Second Committee of Independent Experts Report*.
[145] Paras.51-52 of the *Second Committee of Independent Experts Report*. "The Ministerial Committee recommended a number of short-term strategies – which are to be implemented within two months of the adoption of the report. In particular, it called on the General Prosecutor to investigate any allegation of torture or ill-treatment in detention centers; it recommended the immediate abolition of the protocol of cooperation between the Office of the Public Prosecutor and the Office of the Military Prosecutor, which authorizes the Military Prosecutor to conduct criminal investigations into offenses provided for in the Penal Code; it specified that civilians should not be subject to detention by the military justice system, but that all civilian detainees should be transferred to the ordinary civilian justice system; it urged the General Prosecutor to prosecute any official who refuses to implement a court decision, and that any such official should be dismissed from his functions; and it recommended that the Prime Minister issue clear directives instructing all relevant officials that clearance by security services is not a legal requirement for employment in the civil service. Instead, applicants may be requested to certify only that they have no criminal record. With respect to long-term strategies, the Ministerial Committee proposed six recommendations: a) to establish a Constitutional Court to address issues related to conflicts of jurisdiction; b) to adopt an administrative courts act creating first and second instance administrative courts, with a view to insuring adequate access to justice and an effective remedy; c) to amend the prisons act to allow systematic oversight and monitoring by the Ministry of Justice; d) to enact the Palestinian criminal code; e) to amend the Palestinian code of criminal procedures to separate investigating functions from prosecution functions; and f) to adopt legislation to regulate the functioning of the military justice system, criminal offenses, criminal procedure and other issues related to jurisdictional scope of military justice."

the *FFMGC Report*. The Palestinian General Prosecutor produced evidence of criminal investigations undertaken within the West Bank but none of them was related to the events reported by the FFMGC[146]. The Gaza Authorities, on the other side, reported to have conducted criminal investigations in a limited manner into episodes of internal violence. Imprisonment sentences were imposed for killing cases only in two cases. However, the Committee noted that no investigation or prosecution had been launched into rocket attacks episodes, which impaired the accountability process recommended in the *FFMGC Report*[147].

d) An Evaluation of the Committee's Work

The establishment of the UN Committee of Independent Experts was significant on different levels. Its first aim, reflected in its mandate, was to monitor the accountability process in Israel and the Palestinian Territories, both analyzing the structural capability of national institutions and providing a statistical record of the investigations and prosecutions undertaken, in pursuant of the *FFMGC Report*'s recommendations, which placed the primary responsibility for their implementation upon national authorities. Overall, as pointed out in the previous paragraphs, the outcome has been unsatisfying, due to the failure of both parties to conduct genuine investigations and prosecutions, in accordance with the requirements of International Law[148]. On the one hand, the Report underlined the structural deficiencies of the Israeli Military Justice System, its reticence in dealing with certain cases reported by the FFMGC, and its willingness to shield Israeli soldiers from prosecutions with a blurred approach to evidential matters. On the other hand, it stressed the unwillingness of Palestinian authorities to conduct genuine prosecutions, despite the alleged thoroughness of the internal investigations undertaken, and the scarcity of evidence regarding proceedings and investigations commenced in the Gaza Strip. It is to be noted that the Committee appears to have applied mixed standards in assessing the investigative steps undertaken by the Israeli and Palestinian Authorities. In both its Reports, it praised the Palestinian Independent Investigation Commission's work as being thorough, fully independent and impartial. However, this poses a fundamental question: on what grounds is an investigative system to be considered

[146] Paras.54-55 of the *Second Committee of Independent Experts Report*.
[147] Paras.60-63 of the *Second Committee of Independent Experts Report*.
[148] See also MURRAY, (2012) p.159, in MELONI and TOGNONI (eds.), *supra*, footnote 101.

genuine and in conformity with International Law standards? The genuineness cannot be evaluated only with regard to the investigative stage, but it must be assessed in relation to the entire accountability process. Consequently, the independence and impartiality of investigations are not sufficient for featuring a whole system as genuine. Investigations are only the first step in the pursuit for accountability. As noted by MURRAY, investigations are surely not sufficient

> "[…] if […] they are "a mere formality preordained to be ineffective", or if the authorities have not "taken the reasonable steps available to them to secure the evidence concerning the incident, including, *inter alia*, eyewitness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury, and an objective analysis of clinical findings, including the cause of death."[149]

Accountability for international crimes requires to place the criminal liability upon individuals, as generally acknowledged by Customary International Law[150]. Avoiding such step, as pointed out by MURRAY, would mean avoiding to comply with "the very *raison d'être* of criminal law, whether national or international"[151]. A further observation which arises from the Committee's work is linked with the prosecution of high-level officials, which did not take place in any of the cases presented by the *FFMGC Report*. One should ask oneself whether it is truly possible to imagine a national court genuinely investigating and prosecuting high-level officials[152].

1.1.6 Developments in the Investigations after the Second UN Committee's Report

The internal accountability process did not come to an end with the UN Committee's Report. Recently, further developments have been made public by the press and several NGOs have published the *status* of investigations concerning complaints submitted by themselves on behalf of Palestinian civilians. The present paragraph does not aim at presenting exhaustively the most recent achievements. It rather represents an attempt, to

[149] MURRAY, pp.158-159, *Ibidem*. The author quotes a case before the ECtHR, *Finucane n the United Kingdom*, ECtHR, Application No.29178/95, 1 October 2003.
[150] See, for instance, Rule 151 of HENCKAERTS J., DOSWALD-BECK L. (eds.),(2009) pp.551-555, *supra*, Chapter I, footnote 52; art.25 of the *ICC Rome Statute*.
[151] MURRAY, (2012) p.159, in MELONI and TOGNONI (eds.), *supra*, footnote 101.
[152] See also p.160, *Ibidem*.

the best of the author's knowledge, which is limited to the material available online, to outline the most important outcomes on the ground of accountability.

In a report published by the newspaper Haaretz, on 07 November 2011, the author highlights the steep court fees that individuals have to pay in order to proceed with civil claims seeking compensation for wrongful deaths during *Operation Cast Lead*[153]. The Israeli Authorities claim that high court fees are aimed at preventing frivolous lawsuits, and avoiding that foreigners, who do not hold monetary assets in Israel, could "bolt without paying"[154]. However, Palestinian sources and the PCHR itself maintain that those fees are part of the strategy of impunity adopted by the Israeli Authorities following *Operation Cast Lead*. This significant obstacle to the possibility of seeking compensation before civil courts does not come "out of the blue"; a PCHR report already addressed the issue, noting that these fees, whose amount, according to Haaretz, is quantified in relation to the positive chances of the claim, are paid as a guarantee in the event the case is lost[155]. There is agreement between both the PCHR report and the press article on Haaretz that the fee is applied in a way which is discriminatory. According to the article, Israelis do not have to pay such insurance due to the fact that courts can put liens upon their properties. Similarly, U.S. citizens, due to the reciprocal court rulings enforcement. The law provides for the adjustment of the fee amount to the economic condition of the complainant[156] but, according to Haaretz, it is significantly difficult to obtain a reduction of the court insurance.

Additional hurdles to the chances of success for Palestinians claimants before civil courts in Israel is represented by the impossibility for Israeli lawyers to travel to Gaza to discuss the case with their clients. Furthermore, Gazans are not permitted to enter Israel

[153] See Haaretz Online, *Palestinians say Israel imposing steep court fees to prevent lawsuits*, at: http://www.haaretz.com/news/diplomacy-defense/palestinians-say-israel-imposing-steep-court-fees-to-prevent-lawsuits-1.394246.
[154] *Ibidem*.
[155] See *Genuinely Unwilling* ..., p.73, *supra*, Chapter I, footnote 63.
[156] See *Ibidem*. See also *Palestinian Centre for Human Rights Submission to the UN Committee on the Elimination of Racial Discrimination*, (2012) Palestinian Centre for Human Rights, p.8. Press sources report that the fee adjustment to the economic situation of the complainants has been ruled by the Supreme Court of Justice (see *supra*, footnote 152).

unless under certain limited circumstances. Finally, the panorama is further complicated by the short time constraints for submitting cases to Israeli civil courts[157].

On 18 January 2012, the PCHR published an update regarding the *status* of investigations and proceedings triggered by the Centre on behalf of Palestinian claimants[158]. The Centre noted to have submitted 1046 civil complaints and 490 criminal complaints on behalf of 1046 Palestinian victims. As for the criminal complaints, only 21 responses had been received as to the release of the update. In 19 cases the PCHR received interlocutory responses, which indicates that the case is still under a preliminary examination. In one case, Israel communicated the dismissal of the case, due to the fact that the witness did not travel to the Eretz crossing for being interviewed. In one last case, the response indicated that the alleged perpetrator was charged. With respect to the 1046 civil complaints, only 17 responses have been received for a total amount of 26 applications. 100 tort cases have been issued before Israeli courts by the PCHR. However, the lawyers have been prevented from travelling to Israel to defend their clients, due to the blockade of the Gaza Strip. Consequently, they had to rely on the expertise of Israeli lawyers based in Israel. The latter were refused access to the Gaza Strip and therefore could not communicate with their clients.

An interesting case, which received great attention by the press, is the shelling of Wa'el al-Samouni's house, where at least 100 members of the extended al-Samouni family was stationed at the time of the attack, in accordance with the orders received by the IDF soldiers[159]. The case is also reported in the *FFMGC Report*[160]. B'Tselem

[157] According to both Haaretz and the PCHR, a complaint for compensation must be submitted to the Ministry of Defence within 60 days from its occurrence and, within two years, the full case must be filed. (see *Genuinely Unwilling* ..., p.72, *Ibidem*).

[158] See *Status of Criminal and Civil Complaints Submitted to Israeli Authorities on behalf of Victims of Operation Cast Lead*, (18 January 2012) available at: http://www.pchrgaza.org/portal/en/index.php?option=com_content&view=article&id=8086:status-of-criminal-and-civil-complaints-submitted-to-israeli-authorities-on-behalf-of-victims-of-operation-cast-lead-&catid=56:fact-sheets-&Itemid=18.

[159] See The Guardian Online, *Israel closes inquiry into Palestinian family killed during Gaza war*, at http://www.guardian.co.uk/world/2012/may/02/israel-closes-inquiry-gaza-family-killing; Haaretz Online *IDF closes probe into Israeli air strike that killed 21 members of Gaza family* at http://www.haaretz.com/news/diplomacy-defense/idf-closes-probe-into-israeli-air-strike-that-killed-21-members-of-gaza-family-1.427583; Al Jazeera Online, *Slamming the door to justice on Palestinians*, at http://www.aljazeera.com/indepth/opinion/2012/05/2012579746987569.html.

[160] See paras.712-735 of the *FFMGC Report*. According to both B'Tselem and The *FFMGC Report*, on 4 January 2009, approximately 100 members of the extended al-Samouni were gathered in Wa'el al-Samouni's house, on the IDF soldiers' orders. Some witnesses reported that Palestinian combatants might have been present in the area during the night between 3 and 4 January (as later confirmed by the alleged

submitted a complaint to the Israeli Authorities[161]. According to both the Reports issued by the Government of Israel and the MAG Corps website, a Command Investigation was undertaken and, subsequently, the MAG ordered the opening of a criminal investigation to the MPCID[162]. The results of the MPCID investigation were submitted to the Chief of General Staff, who "[…] determined that the Incident revealed professional shortcomings in the conduct of the Commander of the Givati Infantry Brigade […]"[163]. The Brigade Commander was subsequently sanctioned, preventing him from future promotions[164]. In the assessment regarding the criminal liability of the Commander, the MAG found no grounds to believe that the attack had been carried out intentionally, recklessly or negligently. On the contrary, he considered the Commander to have acted with no deviation "[…] from the boundaries of discretion that a "reasonable military commander" operating in similar circumstances possesses"[165]. On this ground, no criminal or disciplinary sanction was inflicted. The decision to dismiss the case was announced by the MAG Corps on 1 May 2012. A week after the announcement, B'Tselem published a statement alleging the flaws of the criminal investigations carried out in the al-Samouni case. B'Tselem claimed that the case was not submitted with the charge of willful killing, which would have implied the perpetrator's criminal intent. It recalled the obligation to take precautions in carrying out the attacks, binding the IDF. Although the MAG's decision excluded the soldier's liability on the ground of the lack of negligence, B'Tselem maintained that this is in stark contrast with the factual circumstances ascertained by different reports, including

killing of a member of the militant group, Islamic Jihad). However, it appears, from the testimonies that well before the daybreak on 4 January, that the area was in full control of IDF soldiers. When few members left the house to collect firewood, a projectile was fired at them. Two men were killed. The remaining managed to seek shelter returning to the house, but two other projectiles were fired at the house, which partially collapsed, killing 21 members of the extended family and injuring many others. Part of the survivals left the house leaving behind the dead and wounded, despite the IDF orders to remain inside. When they reached Gaza City they sought the help of PRCS to evacuate the injured. The ambulances tried to reach the al-Samouni neighbourhood repeatedly in the following days but were denied access by the IDF. When they finally could get in, they evacuated the injured and left the dead. Subsequently the IDF demolished the house with the dead already inside (see also B'Tselem account at: http://www.btselem.org/press_releases/20120501_samuni_investigation_closed).

[161] See http://www.btselem.org/gaza_strip/cast_lead_cases_refrred_to_jag.

[162] See para.321 of *The Operation in Gaza ..., supra*, Chapter II, footnote 94; para.125 of the *First Update*; para.23 of the *Second Update*; see also *MAG Legal Opinion: Al-Samouni Family Incident*, available at http://www.law.idf.il/163-5080-en/Patzar.aspx.

[163] *MAG Legal Opinion ..., Ibidem.*

[164] *Ibidem*.

[165] *Ibidem*.

the *FFMGC Report*[166]. B'Tselem further claimed that the episode is paradigmatic of a generalized attitude of "sweeping the dirt under the rug", as far as Israel violations of IHL and IHRL are concerned: an attitude that seems to have characterized the Israeli policy after *Operation Cast Lead*. B'Tselem, at the beginning of 2012, also published a summary of the *status* of investigations and prosecutions related to cases it submitted to the Israeli Authorities. The last update dates back to the end of September[167]. Of the 20 proceedings triggered, no one resulted in conviction, although an indictment was issued on charge of "manslaughter of anonymous person". However, in this last case the MAG's decision appears to have undermined the premises for justice, since it refused to enter into the issue of the B'Tselem lawyers-alleged connection between the soldier's conduct and the killing of Majedah and Rayah Abu Hajaj. According to the IDF, the discrepancies between the soldier's account and the facts reported in the claim do not allow to connect the two versions to the degree required for criminal prosecutions. As a result, the proceeding was substantially closed[168].

During the 21th Session of the UNHRC, the Secretary-General issued a new Report on the *Progress made in the implementation of the recommendations of the Fact-Finding Mission by all concerned parties, including United Nations bodies, in accordance with paragraph 3 of section B of Human Rights Council resolution S-12/1*[169]. The Council expressed its concern in respect to the implementation of the *FFMGC Report*'s recommendations. In that occasion, the PCHR submitted a statement summarizing the *status* of the Israeli investigations, prosecutions and further judicial actions, as to the Council session. To sum up:

i) Structural deficiencies remain in the Israeli accountability system. On the one hand, the dual role of the MAG and the reliance on operational debriefings, which, as pointed out above in this paper, do not comply with the international recognized standards for investigations, still constitute a problem of concern. In addition, the practice has shown that plea bargains reduce the charges that are already inappropriate in respect to the gravity of the violations alleged;

[166] See http://www.btselem.org/gaza_strip/20120508_samuni_op_ed.
[167] See http://www.btselem.org/gaza_strip/cast_lead_cases_refrred_to_jag.
[168] See http://www.btselem.org/gaza_strip/20120812_castlead_killing_trial_plea_bargain.
[169] See http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session21/Pages/ListReports.aspx. UN Doc. A/HRC/21/33 (21 September 2012).

ii) As for civil complaints, it is submitted that significant obstacles hamper the full implementation of the right to a remedy, of which the right to compensation is a fundamental component. Only 26 applications out of 1046 have received a response, most of which of interlocutory nature. Only in one occasion the case was referred to an Israeli civil court. Furthermore, steep court fees prevent, most of the time, Palestinians from applying for compensation. Only one case resulted in some form of remedy, although the same case was dismissed on the ground of criminal responsibility;

iii) As for criminal complaints, only 23 out of 490 cases have received a response from the Israeli Authorities. Only one case has resulted in conviction for the theft of a credit card.[170]

For these reasons, the PCHR suggested a Security Council Referral to the ICC, under Chapter VII of the UN Charter[171].

To conclude, the HRC also addressed the steps taken by the Palestinian Authorities both in the West Bank and in Gaza. In particular, the Council noted that the rocket attacks had not ceased, as testified by the recent escalation of violence that resulted in *Operation Pillar of Defense*, conducted by the IDF in the Gaza Strip[172]. As for accountability, the Council recalled its Resolution 16/32[173], since the recommendations of the *FFMGC Report* regarding the establishment of a committee mandated to monitor Israeli and Palestinians investigations and prosecutions, and to refer the matter to the ICC Prosecutor in the event that these investigations not be in good-faith, were not implemented by the UN Security Council[174].

[170] See *PCHR Submits Written and Oral Statement to the 21th Session of the Human Rights Council*, available at: http://www.pchrgaza.org/portal/en/index.php?option=com_content&view=category&id=149&Itemid=310.
[171] As noted above in this chapter (see p.129), the referral of the Security Council was also recommended by the FFMGC.
[172] For further information regarding the recent IDF *Operation Pillar of Defence*, see http://www.alhaq.org/advocacy/topics/gaza/645-al-haqs-legal-analysis-on-the-escalation-of-attacks-in-the-gaza-strip-between-8-and-21-november-2012. See also http://www.haaretz.com/news/diplomacy-defense/timeline-israel-launches-operation-pillar-of-defense-amid-gaza-escalation.premium-1.479284.
[173] See *supra*, footnote 130.
[174] See UN Doc. A/HRC/21/33.

2. The International Community and the Principle of Universal Jurisdiction

As outlined in the first part of this chapter, the *FFMGC Report* contains certain recommendations addressed to the international community[175]. Obligations arising from egregious violations of IHRL and IHL do not bind only the States where the wrongdoing has been perpetrated, or those linked to the perpetrator, or the victims *ratione personae*. Third States may be bound to take action on the basis of the obligations arising as Parties to a convention or treaty, or on the basis of customary law.

2.1 Universal Jurisdiction – Attempts and Failures

On the ground of accountability, the principal *FFMGC Report*'s recommendation to the International Community called upon the State Parties to the *Geneva Conventions* to commence "[...] criminal investigations in national courts, using *universal jurisdiction* [emphasis added], where there is sufficient evidence of the commission of grave breaches of the Geneva Conventions of 1949"[176]. A commonly recognized definition of universal jurisdiction is still lacking in the doctrinal panorama[177]. For reasons of length and completeness, the present work does not embark in such an attempt. Rather, it is accepted that "[...] universal jurisdiction is criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction"[178]. Whatever the most suitable

[175] See *supra*, p.128.
[176] Para.1975(a) of the *FFMGC Report*.
[177] See BECKER S.W., (2003) *Universal Jurisdiction: How Universal is it' A Study of Competing Theories*, The Palestine Yearbook of International Law, Vol.XII, 2002/2003, pp.50 and *ff*; REYDAMS L., (2003) *Universal Jurisdiction. International and Municipal Legal Perspective*, Oxford Monographs in International Law, Oxford University Press, pp.11-27; INAZUMI M., (2005) *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes under International Law*, Intersentia, pp.101 and *ff*.
[178] This is the definition adopted by VV.AA., (2001) *The Princeton Principles on Universal Jurisdiction*, Princeton Project on Universal Jurisdiction, Program in Law and Public Affairs, (Principle 1(1)). Despite the fact that such definition appears to be widely accepted, it is still debatable whether a link with the prosecuting State is necessary. The dilemma becomes apparent when questioning the admissibility of universal jurisdiction *in absentia*, *i.e.* when there is absolutely no link with the prosecuting State, not even the presence of the perpetrator on the State's territory. On the problems arising from admitting universal jurisdiction *in absentia*, see INAZUMI, *Ibidem*; BECKER, *Ibidem*; ZEMACH A., (2011) *Reconciling Universal Jurisdiction with Equality Before the Law*, Texas International Law Journal, Vol.47, No.1, pp.159 and *ff*; RABINOVITCH R.P., (2004) *Universal Jurisdiction in Absentia*, bepress Legal Series, Paper 279, available at http://law.bepress.com/expresso/eps/279; O'KEEFE R., (2004) *Universal Jurisdiction. Clarifying the Basic Concept*, Journal of International Criminal Justice, Vol.2, pp.735-760.

definition of universal jurisdiction may be, "[i]t is uncontroversial today that States may confer upon their courts the right to exercise [...] [it] over international crimes [...]"[179]. As a matter of facts, it is commonly acknowledged that the exercise of universal jurisdiction represents a tool for pursuing accountability for serious violations of human rights, which are considered of concern for the international community as a whole, and combating impunity[180].

The doctrine of universal jurisdiction finds a sound legal basis in a significant number of provisions[181]. However, there is still disagreement in State practice, since some countries have been reluctant to use this tool for political reasons, which undermines the possibility that a customary rule be established[182]. As for the grave breaches of IHL and the international crimes allegedly committed during *Operation Cast Lead*, and documented by the *FFMGC Report*, the legal ground for the exercise of universal jurisdiction can be found in:

i) The Preamble of the *Rome Statute* of the ICC, which declares that "[...] it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes"[183], although such provision does not appear to establish a clear obligation to prosecute or extradite, rather it appears to recall a duty which was already established in International Law[184];

In particular, the notion of universal jurisdiction *in absentia* was dealt with in the *Arrest Warrant* case (*Democratic Republic of the Congo v Belgium*, (11 April 2000) Judgement, ICJ, Reports 2002, and dissenting opinions).

[179] Para.1850 of the *FFMGC Report*.

[180] See REYDAMS, (2003) p.1 at footnote 5, *supra*, footnote 177. The author cites different sources which have to be numbered among what he refers as the "international human rights movement", such as Amnesty International, Redress, the International Council on Human Rights Policy, etc.

[181] REYDAMS, pp.43 and *ff*, *Ibidem*, for instance, links the doctrine of universal jurisdiction to a number of provisions set forth in international legal instruments both before and after the World War II. The author cites the *International Convention for the Suppression of Counterfeiting Currency*, the *Convention for the Suppression of the Illicit Traffic in Dangerous Drugs*, the *Convention for the Prevention and Punishment of Terrorism*, the *Convention on the Prevention and Punishment of the Crime of Genocide*, the *Geneva Conventions Relating to the Protection of Victims of Armed Conflicts*, the *Convention for the Protection of Cultural Property in the Event of Armed Conflict*, the *Convention on the Law of the Sea*, the *International Convention for the Suppression and Punishment of the Crime of Apartheid*, the *Convention for the Suppression of Unlawful Seizure of Aircraft*, the *Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment*.

[182] O'BROIN S. (Head Researcher), (2011) *Applying International Criminal Law to Israel's Treatment of the Palestinian People*, BADIL's Working Paper, No.12, p.83.

[183] *Rome Statute* of the ICC, Preamble.

[184] See AKHAVAN P., (2010) *Whither National Courts? The Rome Statute's Missing Half. Towards an Express and Enforceable Obligation for the National Repression of International Crimes*, Journal of

ii) Art.1 common to the four *Geneva Conventions* and art.1(1) of *Additional Protocol I*, which provides that "[t]he High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances"[185], placing a legal obligation upon the State Parties to ensure that serious violations of IHL be investigated and prosecuted;

iii) Art.146 of the *Fourth Geneva Convention* which provides that "[e]ach High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts"[186];

iv) Art.85 of *Additional Protocol I* to the *Geneva Conventions*, which provides that "[t]he provisions of the Conventions relating to the repression of breaches and grave breaches, supplemented by this Section, shall apply to the repression of breaches and grave breaches of this Protocol"[187].

However, it is to be noted that a sound obligation to exercise universal jurisdiction over international crimes can be assumed only for war crimes, since the norms contained in the *Geneva Conventions* are clear in imposing a proper duty rather than a simple right to prosecute and extradite perpetrators of grave breaches of IHL. Differently, for crimes against humanity, to which certain allegations contained in the *FFMGC Report* appear to amount, there is no obligation to exercise universal jurisdiction. Better said, there is a limited duty, since the Preamble of the *Rome Statute* of the ICC is considered to be declarative of pre-existing obligations under International Law. These obligations stems from treaties and conventions, which cover the subject matter of art.7 of the ICC Statute only in a partial way, *i.e.* imposing a duty to prosecute or extradite only for few of the crimes against humanity enshrined in the Statute (e.g. torture). Efforts to trace back such a duty to international conventions relied on international instruments regarding human rights, such as the ICCPR, as a basis. But they failed, since IHRL provides for the prosecution of serious breaches only *ratione*

International Criminal Justice, Vol.8, No.5, p.1250. "[...] some were of the view that a duty to prosecute international crimes was already recognized in international law. Paragraph 6 of the Preamble may thus be viewed as simply declarative, recalling a pre-existing duty to exercise national criminal jurisdiction".

[185] Art.1 common to the Four *Geneva Conventions* and art.1(1) of *Additional Protocol I*.

[186] Art.146(2) of the *Fourth Geneva Convention*.

[187] Art.85(1) of *Additional Protocol I* to the *Geneva Conventions*.

loci. Also, attempts to identify a customary rule providing for the exercise of universal jurisdiction over international crimes have failed, notwithstanding the consistent *soft law* on the matter. Thus, it is to be concluded that a duty to prosecute or extradite exists only under *lex ferenda*, but "[...] until the *lex ferenda* crystallizes into customary law, or is recognized as a general principle, primary universal repression [*i.e.* the duty to exercise universal jurisdiction] remains largely a right to be exercised by states at their discretion"[188]. In addition, since much discretion in exercising universal jurisdiction is left to national prosecutors and judges, the chances of success depend largely also on "the adoption of a clear domestic legal framework"[189].

Due to Israel's failure to implement its obligations under IHL and IHRL and to provide justice for victims of gross and systematic breaches of both bodies of law entailing war crimes and crimes against humanity, Palestinians have been seeking justice in foreign countries, where national legislation allows for the exercise of universal jurisdiction[190]. However, very few cases have passed the preliminary hurdles and none of them resulted in something more concrete than a mere acknowledgement of the reasons substantiating the *prima facie* case.

a) Attempts in the UK

In September 2009, a group of British lawyers on behalf of 16 Palestinians sought an arrest warrant against the Israeli Defence Minister, Ehud Barak for alleged war crimes during the military operation investigated by the FFMGC. The warrant of arrest was refused by the City of Westminster Magistrates Court, on the ground that Mr Barak

[188] AKHAVAN, (2010) p.1262, *supra*, footnote 184. See the same source for an extensive discussion on the difficulties to identify a sound legal basis for an obligation to prosecute or extradite perpetrators of international crimes (pp.1251-1262).
[189] O'BROIN, (2010) p.84, *supra*, footnote 182.
[190] See, for instance, pp.86-89, *Ibidem*, where the author cites the following cases: a complaint submitted in Belgium in 2001, by some survivals of the Sabra and Shatila massacres in Lebanon against Ariel Sharon, Amos Yaron and others for their role during the massacre; the issuance of an arrest warrant by the Bow Street Magistrates' Court in the UK for Major General Doron Almog, on charge of house demolitions and other war crimes in Rafah in January 2002; the issuance of an arrest warrant by the District Court of Auckland, in New Zealand, for Lieutenant General Moshe Ya'alon, on charge of war crimes, for the alleged dropping of a one-ton bomb in al-Daraj neighbourhood in Gaza City in 2002, which killed Saleh Shehadeh, 14 civilians and injured 150 others; the proceeding initiated in Spain, before the National High Court against 7 former Israeli officials for the same al-Daraj case, which was overturned in appeal before the Supreme Court and led to the amendment of the Spanish Law on universal jurisdiction.

enjoyed immunity from jurisdiction, since he was visiting the UK in his official capacity[191].

In December 2009, the City of Westminster Magistrates Court issued an arrest warrant against the former Minister of Foreign Affairs, Tzipi Livni, on charge of crimes committed during *Operation Cast Lead*. The arrest warrant was subsequently quashed for non-execution, after Livni cancelled her trip to the UK[192].

The above mentioned cases were brought in front of English courts because the UK legislation provides for the exercise of universal jurisdiction, although in a limited manner. As far as grave breaches of the *Geneva Conventions* and *Additional Protocol I*, the legal basis for such exercise of prosecutorial powers is envisaged in the *Geneva Conventions Act* of 1957 and the *Geneva Conventions (Amendment) Act* of 1995. The law provides that:

> "Any person, whatever his nationality, who, whether in or outside the United Kingdom, commits, or aids, abets or procures the commission by any other person of a grave breach of any of the scheduled conventions or the first protocol shall be guilty of an offence and on conviction on indictment (a) in the case of a grave breach involving the wilful killing of a person protected by the convention or protocol in question, shall be sentenced to imprisonment for life; (b) in the case of any other grave breach."[193]

In addition:

> "(3) Proceedings for an offence shall not be instituted (a) in England and Wales, except by or with the consent of the Attorney General; (b) in Northern Ireland, except by or with the consent of the Attorney General for Northern Ireland. (4) If the offence is not committed in the United Kingdom (a) proceedings may be taken,

[191] See The Guardian Online, (29 September 2009) *Lawyers seek arrest of Israeli defence minister in UK for alleged war crimes*, available at http://www.guardian.co.uk/world/2009/sep/29/ehud-barak-warrant-war-crimes-gaza; Aljazeera Online, (30 September 2009) *UK court quashes Barak arrest bid*, available at http://www.aljazeera.com/news/middleeast/2009/09/200929180452021 84.html.

[192] See O'BROIN, (2011) p.88, *supra*, footnote 182; Aljazeera Online, *UK court 'issued warrant for Livni'*, available at http://www.aljazeera.com/news/europe/2009/12/200912142153529927.html; The Guardian Online, *British court issued Gaza arrest warrant for former Israeli minister Tzipi Livni*, available at http://www.guardian.co.uk/world/2009/dec/14/tzipi-livni-israel-gaza-arrest.

[193] *Geneva Conventions Act 1957*, s.1(1), as amended by *Geneva Conventions (Amendment) Act 1995*, s.1(2).

> and (b) the offence may for incidental purposes be treated as having been committed, in any place in the United Kingdom."[194]

Thus, prosecutions cannot be initiated without the prior consent of the Attorney General[195]. This safeguard is provided for in order to counter-balance the power of private parties, who, according to section 6(1) of the *Prosecution of Offences Act 1985*[196], can stimulate the initiation of criminal proceedings. No nationality requirement is provided for in the law, and the accused may be present also temporarily on the territory of the State[197]. It is to be noted, however, that the exercise of jurisdiction according to the principle of universality is only permitted for certain international crimes, that, as far as the present work is concerned, include war crimes in international armed conflicts and not crimes against humanity or war crimes in non-international armed conflicts. For these latter categories, the legal basis for the exercise of jurisdiction is the *International Criminal Court Act 2001*, which, differently from the *Geneva Conventions Act 1957* and following Amendment, requires a nationality link, which may be established in the past, present or subject to the service jurisdiction of the UK, or on the mere residence test[198]. Following the attempt to issue an arrest warrant for Tzipi Livni, the UK Government promised an amendment of the law, with respect of the power of private individuals to seek arrest warrants. Despite the initial proposals demanding the abolishment of the right to private prosecutions, the reform that began in 2010 was of limited impact on the issue. The *Police Reform and Social Responsibility Act 2011*, the outcome of the reform process, affected, in fact, only the procedure for requesting an arrest warrant in private prosecutions. According to section 153 of the Act:

> "Where a person who is not a public prosecutor lays an information before a justice of the peace in respect of an offence to which this subsection applies, no warrant

[194] *Geneva Conventions Act 1957*, s.1A(3) and (4), as inserted by the *International Criminal Court Act 2001*, s.70(2).
[195] See also WILLIAMS S., (2012) *Arresting Developments? Restricting the Enforcement of the UK's Universal Jurisdictions Provisions*, The Modern Law Review, Vol.75, No.3, p.373.
[196] *Prosecution of Offences Act 1985*, s.6(1). See also *Private Prosecutions – Legal Guidance*, available at http://www.cps.gov.uk/legal/p_to_r/private_prosecutions/. See also pp.371-372, *Ibidem*.
[197] WILLIAMS, (2012) p.373, *supra*, footnote 195.
[198] *International Criminal Court Act 2001*, ss.51 and 68. See also p.374, *Ibidem*.

> shall be issued under this section without the consent of the Director of Public Prosecutions."[199]

Whether such change in the law was determined by political pressures on the UK Government, in particular due to the Israeli complaints, it is yet to be fully understood. What the amendment appears to avoid is only the public condemnation deriving from the accusation that may result in the issuing of an arrest warrant, which, under the law amended, has to receive the approval of the Director of Public Prosecutions. It is to be remembered that, under the previous law, the arrest warrant could be issued with no need to consult with the Public Prosecutions division, but the substantial hurdle to the full prosecution, *i.e.* the consent of the Attorney General, was already there. Thus, it seems that the Reform was aimed at avoiding the hypothetical embarrassment of the UK Government in its foreign relations, deriving from the possibility that an arrest warrant be issued and not lead to prosecution, due to the subsequent denial of the Attorney General[200]. It is to be noted, however, that, in October 2011, under the law amended, an application for the issuance of an arrest warrant for Tzipi Livni, was submitted to the Director of Public Prosecutions. The latter denied the arrest warrant on the ground that Ms Livni was visiting the UK as part of a mission and, thus, was granted the immunity, accorded to her by the Foreign and Commonwealth Office, whose decisions concerning immunities are not subject to the scrutiny of the judicial authorities[201].

b) Attempts in South Africa

Attempts to exercise universal jurisdiction with respect to the events related to *Operation Cast Lead* were carried out in South Africa. In August 2009, two South African NGOs, the Palestinian Solidarity Alliance and the Media Review Network, filed an application for the initiation of investigations to the National Director of Public Prosecutions, along with a more-than-3000-pages body of evidence. The application was filed against 70 South African-Israeli individuals allegedly linked with the military operation in Gaza. Among them, David Benjamin, a former IDF legal advisor during

[199] *Police Reform and Social Responsibility Act 2011*, section 153(1), amending the *Magistrates' Courts Act 1980*, by adding subsection (4A) to section 1.
[200] See WILLIAMS, (2012) pp.379 and *ff*, *supra*, footnote 195; AKANDE D., (31 July 2010) *UK to Restrict Universal Jurisdiction Laws (but only slightly)*, Blog of the European Journal of International Law, available at http://www.ejiltalk.org/uk-to-restrict-universal-jurisdiction-laws-but-only-slightly/.
[201] WILLIAMS, p.378, *Ibidem*.

Operation Cast Lead. However, the case was dismissed, on the ground that the evidence collected, despite being extensive, could not be linked to the individuals at stake, and therefore, there was no basis for individual criminal responsibility[202]. The application was filed in pursuant of the *Implementation of the Rome Statute Act* (2002)[203], which allows for the prosecution of perpetrators of international crimes, regardless their nationality, provided that they are present on the territory of the State:

> "In order to secure the jurisdiction of a South African court for the purposes of this Chapter, any person who commits a crime contemplated in subsection (1) outside the territory of the Republic, is deemed to have committed that crime in the territory of the Republic if: (a) that person is a South African citizen; or (b) that person is not a South African citizen but is ordinarily resident in the Republic; or (c) that person, after the commission of the crime, is present in the territory of the Republic; or (d) that person has committed the said crime against a South African citizen or against a person who is ordinarily resident in the Republic."[204]

In 2011 the same two NGOs sought an arrest warrant for Tzipi Livni, who was about to visit South Africa on invitation by Jewish Groups, on charge of having participated in the planning of *Operation Cast Lead*. The visit was subsequently cancelled and the arrest warrant not executed[205].

c) Failures or Achievements?

Overall, the efforts carried out to bring to justice perpetrators of international crimes have failed, at least in the case of Gaza. As it has been underlined, all the cases brought before British or South African courts have been dismissed. However, it is to be acknowledged that most denials of issuing arrest warrants were based on immunity issues, recognizing, on the other hand, the *prima facie* evidence which could

[202] See PARKER F., (12 August 2009) *A Symbolic Exercise*, Global Policy Forum, available at http://www.globalpolicy.org/international-justice/universal-juris diction-6-31/48018.html.
[203] For an account of the functioning of universal jurisdiction in South Africa, see GEVERS C., (24 April 2012) *The Application of Universal Jurisdiction in South African Law*, Blog of the European Journal of International Law, available at http://www.ejiltalk.org/universal-jurisdiction-in-south-africa/.
[204] *Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002*, as amended by the *Judicial Matters Amendment Act 22 of 2005*, s.4(3).
[205] See Aljazeera Online, (16 January 2011) *S Africa groups seek Livni arrest*, available at http://www.aljazeera.com/news/africa/2011/01/20111164466517708.html; Haaretz Online, (15 January 2011) *South African groups seek arrest warrant for Livni*, available at http://www.haaretz.com/news/diplomacy-defense/south-african-groups-seek-arrest-warrant-for-livni-1.337175.

substantiate the case[206]. In other cases, however, the arrest warrants were not executed, as pointed out above, due to last-minute cancellations of the visits to countries provided with universal jurisdiction[207].

2.2 Third States Responsibilities in the Context of International Crimes

Al-Haq v. UK

International Criminal Law does not specifically provide for the criminal liability of States along with the individual criminal responsibility. However, certain international crimes, for their gravity and for having been committed by state officials or somehow linked to the state policy, entail the state responsibility for serious breaches of peremptory norms of International Law[208]. War crimes and crimes against humanity can be included among these obligations of *jus cogens*[209]. According to art.41 of the *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, "States shall cooperate to bring to an end through lawful means any serious breach within the meaning of art 40"[210]. In addition, "[n]o State shall recognize as lawful a situation

[206] That is the case of the denial opposed to applicants seeking for an arrest warrant for Mr Ehud Barak (see *supra*, pp.164-165). The judge of the City of Westminster Magistrates' Court addressed declared to be convinced of the reasons substantiating the application, which alleged Barak's command responsibility for war crimes committed during *Operation Cast Lead*, but held that he was entitled to immunity (see O'BROINS, (2011) p.86 at footnote 343, *supra*, footnote 182).

[207] See *supra*, p.164.

[208] O'BROIN, (2011) p.61, *supra*, footnote 182. See also art.40 of the *Draft Articles on Responsibility of States for Internationally Wrongful Acts with commentaries*, Report of the International Law Commission (2001). According to the mentioned article "1.This chapter applies to the international responsibility which is entailed by a serious breach by a State of an obligation arising under a peremptory norm of general international law. 2. A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfil the obligation". The peremptory character of the obligation breached has to be measured according to the opinion of the International Community as a whole (the *Draft Articles* specifically recall art.53 of the 1969 *Vienna Convention*). According to the *Draft Articles*, "[t]he concept of peremptory norms of general international law is recognized in international practice, in the jurisprudence of international and national courts and tribunals and in legal doctrine". CASSESE refers to the same concept as "aggravated State responsibility" (see CASSESE, (2008) p.7, *supra*, Chapter I, footnote 47).

[209] See *Draft Articles ...*, art.40, Commentary, paras.4 and 5. See also BASSIOUNI M.C., (1997) *International Crimes: Jus Cogens and Obligatio Erga Omnes*, Law and Contemporary Problems, Vol.59, No.4, p.68. The peremptory character of war crimes and crimes against humanity norms can be inferred, according to BASSIOUNI, from "(1) international pronouncements, or what can be called international *opinio juris*, reflecting the recognition that these crimes are deemed part of general customary law; (2) language in preambles or other provisions of treaties applicable to these crimes which indicates these crimes' higher status in international law; (3) the large number of states which have ratified treaties related to these crimes; and (4) the *ad hoc* international investigations and prosecutions of perpetrators of these crimes".

[210] See *Draft Articles ...*, art.41(1).

created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation"[211].

On these grounds, Al-Haq submitted a claim to the UK High Court of England and Wales for judicial review, in February 2009[212]. Al-Haq challenged the UK Government on its policy with regard to Israel and the Occupied Palestinian Territories. It maintained that the UK Government had failed to comply with certain Customary International Law obligations arising from Israel's violations of *jus cogens*, both before and after *Operation Cast Lead*. Thus, the claim did not focus specifically on the findings of the *FFMGC*, but, as stressed by al-Haq, the International Community's failure to take any action to stop Israel's violations of "[...] "intransgressible" principles of international humanitarian law"[213], represented a further substantial issue to be considered in order to assess the UK's obligations. In particular, Al-Haq's claim "argues that the UK is complicit in Israel's violations of international humanitarian law through its arms and arms-related trade with Israel"[214]. Prior to the submission of the claim, al-Haq, with other Palestinian human rights NGOs, wrote to the High Parties of the Geneva Conventions (including the UK), publicly calling for the adoption of such measures that may have been necessary to put an end to the Israel's serious violations of IHL[215]. In addition to the norms recalled above in this paragraph, the letter sent to the Secretary of State for Foreigners and Commonwealth Affairs maintains that legal obligations upon the UK derived also from common art.1 to the *Geneva Conventions*, which calls the High Contracting Parties to ensure respect for the provisions contained therein[216]. Al-Haq also recalled art.41(2) of the *Draft Articles on Responsibility of States for*

[211] Art.41(2), *Ibidem*. The same obligation has been recalled by the ICJ in its *Wall Advisory Opinion* at para.159. See also O'BROIN, (2011) p.62, *supra*, footnote 182.
[212] See O'BROIN, pp.62-63, *Ibidem*. See also *Al-Haq commences legal proceedings against UK Government over breach of legal obligations in relation to the Occupied Palestinian Territory*, available at: http://www.alhaq.org/advocacy/targets/accountability/69-al-haq-vs-uk/220-al-haq-commences-legal-proceedings-against-uk-government-over-breach-of-legal-obligations-in-relation-to-the-occupied-palestinian-territory. See also *Seeking to Uphold Third State Responsibility: The case of Al-Haq v. UK*, available at http://www.badil.org/en/al-majdal/item/12-article-2.
[213] See *Al-Haq commences ...*, *Ibidem*; see also *Draft Articles ...*, art.40, commentary, para.5.
[214] See *Al-Haq v. UK*, available at: http://www.alhaq.org/advocacy/targets/accountability/69-al-haq-vs-uk/243-al-haq-v-uk-.
[215] See the *Pre-action protocol letter to Secretary of State for Foreign & Commonwealth Affairs David Miliband*, (3 February 2009), available at http://www.alhaq.org/advocacy/targets/accountability/69-al-haq-vs-uk/243-al-haq-v-uk-.
[216] Common art.1 of the *Geneva Conventions*. "The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances".

Internationally Wrongful Acts, which, read jointly with art.16, provides for the complicity of the State aiding or assisting another State in the commission of a wrongful act, to the extent that it contributed to it[217]. As spelled out in the *Draft Articles*, the aid and assistance must be born with "knowledge of the circumstances of the internationally wrongful act"[218]. Since the UK had previously received the various letters referred to above, Al-Haq argued that it was aware of the policy of human rights disregard brought about in the Occupied Palestinian Territories, in particular with regard to *Operation Cast Lead*. Following the exposition of the legal ground for action, the letter refers to the policy enforced by the UK Government concerning arms trade with Israel[219], providing details on various agreements between the Governments of Israel and the UK. Finally, the letter underlined the obligations arising upon the High Contracting Parties to investigate and prosecute those responsible for the perpetration of grave breaches of the *Geneva Conventions* by means of universal jurisdiction. After a negative response from the Treasury Solicitor, which rejected the allegations collected in the letter[220], the claim was reiterated before the High Court of England and Wales, recalling the arguments above mentioned. According to the plaintiff, the UK had failed to comply with four duties arising from Israel's violations of IHL:

> "(a) to denounce and not to recognise as lawful situations created by the other state's actions; (b) not to render aid or assistance in maintaining the situation; (c) to cooperate with other states using all lawful means to bring the breaches to an end; (d) to take all possible steps ensure that the state in question respects and complies with its obligations under the Conventions."[221]

The claimant maintained, first, that the UK had failed to comply with the obligation under letter (a), due to its "[...] failure [...] to stand up and denounce Israel's actions

[217] See *Draft Articles ...*, art.16. "A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (a) that State does so with knowledge of the circum-stances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that State".
[218] See *Draft Articles ...*, art.41, commentary, para.11.
[219] For further details on the issue of UK-Israel arms trade, see the *Pre-action protocol letter ...*, *supra*, footnote 181. See also *Salah Hasan v. Secretary of State for Trade and Industry*, (19 November 2001) Case No.CO/9605/2006, High Court of Justice Queen's Bench Division Administrative Court. See also the appeal judgement on 25 November 2008, Case No.C1/2008/0030, Supreme Court of Judicature Court of Appeal (Civil Division).
[220] See *Response of the Secretaries of State*, (20 February 2009) available at http://www.alhaq.org/advocacy/targets/accountability/69-al-haq-vs-uk/243-al-haq-v-uk-.
[221] See *Grounds for Judicial Review Claim*, lodged with the High Court, (24 February 2009), para.84.

[...]" as well as "[...] to abstain from any statements or actions which might imply acceptance of or acquiescence in the situation created by Israel's unlawful actions"[222]. Secondly, the Defendant had allegedly failed to comply with the obligation under letter (b) due to its arms trading with Israel and its participation in the *EU-Israel Association Agreement*[223]. Thirdly, the obligation under letter (c) had been allegedly breached by failing to adopt proactive steps in elaborating a viable solution, also in international *fora*, for the purpose of putting an end to the violations[224]. Finally, al-Haq complained that the UK had not complied with the obligation under letter (d) by failing to undertake a set of possible steps such as:

> "a. the exercise of universal jurisdiction to prosecute or extradite any individuals involved in grave breaches, b. the enforcement of the system for suppression of such breaches, c. significant diplomatic pressure, d. the introduction of measures to the Security Council under Chapter VII of the UN Charter (the Security Council's powers to maintain peace); e. clear public denunciation, f. lawful sanctions, g. application of pressure through withdrawal of preferential trading terms, or h. convening a meeting of the Conference of the Parties."[225]

The complainant submitted that, although these matters fell within the competence of the executive branch, given their importance, the Court had competence to review the compliance with international obligations[226]. In light of these allegations and in the interest of justice, the plaintiff called the defendant to comply with the obligations above mentioned, by suspending the agreements between the UK and Israel concerning arms trading, and exerting the power to denounce and take further action, also in cooperation with other States, in order to ensure the respect for IHL[227]. On 27 July 2009, the Divisional Court of the High Court of Justice of England and Wales refused al-Haq's application for permission to seek judicial review of the UK's actions in the light of Israel's violations of IHL and other relevant peremptory norms of International

[222] Paras.101-104, *Ibidem*.
[223] Paras.105-115, *Ibidem*.
[224] Paras.116-118, *Ibidem*. The plaintiff claims that the UK Government could have, for instance, called for the convening of the Conference of the Parties of the *Geneva Conventions*, introduced resolutions into the UN Security Council, undertaken other unspecified lawful steps as a Permanent Member of the Council and of the G8 and a leading member of the EU, but failed to do.
[225] Para.121, *Ibidem*.
[226] See paras.119-125, *Ibidem*.
[227] See paras.126-127, *Ibidem*.

Law[228]. The judges found against al-Haq on two grounds: justiciability and standing. As for justiciability, the Court held that the present case, at bottom, implied an evaluation regarding the conduct of Israel.

> "The need, for the purpose of the present application [...], to assume facts, does not permit the court to ignore the claim in substance being made; for condemnation of Israel"[229]

Consequently, it rejected its competence, also affirming that such an evaluation would be based on facts whose verifiability "is not plain and acknowledged"[230]. The Court also ruled that matters of foreign policy, among which it places the guidelines spelled out in Al-Haq's application, are to be decided by the executive branch. As a matter of facts, the Court held that what the applicants is asserting is not a right, as it is required to trigger the competence of the Court, rather a prerogative[231]. On this latter ground, the lack of a right in the claim, the Court also excluded standing, which should be evaluated "[...] in the context of the right being claimed"[232]. However, al-Haq appealed the judgement, maintaining that the Court of First Instance had misinterpreted the arguments of the applicants, whose aim was to challenge the UK Government on matters regarding its own obligation, rather than requesting the Court to judge on Israel's violations, which, by the way, were, according to al-Haq, sufficiently substantiated in facts, by several reports – to which the *FFMGC Report* had to be added in the appeal judgement -, so as to consider that Israel had actually disregarded core principles of International Law[233]. Despite these arguments, the Court of Appeal rejected the claim on the same grounds as the Court of First Instance[234].

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[228] See *Judgement handed down in the case of Al-Haq v Secretary of State for Foreign and Commonwealth Affairs*, available at http://www.alhaq.org/advocacy/targets/accountability/69-al-haq-vs-uk/249-judgment-handed-down-in-the-case-of-al-haq-v-secretary-of-state-for-foreign-and-commonwealth-affairs.

[229] See *The Queen on the Application of Al-Haq v Secretary of State for Foreigner and Commonwealth Affairs*, (27 July 2009), Divisional Court of the High Court of Justice, Case No.C0/1739/2009, para.41.

[230] Para.42, *Ibidem*.

[231] Paras.43-46, *Ibidem*.

[232] Para.48, *Ibidem*.

[233] See Al-Haq Press Release *Court of Appeal to Hear Case Challenging The UK's Relationship With Israel*, available at http://www.alhaq.org/advocacy/targets/accountability/69-al-haq-vs-uk/284-court-of-appeal-to-hear-case-c hallenging-the-uks-relationship-with-israel.

[234] *Al-Haq v Secretary of State for Foreign and Commonwealth Affairs*, (25 February 2010) Court of Appeal of England and Wales, Case No. Unknown to the author. See, for details, Al-Haq Press Release

2.3 European Union Obligations

The European Union and its Member States recognize the importance of compliance with IHL and accountability for international crimes. The steps undertaken in this framework are notable. On 13 June 2002 the Council of the European Union established a European network of contact point in respect of persons responsible for genocide, crimes against humanity and war crimes[235]. Interestingly, the decision recalled the complementary role of the ICC (and, more generally, of International Criminal Justice) with respect to national criminal jurisdictions[236] and the importance of the cooperation between States in bringing about investigations and prosecutions, as well as in exchanging information, regarding international crimes[237]. Subsequently, on 8 May 2003, the Council adopted a decision on the investigation and prosecution of genocide, crimes against humanity and war crimes[238]. The decision was aimed at enhancing the cooperation among law enforcement authorities of the different Member States of the EU, in the investigation and prosecution of individuals who have committed or taken part in the commission of genocide, crimes against humanity and war crimes, as referred to in the *Rome Statute* of the ICC[239]. The decision provided for the establishment of specialist units within the competent law enforcement authorities and it was also concerned with immigration authorities, so as to provide for the exchange of

Al-Haq v UK Secretary of State for Foreign & Commonwealth Affairs at al.: Denial of Claim, available at http://www.alhaq.org/advocacy/targets/accountability/69-al-haq-vs-uk/289-al-haq-v-uk-secretary-of-state-for-foreign-a-commonwealth-affairs-et-al-denial-of-claim.

[235] See Council Decision 2002/494/JHA (13 June 2002), *Official Journal of the European Union L 167, 26/06/2002*.

[236] "Whereas" Nos.2, 3 and 4, *Ibidem*. "(2) The Rome Statute of the International Criminal Court of 17 July 1998 affirms that the most serious crimes of concern to the international community as a whole, in particular genocide, crimes against humanity and war crimes, must not go unpunished and that their effective prosecution must be ensured by taking measures at national level and by enhancing international cooperation. (3) The Rome Statute recalls that it is the duty of every State to exercise its criminal jurisdiction over those responsible for such international crimes. (4) The Rome Statute emphasises that the International Criminal Court established under it is to be complementary to national criminal jurisdictions.".

[237] "Whereas" Nos.6, 8, 9 and 10, *Ibidem*. "(6) The investigation and prosecution of, and exchange of information on, genocide, crimes against humanity and war crimes is to remain the responsibility of national authorities, except as affected by international law. [...] (8) The successful outcome of effective investigation and prosecution of such crimes at national level depends to a high degree on close cooperation between the various authorities involved in combating them. (9) It is essential that the relevant authorities of the States Parties to the Rome Statute, including the Member States of the European Union, cooperate closely in this connection. (10) Close cooperation will be enhanced if the Member States make provision for direct communication between centralised, specialised contact points."

[238] See Council Decision 2003/335/JHA (8 May 2003), Official Journal of the European Union, L 118/12, 14/5/2003.

[239] Art.1, *Ibidem*.

relevant information when the alleged perpetrator of one of the international crimes referred to above is present in one of the Member States of the EU. Furthermore, the Council of the EU adopted the *European Union Guidelines on promoting compliance with international humanitarian law*[240]. Having recalled the concept of individual criminal liability for serious breaches of IHL entailing war crimes, the *Guidelines* provide for mechanisms of assessment, monitoring and reporting on recommendations for action[241]. The *Guidelines* also provide a set of possible actions to be taken with respect to Third Countries' violations, including: political dialogue; general public statements; demarches and/or public statements about specific conflicts; restrictive measures or sanctions; cooperation with international bodies; crisis-management operations; encouraging the promotion of accountability through judicial tools in the countries where the crimes have been perpetrated; training; and restrictions to arms trade where IHL violations occurs or may occur in the targeted country for licences agreements[242].

The recommendations of the *FFMGC Report* did not specifically and individually address the European Union. However, as part of the international community, the EU was and still is involved in the process of implementation of the Report's recommendations. This was confirmed by the European Parliament's endorsement of the *FFMGC Report*[243]. However, according to BADIL[244] and the Russell Tribunal on Palestine[245]:

> "While the European Union and its member states are not the direct perpetrators of these acts, they nevertheless violate international law, either by failing to take the measures that Israel's conduct requires them to take, or by contributing directly or

[240] *European Union Guidelines on promoting compliance with international humanitarian law*, Council Decision 2005/C 327/04, Official Journal of the European Union C 327/4, 23/12/2005.
[241] Part III(A), *Ibidem*.
[242] Part III(B), *Ibidem*.
[243] See *supra*, p.145.
[244] See O'BROIN, pp.63-65, *supra*, footnote 182. BADIL, for which the working paper has been drafted, is an NGO based in Bethlehem, whose work is concerned with Palestinian Residency and Refugee Rights.
[245] See *Conclusions of the First International Session of the Russell Tribunal on Palestine*, (Barcelona, 1-3 March 2010), available at http://www.russelltribunalonpalestine.com/en/. The Russell Tribunal on Palestine, also known as International War Crimes Tribunal, is a non-profit organization, created in 2009, involved in the promotion of peace and justice in the Israeli-Palestinian conflict, in the framework of International Law. For further details see the website and BARAT F., MACHOVER D., *The Russel Tribunal on Palestine*, in MELONI and TOGNONI (eds.), (2012) pp.527-542, *supra*, Chapter I, footnote 4.

> indirectly to such conduct. Moreover, the European Union and its member states do not comply with the relevant provisions of its own constitution, which confirms the attachment of the European Union to fundamental rights and freedoms, states its willingness to uphold and promote the respect of International Law and take appropriate initiatives to that end (European Union Lisbon Treaty, preamble, art.2, 3, 17 and 21)."[246]

As far as *Operation Cast Lead* is concerned, the Tribunal's conclusions recalled several agreements stipulated within the European context[247], whose clauses bind the Member States to certain obligations with respect to human rights abuses, such as the *Declaration on Principles of International Law Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*[248], the *Euro-Mediterranean Association Agreement*[249], the *Geneva Conventions*. In addition, the Tribunal recalled also the *Draft Articles on Responsibility of States for Internationally Wrongful Acts*. The Tribunal's findings claim that the EU has failed to comply with its obligations under International Law in different manners, which, as far as *Operation Cast Lead* is concerned, involve:

i) The arms trading between the EU and Israel;
ii) The failure to complain about the destruction of properties during the military operations;
iii) The failure call upon the Israeli Government to comply with its Human Rights obligations, arising from the various above mentioned agreements.[250]

The Tribunal further declared that such conducts entail the EU complicity with the actions carried out by Israel, according to the *Draft Articles*[251]. To conclude, the Tribunal recommended, among other things, that the Member States of the EU take all feasible steps to ensure the suspension of those agreements with Israel, which

[246] Para.20, *Conclusions ..., Ibidem*.
[247] Paras.21-27, *Ibidem*.
[248] See UN General Assembly resolution 2625 (XXV) of 24 October 1970.
[249] See the *Euro-Mediterranean Association Agreements*, (20 November 1995) available at http://europa.eu/legislation_summaries/external_relations/relations_with_third_countries/mediterranean_partner_countries/r14104_en.htm. In particular, see the agreement with Israel (Official Journal of the European Union, L 147 of 21/6/2000).
[250] Para.28, *Conclusions ..., supra*, footnote 211.
[251] Paras.29-31, *Ibidem*.

undermine the full compliance with international legal obligations arising from Israel's violations. Additionally, it recommended that States implement the *FFMGC Report*'s recommendations, through the exercise of universal jurisdiction and remove any impediment which may obstacle the full compliance with the duty to prosecute or extradite.[252]

3. The International Criminal Court

The ICC was involved in the recommendations of the FFMGC at different stages. The UNHRC was recommended to submit the Report to the Office of the Prosecutor of the ICC[253]. The Mission also recommended the UN Security Council to refer the situation in Gaza to the ICC Prosecutor, acting under Chapter VII of the UN Charter, if investigations in Israel and the Palestinian Territories revealed to be insufficient and not in good-faith[254]. Furthermore, the Report addressed the Prosecutor of the ICC, recommending to decide "[...] as expeditiously as possible" on the status of Palestine for the purposes of the *ICC Statute*, following a declaration issued by the Palestinian Authorities accepting the jurisdiction of the Court[255].

The ICC could have taken an active role in ensuring justice and accountability for the events occurred during *Operation Cast Lead*, being the tool of last resort for combating impunity. However, discussing the role of the ICC with respect to the situation in Gaza requires to deal with at least two interrelated issues: on the one hand, the Prosecutor's discretion in initiating an investigation; and on the other hand, the Palestinian statehood for the purposes of the exercise of the Court's jurisdiction. This latter issue is of particular interest, especially in the light of the recent developments at the UN level, which determined the upgrade of Palestine to the *status* of "observer State" in the General Assembly. Furthermore, the issue of the Palestinian statehood fuelled great debate among scholars, to the point that a specific window has been opened in the

[252] Para.34, *Ibidem*.
[253] Para.1968(c) of the *FFMGC Report*.
[254] Para.1969(b)-(e) of the *FFMGC Report*.
[255] Para.1970 of the *FFMGC Report*.

Human Rights & International Criminal Law Online Forum, a partnership developed by the Office of the Prosecutor and the UCLA Law School[256].

3.1 Jurisdiction, Triggering Mechanisms and Admissibility before the ICC

The ICC jurisdiction is defined through four different parameters: the temporal (or *ratione temporis*) jurisdiction; the territorial (or *ratione loci*) jurisdiction; the personal (or *ratione personae*) jurisdiction; and the subject-matter (or *ratione materiae*) jurisdiction[257]. Temporal jurisdiction is defined in accordance with the fundamental principle of non-retroactivity, also known as *nullum crimen sine lege praevia*[258] (art.22 of the *Rome Statute*). Art.11 of the *Rome Statute* provides that the Court will exercise its jurisdiction with respect to crimes committed after the entry into force of the Statute. However, in the event that a State becomes a party to the Statute after its entry into force (*i.e.* 1 July 2002), the jurisdiction will be exercised with respect to crimes committed after the Statute's entry into force for the new State party, unless it declares to accept the jurisdiction retroactively, pursuant to art.12(3) of the Statute[259]. Territorial jurisdiction is set forth in art.12(2) and (3) of the *Rome Statute*. Art.12(2)(a) provides that, if the Court is triggered by a State Party or by the Prosecutor *motu proprio*, the offence has to be committed within the territory of a State Party in order to conclude

[256] Website available at http://uclalawforum.com/.

[257] See SCHABAS, (2011) p.69, *supra*, Chapter I, footnote 65; DELLA MORTE G., in MELONI and TOGNONI (eds.), (2012) pp.36-41, *supra*, Chapter I, footnote 4.

[258] See more extensively on this issue: SCHABAS, pp.69-76, *Ibidem*; CASSESE, (2008) pp.43-44, *supra*, Chapter I, footnote 47. The issues of *ratione temporis* jurisdiction and the principle of non-retroactivity are interrelated. SCHABAS notes that, at the Rome Conference, they were discussed under the same agenda item, and proposals were brought forth to include both concepts in a single provision (p.70). However, the final outcome, as it merges from the *Rome Statute*, is shaped so as to set forth the two concepts in two different provisions: art.11 of the *Rome Statute* refers to the issue of temporal jurisdiction, while art.22 provides for the *nullum crimen sine lege praevia* principle. SCHABAS argues that the two notions cannot be confused, since one may challenge the jurisdiction of the Court on the ground of a violation of the principle of non-retroactivity. This would be the case of a State accepting the jurisdiction of the Court after 1 July 2002 (date of the entry into force of the Statute) with an *ad hoc* declaration, pursuant to art.12(3) of the Statute, thus retroactively. One may question the Court's jurisdiction arguing that the crimes under art.5 of the Statute do not reflect customary law, and thus would not justify prosecution. However, the author recognizes that such argument, although not entirely frivolous, would hardly be accepted by an international court, nor practice has shown any indication in this sense.

[259] Art.11 of the *Rome Statute of the ICC*. See also WILLIAMS S.A., in TRIFFTERER O. (ed.), (1999) *Commentary on the Rome Statute of the International Criminal Court. Observers' Notes, Article by Article*, Nomos Verlagsgesellschaft Baden-Baden, pp.323-328; BOURGON S., *Jurisdiction ratione temporis*, in CASSESE A., GAETA P., JONES J.R.W.D. (eds.), (2002) *The Rome Statute of the International Criminal Court: A Commentary. Volume I*, Oxford University Press, pp.343-558.

that the ICC has jurisdiction *ratione loci*[260]. Art.12(3), instead, provides for the acceptance of the ICC jurisdiction after the entry into force of the Statute, and thus extends the Court's territorial jurisdiction over crimes committed within the boundaries of the State lodging such declaration of acceptance[261]. In the event that jurisdiction is conferred to the Court with a Security Council referral, pursuant to art.13(b) and Chapter VII of the *UN Charter*, the Court is able to exercise its jurisdiction upon the territory for which the referral was issued[262]. The Court can also exercise its jurisdiction in the event that a crime within its subject-matter jurisdiction is committed by a citizen of a State Party, irrespective of the *locus commissi delicti*[263]. Personal jurisdiction stems from a number of provisions of the *ICC Statute*. The Court exercises its jurisdiction over natural persons, according to artt.1 and 25 of the *Rome Statute*[264]. Individuals may be tried by the ICC for having committed a crime within its subject-matter jurisdiction only if they are nationals of a State Party or of States who have accepted the Court's jurisdiction pursuant to art.12(3) of the Statute (principle of nationality). Otherwise, nationals of States who are not parties to the Statutes may be tried for having committed a crime within the territory of a State Party (principle of territoriality). Nationals of States who are not parties to the Statute may also be tried if the Court's jurisdiction is triggered by the Security Council with a referral under art.13(b)[265]. With regard to the jurisdiction *ratione personae*, it is to be recalled: the exclusion of jurisdiction over persons below the age of 18[266]; the non-applicability of the "superior order" as a defence, the issue of command responsibility, which allows for the prosecution of high-ranking officials who may have not materially perpetrated a crime but are considered

[260] Art.12(2)(a) of the *Rome Statute of the ICC*. See also BOURGON S., *Jurisdiction ratione loci*, in CASSESE *et al.*, pp.564-565, *Ibidem*.
[261] Art.12(3) of the *Rome Statute of the ICC*. See also SCHABAS, (2011) p.81, *supra*, Chapter I, footnote 65.
[262] Art.13(b) of the *Rome Statute of the ICC*. See also SCHABAS, *Ibidem*.
[263] Art.12(2)(b) of the *Rome Statute of the ICC*.
[264] See FRULLI M., *Jurisdiction ratione personae*, in CASSESE *et al.* (eds.), (2002) p.532, *supra*, footnote 259. Although a proposal was advanced, in particular by France, during the Rome Conference, it was agreed not to include the criminal liability of juridical persons, due to the differences between national legal systems, which would have caused serious problems to the ICC.
[265] See art.12(2)(a) and (b), (3) of the *Rome Statute of the ICC*. See also FRULLI, pp.535-536, *Ibidem*. Interestingly, in a footnote (n.35), the author recalls the argument according to which the major flaw of the personal jurisdiction of the ICC would be represented by the lack of any reference to the custodial State, in the event that it be a Party to the *Rome Statute*. It is argued that, in such event, the purpose of combating impunity would have been achieved more effectively. See also SCHABAS, (2011) pp.76-77, *supra*, Chapter I, footnote 65.
[266] Art.26 of the *Rome Statute of the ICC*. See also FRULLI, pp.533-535, *Ibidem*.

responsible on the ground of their top position in the chain of command[267]; the non-applicability of the statute of limitations[268]; and the irrelevance of the official capacity, which otherwise may bar the Court from exercising its jurisdiction, due to the immunities or procedural rules that may be attached to that *status*[269]. Subject-matter jurisdiction, finally, is set forth in art.5 of the *Rome Statute*, and it encompasses war crimes, crimes against humanity, genocide and the crime of aggression[270].

The ICC jurisdiction can be triggered in three different ways[271]:

i) By a State Party referral (art.13(a) of the *Rome Statute*). According to art.14 of the Statute, "[a] State Party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed requesting the Prosecutor to investigate the situation [...]"[272]. The referring State should specify as far as possible the circumstances of the case and provide the Court with the relevant documentation[273]. There is no further requirement as for the referring State, which could be any contracting State, due to the fact that the crimes within the Court's jurisdiction are of universal concern[274];

[267] Art.28 of the *Rome Statute of the ICC*.
[268] Art.29 of the *Rome Statute of the ICC*.
[269] Art.27 of the *Rome Statute of the ICC*. See also SCHABAS, (2011) pp.80-81, *supra*, Chapter I, footnote 65.
[270] Art.5 of the *Rome Statute of the ICC*. For a definition of each of the four core crimes, see artt.6, 7, 8, 8*bis* of the *Rome Statute*.
[271] The International Law Commission draft proposed only two paths for triggering the jurisdiction of the Court: the Security Council referral of a situation and the inter-State complaint. The latter was substantially different from how it is shaped nowadays, since it required that both the referring and referred States accepted the jurisdiction, with the exception of the referral for the crime of genocide, if both States were parties to the Convention for the Prevention and Punishment of the Crime of Genocide. The triggering procedure on the Prosecutor's initiative was not contemplated due to the reticence of the States. The new ICC was substantially different from previous experiences of international criminal tribunals, whose prosecutors enjoyed a certain degree of discretion due to the limited scope of the judicial bodies (for instance, the ICTY Prosecutor could rely on large discretion in targeting certain individuals, as long as he or she did not exceed the limits of its jurisdiction, which was limited to acts committed in the Former Yugoslavia). The ICC could represent a substantial threat for States, who might want to shield their nationals from prosecutions, since its scope is much broader, extending to the territory of its State Parties. (see SCHABAS, (2011) pp.157-159, *supra*, Chapter I, footnote 65).
[272] Art.14(1) of the *Rome Statute of the ICC*. See more diffusely, KIRSCH P., ROBINSON D., *Referral by States Parties*, pp.619-625, in CASSESE *et al.* (eds.), (2002), *supra*, footnote 259; SCHABAS, pp.159-167, *Ibidem*.
[273] Art.14(2) of the *Rome Statute of the ICC*.
[274] See CASSESE, (2008) p.397, *supra*, Chapter I, footnote 47.

ii) By a Security Council referral (art.13(b) of the *Rome Statute*). A referral by the Security Council can be issued acting under Chapter VII of the UN Charter. It is to be noted that the Security Council will be likely to refer only situations in which crimes amounting to a "threat to or a breach of the peace", since Chapter VII authorizes it to act in such events[275]. In addition, the Security Council is able to refer a situation to the Prosecutor of the ICC, as far as it does not exceed the limits set forth in the *Rome Statute*. Thus, a referral concerning crimes that do not fall within the ICC jurisdiction *ratione materiae* will not be valid[276];

iii) By the Prosecutor *proprio motu* (art.13(c) of the *Rome Statute*). The power of the Prosecutor to trigger the Court is based on the information he or she may receive from a number of different sources[277]. A distinction may be drawn between the "preliminary probing" and the "investigation proper"[278]. The former refers to the corroboration of the evidence received by the Prosecutor, in order to establish whether there is "a reasonable basis to proceed with an investigation"[279]. The Prosecutor may rely on information collected from governmental sources[280], intergovernmental organizations, NGOs, etc[281]. After that, the Prosecutor must submit "a request for authorization of an investigation" to the Pre-Trial Chamber of the ICC, which shall grant the request, if it considers "that there is a reasonable basis to proceed with an investigation"[282]. The Pre-

[275] See Chapter VII of the *Charter of the United Nations*, headed "Action with respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression". See, also, CASSESE, *Ibidem*. More diffusely on the Security Council referral, see SCHABAS, (2011) pp.168-176, *supra*, Chapter I, footnote 65; CONDORELLI L., VILLALPANDO S., *Referral and Deferral by the Security Council*, pp.628-655, in CASSESE *et el.*, (2002), *supra*, footnote 259.
[276] See SCHABAS, p.169, *Ibidem*.
[277] The inclusion of the Prosecutor's *proprio motu* investigations in the *Rome Statute* represented one of the most controversial issues at the Rome Conference, and was opposed in particular by the US, China and Israel. Such provision, in fact, confers to the Prosecutor discretionary powers, typical of national justice systems. However, due to the objections raised by the countries opposing the proposal, the final outcome resulted in a limited discretion, since the initiative of the Prosecutor is regulated by art.15 of the *Rome Statute*, which provides for counter-weights such as the authorization of the Pre-Trial Chamber of the ICC for initiating a formal investigation. Additionally, it is to be remembered that the prosecutorial discretion can be exercised taking into account the principle of complementarity which regulates the relationship of the Court with national jurisdictions (see *infra*). See SCHABAS, pp.176-182, *Ibidem*.
[278] CASSESE, (2008) p.396, *supra*, Chapter I, footnote 47.
[279] Art.15(3) of the *Rome Statute of the ICC*.
[280] No reference is made to the nature of the governments referred to, which may be of State Parties or non-party States.
[281] Art.15(2) of the *Rome Statute of the ICC*.
[282] Art.15(4) of the *Rome Statute of the ICC*.

> Trial Chamber will *prima facie* assess also the admissibility and jurisdictional issues[283].

Finally, before proceeding with the analysis of the case of Gaza, admissibility has to be briefly outlined. Admissibility is set forth in art.17 of the *Rome Statute* and it is concerned with whether a matter falling under the Court's jurisdiction should be litigated before it[284]. An assessment regarding admissibility must take into account three separate issues: complementarity, gravity, and *ne bis in idem*. Complementarity regulates the relationship between the Court and national jurisdictions who can claim that the case is to be prosecuted before their courts, on the ground of one or more of the four recognized principles of jurisdiction: territoriality, active personality, passive personality, and universality[285]. In the *Rome Statute*, paragraph 10 of the Preamble, art.1 and art.17 provide for the complementary role of the ICC with respect to national jurisdictions[286]. According to art.17(1) of the *Rome Statute*, the Court is barred from exercising its jurisdiction over crimes which have been investigated and prosecuted by a State rightfully claiming jurisdiction over the case, unless it is unwilling or unable to genuinely carry out those investigations and prosecutions (art.17(1)(a) of the *Rome Statute*). Equally inadmissible is the case for which the prosecution of the alleged perpetrator has been dismissed, following formal investigations, unless such decision is the result of the unwillingness or inability of the State to prosecute (art.17(1)(b) of the *Rome Statute*). Art.17(2) and (3) also set out the indicator for assessing whether the State is unwilling or unable to carry out investigations or prosecutions. Unwillingness

[283] *Ibidem*. For further details on the triggering procedure on prosecutorial initiative, see also KIRSCH P., ROBINSON D., *Initiation of Proceedings by the Prosecutor*, pp.657-664, in CASSESE *et al.* (eds.), (2002), *supra*, footnote 259.
[284] See SCHABAS, (2011) pp.187-190, *supra*, Chapter I, footnote 65.
[285] See CASSESE, (2008) pp.336-339, *supra*, Chapter I, footnote 47.
[286] Para.10 of the Preamble provides that "[...] the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions"; art.1 of the Statute declares that the Court "[...] shall be complementary to national criminal jurisdictions"; art.17 recalls both art.1 and para.10 of the Preamble, and set forth the circumstances under which the case shall be declared inadmissible before the Court. There were two underlying reasons for designing the role of the ICC with respect to national jurisdictions according to the complementarity principle. On the one hand, it was believed to be inappropriate to overwhelm the Court with cases from all over the world, since this would have impaired its efficiency. It was believed that the vast majority of the cases should be prosecuted at national level, notwithstanding the hurdles that the Court might encounter in conducting investigations, which is a much easier task for national courts and bears drawbacks for the collection of evidence. On the other hand, complementarity was conceived as a tool for ensuring and respecting the sovereignty of States, on which basis they would claim their jurisdiction over a particular case. See CASSESE, p.343, *Ibidem*.

can be established: if national investigations and proceedings have been undertaken for the purpose of shielding the alleged perpetrator from criminal responsibility (art.17(2)(a)); if an undue delay in initiating investigations and prosecutions has occurred, whereby the genuine intention to bring to justice alleged perpetrators is undermined (art.17(2)(b)); if the investigations and prosecutions have been conducted in a manner which is not independent and impartial, thus revealing that the intention to bring to justice alleged perpetrators is not genuine (art.17(2)(c))[287]. A State is unable to investigate or prosecute, when, due to a collapse of its national judicial system it is not able to: obtain the accused; collect the necessary evidence or testimonies; carry out its proceedings[288]. The test of complementarity applies also with respect to State not parties to the *Rome Statute*, thus barring the Court to exercise its jurisdiction, if the non-party State is willing and able to genuinely investigate and prosecute the conduct which may be criminalized by other legal instruments (art.18(1) of the Statute). The gravity requirement for admissibility stems from art.17(1)(d) of the Statute, which declares that the Court shall reject admissibility if the crime is not of sufficient gravity to justify its intervention. It is not clear what the Statute means with "sufficient gravity", since all the crimes falling within the subject-matter jurisdiction of the Court are considered the "most serious crimes of concern to the international community"[289]. Conflicting interpretations have succeeded, since in 2010, the Pre-Trial Chamber II, in the case regarding the situation in Kenya, ruled that "gravity may be examined following a quantitative as well as a qualitative approach", and referred to some elements set forth in Rule 145 of the *Rules of Procedure and Evidence* of the Court, regarding sentencing. In particular, these would include "the scale of the alleged crimes [...]; the nature of the unlawful behaviour or of the crimes allegedly committed[...]; the means employed for the execution of the crime [...]; and the impact of the crimes and the harm caused to

[287] See also SCHABAS, (2011) pp.193-194, *supra*, Chapter I, footnote 65; HOLMES J.T., *Complementarity: National Courts versus the ICC*, pp.674-677, in CASSESE *et al.* (eds.), (2002), *supra*, footnote 259.
[288] Art.17(3) of the *Rome Statute of the* ICC. See also HOLMES, pp.677-678, *Ibidem*. According to CASSESE, the State could be deemed to be unable due to legislative impediments, such as amnesty laws, or statute of limitations, which prevent the judges to commence proceedings against alleged suspected (CASSESE, (2008) p.344, *supra*, Chapter I, footnote 47).
[289] Para.4 of the Preamble of the *Rome Statute of the ICC*.

victims and their families"[290]. Finally, the *ne bis in idem* principle or prohibition of double jeopardy is set out in artt.17(1)(c) and art.20 of the *Rome Statute*. It determines that no proceeding shall be initiated before the Court against a person who has already been convicted or acquitted by another court, for the crimes set forth in artt.5, 6, 7, 8, and 8*bis* of the Statute with respect to the same conduct, unless those proceedings were not conducted independently and impartially, or were carried out in order to shield the alleged perpetrators from prosecution[291]. The provision provides also for the situation to the contrary, *i.e.* the inadmissibility of any proceeding before other courts for the crimes under art.5 of the Statute if the perpetrator has already been tried before the ICC (art.20(2) of the Statute), and for the inadmissibility before the Court of any case concerning a crime for which it has already convicted or acquitted the perpetrator (art.20(1) of the Statute)[292]. To conclude, it is to be remembered that the admissibility test applies to any triggering mechanism for the setting in motion of the Court[293].

3.2 The Palestine Declaration recognizing the ICC Jurisdiction

On 21 January 2009, the PNA Minister of Justice lodged on behalf of the PNA a declaration recognizing the ICC jurisdiction over act committed in the territory of Palestine since 1 July 2002, pursuant to art.12(3) of the *Rome Statute of the ICC*, with the Registrar of the Court[294]. The Registrar, pursuant to Rule 44(2) of the *Rules of Procedure and Evidence* of the Court, acknowledged receipt and informed the PNA of the effects stemming from the acceptance of the ICC jurisdiction, pursuant to art.12(3). In addition, the ICC Registrar specifically declared that notice of the reception of the

[290] SCHABAS, (2011) p.203, *supra*, Chapter I, footnote 65, quoting *Situation in Kenya* (ICC-01/09), Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, 31 March 2010, para.60.
[291] Art.20(3) of the *Rome Statute of the ICC*. On the prohibition of double jeopardy, see also VAN DEN WYNGAERT C., ONGENA T., *Ne bis in idem Principle, Including the Issue of Amnesty*, pp.705-729, in CASSESE *et al.* (eds.), (2002) *supra*, footnote 259; SCHABAS, pp.203-205, *Ibidem*.
[292] SCHABAS notes the asymmetry between the provision set forth in art.20(2) and art.20(3), since the former refers only to crimes against humanity, war crimes, genocide and the crime of aggression in general (art.5 of the Statute), while the latter provides for each of the conducts described in artt.6, 7, 8, 8*bis*. See SCHABAS, *Ibidem*.
[293] CASSESE, (2008) p.344, *supra*, Chapter I, footnote 47.
[294] See the *Declaration recognizing the Jurisdiction of the International Criminal Court*, submitted to the Registrar by the Minister of Justice of the PNA, Mr Ali Khashan, available online on the ICC website, at http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/registry/Pages/declarations.aspx.

declaration would be "without prejudice to a judicial determination on the applicability of Article 12, para 3 to your correspondence"[295].

The above mentioned declaration raises a fundamental question, which needs to be tackled in order to assess the validity of the PNA's submission: does the PNA hold the authority to issue such declaration? Numerous legal opinions have fuelled the subsequent debate among scholars from all over the world[296]. The present work does not aim at presenting extensively and in full details the whole range of argumentations. Rather, an outline of the main stances will be provided.

The arguments that have been advanced in the international arena can be divided into two main categories. On the one hand, one can place those that seek to legitimize an intervention of the ICC on the ground of the Palestinian statehood and those opposing this argument, denying that Palestine is a State. On the other hand, those proposing a functional interpretation of art.12(3) of the *Rome Statute* and those opposing it may be placed. It is to be noted that both these sets of arguments may lose relevance at least as far as Palestine is concerned, in the light of the recent vote within the UN General Assembly, which conferred the *status* of "observer State" to Palestine, seemingly clarifying its place in the International Community and how other States look at it.

3.2.1 Palestinian Statehood

As for the first set of arguments, the starting consideration is to be found in art.12(3) of the *Rome Statute*, which requires the declaration of acceptance of the ICC jurisdiction be lodged by a State. Thus, only if Palestine is to be considered a State, it could be entitled to issue such declaration. In addition, in the event that Palestine is considered a State, it is to be spelled out over which territory it could claim authority so as to determine the boundaries within which the Court will be authorized to exercise its jurisdiction. Subsequently to the submission of the Palestinian declaration recognizing the Court's jurisdiction, a number of legal opinion were addressed to the Office of the

[295] See DELLA MORTE, pp.39-40, *supra*, footnote 257, quoting the Registrar's response. See also *Question and Answers* about the declaration lodged by the PNA, available on the ICC website at http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/registry/Pages/declarations.aspx.

[296] The reader may be provided with a hint of the never-ending debate, by considering the collection of contributions from eminent scholars edited by MELONI and TOGNONI, (2012) *supra*, Chapter I, footnote 4.

ICC Prosecutor[297]. In brief, the main arguments against the Palestinian statehood can be summarized as follows:

i) Some Palestinian officials' statements appear to rebut the idea of an already existing Palestinian State, in the sense that they call for the future establishment of an independent State of Palestine[298];

ii) The negotiations between the Palestine Liberation Organization (PLO) and the Israeli Government, especially with the 1995 Interim Agreement, reveal that Israel retained the most fundamental functions with respect to the Palestinian territories, namely the responsibility for conducting foreign relations and the control of borders of the Gaza Strip and the West Bank. According to some authors, this would demonstrate that "[...] the PA [Palestinian Authority] was not able to freely govern any territory in the West Bank or Gaza Strip without the express warrant of Israel"[299] and that Palestine does not qualify for statehood, as far as it does not satisfy one of the criteria set forth in art.1(d) of the *Montevideo Convention on the Rights and Duties of States*, namely foreign relations[300];

iii) Palestine is not considered a State within the UN context due to its "observer non-State entity" *status* within the General Assembly. Additionally, the lexicon of the UN bodies, including the label adopted within the Rome Conference for the establishment of the ICC, suggests that no State is recognized, but a mere entity[301];

iv) The ICJ Advisory Opinion concerning the legality of the Wall appears to confirm the view according to which no Palestinian State can be considered

[297] See a list of submissions, published online on the ICC website at http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/decision%20not%20to%20proceed/palestine/Pages/summary%20of%20submissions%20on%20whether%20the%20declaration%20lodged%20by%20the%20palestinian%20nati.aspx.

[298] See *Legal Memorandum Opposing Accession to International Criminal Court Jurisdiction by Non-State Entities*, (9 September 2009) submission of the European Centre for Law and Justice, pp.12-15; ASH R.W., (2009) *Is Palestine a "State"? A Response to Professor John Quigley's Article, "The Palestine Declaration to the International Criminal Court: The Statehood Issue"*, pp.443-447, in MELONI and TOGNONI (eds.), (2012) *supra*, Chapter I, footnote 4.

[299] ASH, p.448, *Ibidem*.

[300] See the letter addressed to the former Prosecutor of the ICC, submitted by the International Association of Jewish Lawyers and Jurists (9 September 2009); see in particular the attached opinion of SHAW M., *In the Matter of the Jurisdiction of the International Criminal Court with regard to the Declaration of the Palestinian Authority*, para.34.

[301] See ASH, (2009) pp.450-452, *supra*, footnote 298. See also BENOLIEL D., PERRY R., (5 November 2009) *Israel, Palestine and the ICC*, submission to the ICC Prosecutor, pp.12-15.

existing, on the following ground: self-defence under art.51 of the UN Charter cannot be invoked as a justification for legitimizing the construction of the Wall, since it only applies to inter-State disputes, while it does not apply to Israel as opposed to Palestine; Judge Elaraby's separate opinion claims that "[t]he independence of the Palestinian Arab State [had] not yet materialized"[302];

v) The 1988 Palestine declaration of statehood[303] was ineffective, due to competing claims attributable to other entities who undermines its validity[304]. In addition, it is submitted that the British Mandate over Palestine was not meant to preserve it for the future establishment of an Arab State. First of all, even if the former Mandate of Palestine, under the auspices of the League of Nations, was bound to result in an Arab State when expired, the UN, who may have endorsed the Palestinian statehood, did not have the authority to do so, due to the fact that it was not replacing the former organization (*i.e.* the League of Nations) and thus, did not inherited its obligations under International Law[305]. Furthermore, it is argued that rejection by Palestinian Authorities to accept the original partition plan, designed within the UN, has meant rejecting the UN granting of sovereignty and, since then, due to the unwillingness of Arab neighbouring States to relinquish sovereignty over the territories of the West Bank and the Gaza Strip to Palestinian Authorities, following the Arab-Israeli War (1948-49), no other claim could be established apart from that arising in favour of Israel, which is emphasised by the official intention on part of Israel to apply the *Fourth Geneva Convention*, despite having no legal duty to do so[306].

[302] See ASH, pp.452-453, *Ibidem*; *Legal Memorandum Opposing ...*, pp.16-17, *supra*, footnote 298.
[303] In 1988 the Palestinian National Council, the former representative body for Palestine, proclaimed "the establishment of the State of Palestine in the land of Palestine with its capital at Jerusalem". See UN Doc. A/43/827S/20278, (18 November 1988), *Political Communiqué and Declaration of Independence*, Palestinian National Council, (15 November 1988).
[304] BENOLIEL and PERRY, pp.16-19, *supra*, footnote 301. The authors claimed that the 1948 declaration of the so called All-Palestine Government and the 2009 declaration by an anti-Hamas leader in Gaza challenged the validity of the 1988 declaration, qualifying as competing claims. See also QUIGLEY J., (2010) *The International Criminal Court and the Gaza War*, The Palestine Yearbook of International Law, Vol.XVI, p.42.
[305] BENOLIEL and PERRY, pp.18-19, *Ibidem*. See also QUIGLEY, p.43, *Ibidem*. For a more profound historical analysis of the situation in Palestine prior to the establishment of the State of Israel in 1948, see VERCELLI C., (2010) *Storia del conflitto israelo-palestinese*, Editori Laterza.
[306] ASH, (2009) pp.455-458, *supra*, footnote 298.

Against such interpretation, arguments in favour of the Palestinian statehood may be opposed. Hereinafter they will be briefly recalled:

i) First of all, a historical argument is put forward. It is argued that since 1974, when the UN General Assembly pronounced in favour of the self-determination of the Palestinian people, and subsequently admitted the PLO as an "observer non-State entity" to the UN, a process of recognition of the Palestinian statehood was triggered within the International Community[307]. According to public sources, at the moment 131 members of the UN recognize Palestine[308];

ii) The argument according to which there are no competing claims over the West Bank and Gaza. Egypt did not claim sovereignty over the Gaza Strip, following the Arab-Israeli War. Jordan did claim a title but "[...] subject to Palestine's overriding claim to the territory", so that it renounced to such claim in 1988, following the Palestinian declaration of independence. In addition, following the Six-Day War (1967), Israel occupied the Gaza Strip and the West Bank but did not claim sovereignty. Nor it could have claimed it, due to the prohibition to acquire territories by means of force, set forth in IHL[309];

iii) The *de facto* recognition of Palestine as a State by the same Israeli Government, implied in the demand for recognition of the State of Israel addressed to the PLO, in particular during the negotiation headed by then-Prime Minister Yitzhak Rabin[310];

iv) The argument according to which Palestine does not lack elements for asserting its statehood, not even as far as the conduct of foreign relations is concerned, since it is a matter under the responsibility of the PLO, despite the provisions set

[307] See QUIGLEY J., (2009) *The Palestine Declaration to the International Criminal Court: The Statehood Issue*, in MELONI and TOGNONI (eds.), (2012), pp.431-434, *supra*, Chapter I, footnote 4. In particular, QUIGLEY reports that, after the 1988 declaration of independence (see *supra*, footnote 302), Palestine was recognized by 89 States. Many others declared that they did not fully recognize the State of Palestine, but only to a certain degree, which means that they did not denied its existence. QUIGLEY quotes the then-French President Mitterand who stated that "[m]any European countries are not ready to recognize a Palestine state. Others think that between recognition and non-recognition there are significant degrees; I am among these" (QUIGLEY, p.434, in MELONI and TOGNONI).
[308] See http://en.wikipedia.org/wiki/International_recognition_of_the_State_of_Palestine.
[309] See QUIGLEY, pp.434-435, *Ibidem*.
[310] QUIGLEY, pp.435-436, *Ibidem*.

forth in the post-Oslo agreements, and International Law is indifferent towards the internal asset of powers[311];

v) The widespread confusion between statehood and independence. The latter does not, in fact, undermine the former. Statehood is not affected when the territory is militarily occupied and, thus, independence is denied[312].

3.2.2 Functional Interpretation of Article 12(3) of the *Rome Statute of the International Criminal Court*

A second approach to the ICC jurisdiction over the crimes committed during *Operation Cast Lead* and, more generally, to the legitimization of the declaration lodged by the PNA focuses on the meaning of art.12(3) of the *Rome Statute*, which is reproduced below:

> "If the acceptance of a *State* which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting *State* shall cooperate with the Court without any delay or exception in accordance with Part 9."[313] [emphasis added]

At first glance, it would appear that only States could accept the Court's jurisdiction and, thus, any other entity, not amounting to a State within the classical definition provided by International Law[314], should be refused the possibility to become Party to the Statute. Such interpretation, however, would not completely undermine the possibility for those entities, who do not qualify as States, to obtain justice for international crimes committed within their territory, since one of the basis for the setting in motion of the ICC may be provided by a referral of the UN Security Council, acting under Chapter VII of the *UN Charter*, pursuant to art.13(b) of the *Rome*

[311] QUIGLEY, (2010) p.39, *supra*, footnote 304. See also QUIGLEY J., (2009) *Palestine Statehood: A Rejoinder to Professor Robert Weston Ash*, in MELONI and TOGNONI (eds.), (2012) pp.462-463, *supra*, Chapter I, footnote 4.
[312] QUIGLEY, (2009) pp.465-467, *Ibidem*.
[313] Art.12(3) of the *Rome Statute of the ICC*.
[314] A classical definition of State may be drawn from art.1 of the *Montevideo Convention on the Rights and Duties of States*, which reads as follows: "The state as a person of international law should possess the following qualifications: a) a permanent population; b) a defined territory; c) government; and d) capacity to enter into relations with the other states."

Statute[315]. Yet the Security Council is a political body, where political considerations may impinge on the effective pursuit for justice, through the exercise of the veto power by the Permanent Members. An eventuality not so far from the reality in the case of Gaza, since the call for a Security Council Resolution under Chapter VII, recommended by the FFMGC in the event that impunity remain uncontested at the national level, is still unanswered. Despite the argument justifying the inaction of the Council on the ground of opportunity and the still possible future action[316], such mechanism risks to jeopardize the fundamental aim underlying the establishment of an International Criminal Court, *i.e.* the fight against impunity[317]. Art.31(1) of the *Vienna Convention on the Law of Treaties* reads:

> "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[318]

Thus, apart from a literal interpretation of the wording of a treaty, a contextual and teleological interpretations should be adopted. According to the Preamble of the *Rome Statute of the ICC*, the Court was established:

> "[...] to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes"[319]

Consequently, it can be assumed that the word "State" in art.12(3) cannot be interpreted in a sense which would risk to leave certain situations in a "jurisdictional vacuum"[320]. Among these, one could place Palestine, in the event that its statehood be

[315] See RONEN Y., (2010) *ICC Jurisdiction Over Acts Committed in the Gaza Strip: Article 12(3) of the ICC Statute and Non-State Entities*, in MELONI and TOGNONI (eds.), (2012) p.482, *supra*, Chapter I, footnote 4.
[316] *Ibidem*. RONEN maintains that the Security Council's power of referral to the ICC was included in the Statute, in full knowledge of the political nature of the Council itself. Consequently, the drafters accepted that, on the ground of opportunity, the Council could decide that a particular situation could not be referred to the Court, despite its gravity, because of political considerations. At the same time, such power would not undermine a possible future referral.
[317] See, for instance, SHANY Y., (2010) *In Defence of Functional Interpretation of Article 12(3): A Response to Yaël Ronen*, in MELONI and TOGNONI (eds.), (2012) p.504, *supra*, Chapter I, footnote 4.
[318] Art.31(1) of the *Vienna Convention on the Law of Treaties*, (23 May 1969).
[319] Para.5 of the Preamble of the *Rome Statute of the ICC*. The previous paragraph also stresses the need for accountability: "Affirming that the most serious crimes of concern to the international community as a whole *must not go unpunished and that their effective prosecution must be ensured* by taking measures at the national level and by enhancing international cooperation" [emphasis added].
[320] The expression is borrowed from RONEN, (2010) p.482, *supra*, footnote 315.

rebutted. In fact, it would appear that no other entity, apart from the Security Council, could trigger the jurisdiction of the Court. Since the Council has revealed to be unwilling to refer the situation to the ICC, then the call for accountability contained in the *FFMGC Report* would remain "dead letter"[321]. Thus, the only way to ensure accountability for international crimes falling under the subject-matter jurisdiction of the Court would be to abide by a broader interpretation of art.12(3) of the Statute. The first attempts to propose such approach was undertaken by Professor PELLET A. in a submission to the Office of Prosecutor[322] as well as by al-Haq[323]. Accordingly, the Court, in determining the effects of the Declaration lodged by the PNA, should not attempt to establish whether Palestine qualifies as a State under International Law. Conversely, it should only ascertain whether the statutory conditions for the exercise of its jurisdiction are matched. In other words, it should determine whether Palestine can be considered a "State" to the effects of the ICC jurisdiction. PELLET draws a comparison with the General Assembly request to the ICJ to issue an Advisory Opinion concerning the *status* of Kosovo. In that occasion, the Assembly asked the Court whether "the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo [is] in accordance with international law"[324]. In order to support its claim, the same author rely on the well-established principle of the *kompetent kompetenz*, according to which the Court is the judge of its own jurisdiction[325].

[321] The Mission noted that "[...] long-standing impunity has been a key factor in the perpetuation of violence in the region and in the reoccurrence of violations, as well as in the erosion of confidence among Palestinians and many Israelis concerning prospects for justice and a peaceful solution to the conflict" (para.1964 of the *FFMGC Report*) and that "[...] meaningful and practical steps to end impunity for such violations would offer an effective way to deter such violations recurring in the future [...] [and that] the prosecution of persons responsible for serious violations of international humanitarian law would contribute to ending such violations, to the protection of civilians and to the restoration and maintenance of peace" (para.1966 of the Report).

[322] See PELLET A., (18 February 2010) *Les effets de la reconnaissance par la Palestine de la compétence de la CPI*, submission to the Office of the Prosecutor, available at http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/decision%20not%20to%20proceed/palestine/Pages/summary%20of%20submissions%20on%20whether%20the%20declaration%20lodged%20by%20the%20palestinian%20nati.aspx.

[323] See KEARNEY M., DENAYER S., (14 December 2009) *Issues Arising from the Palestinian Authority's Submission of a Declaration to the Prosecutor of the International Criminal Court under Article 12(3) of the Rome Statute*, Al-Haq Position Paper, submission to the Office of the Prosecutor, available at *Ibidem*.

[324] See PELLET, (2010) p.411, *supra*, footnote 322. In its subsequent reasoning Professor PELLET recalls a number of treaties and conventions requiring such a functional approach (see pp.413-415).

[325] Artt.18 and 19 of the *Rome Statute of the ICC*. See also p.415, *Ibidem*.

It is submitted that a non-State entity or a "Quasi-State", in order to accept the Court's jurisdiction, pursuant to art.12(3) of the *Rome Statute*, should be able to transfer criminal jurisdiction to the ICC, which encompasses two requisites: the possession of jurisdiction over criminal matters, and the capability to delegate such *potestas* to the Court[326]. According to RONEN, issues relating to the PNA's criminal jurisdiction within the Gaza Strip should be resolved in the light of its own *status* in the Strip, rather than in the light of the Israeli-PLO Interim Agreement, whose actual validity is questionable[327]. The author concludes that the PNA lacks the required control over the territory in the Gaza Strip, both if it is admitted that Israel continues to be the Occupying Power or the occupation has come to an end. In the first event, criminal jurisdiction would remain with Israel, while in the second stance the PNA would lack effective control over the territory due to the competing claim of Hamas[328]. In addition, it is argued that the PNA faces serious hurdles, imposed by the Agreement, in conducting foreign relations. On this ground, the attempt to authorize the ICC to exercise its jurisdiction over its territory appears to run contrary to the provisions of the Agreement. Differently, it would be easier to accept the validity of the declaration if it were submitted by the PLO, which is entitled to broader foreign relations powers[329]. However, such arguments may be challenged and even dismissed, at least of three grounds. In the first place, as underlined also by Al-Haq:

> "The exclusion of Israelis from PA jurisdiction as provided for in the Interim Agreement cannot legitimately be considered as extending to the international crimes of war crimes and crimes against humanity as to do so would be incompatible with international law"[330]

[326] See RONEN, (2010) p.483, *supra*, footnote 315.
[327] The Israeli-PLO Interim Agreement, also known as Oslo II, is an agreement regulating complex issues concerning the partition of competences between the Israeli Government and the Palestinian side in the West Bank and the Gaza Strip, which was signed on 28 September 1995 (see the online text available at http://www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/THE+ISRAELI-PALESTINIAN+INTERIM+AGREEMENT.htm). Under the Agreement, criminal jurisdiction over Israeli remains with Israel. The validity of the Agreement may be questioned, due to the fact it was meant to expire within 5 years from its ratification, the time period deemed necessary to reach a further agreement. However, such agreement was never concluded, and, seemingly, the 1995 Agreement expired, despite Israel's claim that it is still in force. See more specifically RONEN, p.483 at footnote 84, *Ibidem*.
[328] RONEN, pp.484-485, *Ibidem*.
[329] SHANY, (2010) pp.506-509, *supra*, footnote 317.
[330] KEARNEY and DANAYER, (2009) para.36, *supra*, footnote 323.

Such consideration flows from the fact that the Palestinian Authority is expected to abide by the obligations to investigate and prosecute, set forth in art.146(2) of the *Fourth Geneva Convention*, which cannot be applied discriminatorily, *i.e.* excluding certain individuals on the ground of nationality (in this case, Israeli alleged perpetrators)[331]. Secondly, the Oslo accords, whose validity is questionable on the ground of their temporal scope, may not be regarded as limiting the PNA's ability to fulfil with its obligations under International Law. In particular, it is argued that the Palestinian ability to conduct foreign relations cannot be challenged on the ground of the Oslo Accords, due to the fact that they had not been registered with the UN, pursuant to art.102 of the *UN Charter*, and, in case of conflict between obligations arising from the Charter and other international agreements, the provisions set forth in the former should prevail[332]. Finally, as for the claim that the PNA is not capable of delegating jurisdiction over criminal matters regarding the Gaza Strip, due to the loss of control over the Strip, one could argue that "[t]he right to delegate jurisdiction is reflective of an internationally recognized legal authority, and not of the material ability of actually exercising jurisdiction [...]"[333]. On the contrary, the loss of control over a portion of territory is probably the most appropriate situation for a self-referral to the ICC, since the State delegating jurisdiction would be unable to genuinely carry out investigations and prosecutions[334].

Lastly, it is argued that, admitting a functional interpretation of art.12(3) of the *Rome Statute*, would risk to jeopardize the role of the Prosecutor or the Court itself, since they would be entrusted with an exceptional competence, *i.e.* the recognition of a State[335]. However, such sensitive activity should be prerogative of States, not of a Court. The Prosecutor, by recognizing a non-State entity to the effects of the ICC jurisdiction, would risk to politicize its function. A Prosecutor's decision, be it positive or negative, may be referred for judicial review to the Pre-Trial Chamber or the Pre-Trial Chamber

[331] For an extensive analysis of the application of the obligations to investigate and prosecute, see paras.33-35, *Ibidem*. See also GOWLLAND-DEBBAS V., (2010) *Note on the Legal Effects of Palestine's Declaration Under Article 12(3) of the ICC Statute*, in MELONI and TOGNONI (eds.), (2012) p.524, *supra*, Chapter I, footnote 4.
[332] Art.103 of the *UN Charter*. See also GOWLLAND-DEBBAS, p.523, *Ibidem*.
[333] SHANY, (2010) p.506, *supra*, footnote 317.
[334] *Ibidem*. See also QUIGLEY, (2010) p.39, *supra*, footnote 304.
[335] RONEN, (2010) pp.485-490, *supra* footnote 315.

on its own initiative may proceed in this direction[336]. In any event, it is submitted that the Court should not engage in a function that is generally carried out by State. For this reason, the Assembly of the State Parties may perhaps be a more appropriate *forum* for addressing such issue. Even in this case there is a risk of compromising the role of the ICC, since, it is maintained, non-State entities or quasi-State would most probably recur to the Court as a ground for battling over their *status* aspirations in the International Community. Nor would it be arguable the introduction of specific criteria for admitting only certain non-State entities, namely those which do not present problems of competing claims over the territory, since this would foster suspects of favouring the PNA in particular[337]. By contrast, SHANY maintains that the risk of politicization could be easily dispelled, thanks to the discretionary powers of the Prosecutor, who could reject jurisdiction over contentious situations, especially where competing sovereignty claims insist, on the ground of the "interest of justice"[338]. In addition, the acceptance of a declaration lodged by a non-State entity would not engage the Prosecutor in the assessment of contested situations, such as the boundaries of a "State", as it would be the case of Palestine[339]. On the contrary, the functional approach would allow the Prosecutor to assume jurisdiction over a situation, with no need to take position on the precise statehood *status*.

On 3 April 2012, more than three years after the PNA Declaration, the Office of the Prosecutor issued its stance on the matter, avoiding to assume a decision on the statehood of Palestine to the effects of art.12(3) of the *Rome Statute*, and deferring it to the competent bodies of the UN system.

> "In interpreting and applying article 12 of the Rome Statute, the Office has assessed that it is for the relevant bodies at the United Nations or the Assembly of the State Parties to make the legal determination whether Palestine qualifies as a State for the purpose of acceding to the Rome Statute and thereby enabling the exercise of jurisdiction by the Court under art.12(1). The Rome Statute provides no authority for the Office of the Prosecutor to adopt a method to define the term

[336] Art.53(3) of the *Rome Statute of the ICC*.
[337] RONEN, (2010) pp.489-490, *supra*, footnote 315.
[338] Art.53(1)(c) of the *Rome Statute of the ICC*.
[339] SHANY, (2010) p.505, *supra*, footnote 317.

"State" under article 12(3) which would be at variance with that established for the purpose of article 12(1)."[340]

3.3 The Prosecutorial Discretion *vis-à-vis* the Case of Gaza

Although the Palestine Declaration lodged under art.12(3) of the *Rome Statute* did not refer to a specific crime or situation[341], in the immediate aftermath of its issuance a number of submissions to the Office of the Prosecutor, among which one could recall the complaint presented before the ICC by DEVERS G. and FANON-MENDES-FRANCE M.[342], led the Prosecutor to commence a preliminary examination[343], pursuant to artt.12 and 15 of the *Rome Statute*. As it has been pointed out above, the preliminary enquiry did not result in formal investigations, nor did it referred the decision to the Pre-Trial Chamber for authorization. Rather a sort of "non-decision" was endorsed, namely the decision not to determine whether Palestine could be considered a State for the purposes of the ICC jurisdiction, since such determination is to be assumed by the competent bodies of the UN.

In the light of the discretion that the ICC Prosecutor enjoys in carrying forward its functions, a question may arise: were there other options for the Prosecutor? Could the above mentioned decision have been different?

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[340] See *Situation in Palestine*, Update (3 April 2012), Office of the Prosecutor of the ICC, available at http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/decision%20not%20to%20proceed/palestine/Pages/update%20on%20situation%20on%20palestine.aspx.

[341] Despite the wording of art.12(3) of the *Rome Statute*, which appears to require that the declaration be lodged with specific reference to a crime (see SCHABAS, (2011) p.88, *supra*, Chapter I, footnote 65, for genuine questions regarding the scope of art.12(3) of the Statute), it is argued that nothing shall prevent a non-Party State to extend the temporal scope beyond a specific event, including retroactively, and to issue a declaration with reference to the "crimes", in general, as stemming from art.5 of the Statute. After all, this stance could easily be inferred from a reading of art.44 of the *Rules of Procedure and Evidence*, which requires "[...] the Registrar [...] [to] inform the State concerned that the declaration under article 12, paragraph 3, has as a consequence the acceptance of jurisdiction with respect to the crimes referred to in article 5 of relevance to the situation and the provisions of Part 9, and any rules thereunder concerning States Parties, shall apply". See QUIGLEY, (2010) pp.29-30, *supra*, footnote 304; OLÀSOLO H., (2005) *The Triggering Procedure of the International Criminal Court*, Martinus Nijhoff Publishers. See also AZAROV V., (16 February 2009) *Article 12(3) of the Rome Statute: An Intrinsic Misnomer?*, available online at http:// www.internationallawobserver.eu/2009/02/16/article-123-of-the-rome-statute-an-intrinsic-misnomer/.

[342] See MELONI and TOGNONI, (2012) pp.61-75, *supra*, Chapter I, footnote 4, for a full reproduction of the complaint.

[343] See http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/decision%20not%20to%20proceed/palestine/Pages/palestine.aspx.

As it is well known, the *Rome Statute*, treasuring certain national legal traditions, empowered the Prosecutor of the ICC with a certain degree of discretion in exercising its functions[344]. For reasons of space and completeness, no extensive coverage of each single aspect will be provided to the reader. Rather, I will focus, in particular, on the role of the prosecutorial discretion throughout the pre-investigation phase, namely the preliminary examination.

During this early stage of the procedure before the ICC, the Prosecutor is considered to be the primary organ, due to the role that the *Rome Statute* shaped for it. It is the Prosecutor to be entrusted with: assessing the *notitia criminis*; carrying out the preliminary examination; determining whether there is "a reasonable basis to proceed" with an investigation[345]. Nevertheless, the Statute designs a complex system for limiting its discretion. Apart from formal and "pragmatic" accountability[346], the Statute provides for judicial control. In particular, if the Prosecutor commences a preliminary examination, pursuant to artt.13(c) and 15 of the Statute, when it has collected enough evidence to establish that there is "a reasonable basis to proceed with an investigation", it must submit to the Pre-Trial Chamber a "request for authorization of an investigation". If the Pre-Trial Chamber grants the authorization, the Prosecutor may initiate the investigation[347]. If, on the contrary, the Pre-Trial Chamber denies the authorization to proceed with the investigation, the Prosecutor is not barred from applying again to the Pre-Trial Chamber for an authorization, on the ground of new

[344] See, extensively, OLÀSOLO H., (2003) *The prosecutor of the ICC before the initiation of investigations: A quasi-judicial or a political body?*, International Criminal Law Review, Vol.3, No.2, pp.87-150; DANNER A.M., (2003) *Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court*, The American Journal of International Law, Vol.97, No.3, pp.510-552; GREENAWALT A.K.A., (2007) *Justice without Politics? Prosecutorial Discretion and the International Criminal Court*, Journal of International Law and Politics, Vol.39, No.3, pp.583-673.

[345] OLÀSOLO, (2003) p.91, *Ibidem*.

[346] Formal control is referred to the power of the Assembly of the States Parties to remove the Prosecutor if he/she is found to have engaged in serious misconduct or to have breached his/her duties; "pragmatic" control or accountability is carried out by States, NGOs and other entities, in front of which the Prosecutor will be accountable, and who retain a certain power to "sanction" the Prosecutor (States, for instance, may be less inclined to cooperate with the Court, especially those who are not bound by the provision of the Statute, namely the Non-Party States. See DANNER, (2003) pp.524-525, *supra*, footnote 344.

[347] Art.15(3) and (4) of the *Rome Statute of the ICC*. See also CASSESE, (2008) p.396, *supra*, Chapter I, footnote 47; SCHABAS, (2011) pp.178-179, *supra*, Chapter I, footnote 65; OLÀSOLO, (2003) pp.98-101, *supra*, footnote 344.

elements[348]. In the event that the Prosecutor considers that there is no "reasonable basis to proceed with an investigation", he/she shall inform those who provided the information that represented the basis for the preliminary examination (art.15(6) of the *Rome Statute*) as well as the Pre-Trial Chamber, if his/her decision was based solely on the fact that it would not be in the interest of justice to commence an investigation (art.53(1) of the *Rome Statute*). The decision of the Prosecutor not to submit to the Pre-Trial Chamber for authorization does not prevent those who provided information to renew their claim by presenting new evidence (art.15(6) and Rule 49 of the *Rules of Procedure and Evidence*). In addition, if the decision of the Prosecutor not to proceed with investigations may be reviewed at the initiative of the Pre-Trial Chamber if it is based on the "interest of justice" (art.53(3)(b) of the *Rome Statute* and Rule 109 of the *Rules of Procedure and Evidence*). In addition, the jurisdiction of the Courts and the ruling on admissibility may be challenged by the accused, other persons involved or States, before the Pre-Trial Chamber, if a request for indictment has not yet been issued[349]. In addition, the Prosecutor is entitled to seek *proprio motu* a ruling of the Pre-Trial Chamber on admissibility or jurisdiction, before the confirmation of charges[350]. A decision on admissibility or jurisdiction may be appealed to the Appeal Chambers, pursuant to art.82(1)(a) of the *Rome Statute*. Further safeguards are provided for in the Statute in order to limit the prosecutorial discretion with respect to situations referred to the ICC by States or the Security Council, pursuant to art.13(a) and (b). However, for the purposes of this work it will be sufficient to deal with the case of a prosecutorial *proprio motu* triggering procedure, since it appears that the preliminary examination on Palestine was initiated, pursuant to information provided by NGOs and other sources to the Office of the Prosecutor[351].

During the preliminary examination, the prosecutorial discretion is relevant to mainly two steps: the collection of evidence for supporting a decision to submit or not to the Pre-Trial Chamber for authorization, and the decision itself. As for the first stage of the

[348] Art.15(5) of the *Rome Statute of the ICC*. See also SCHABAS, (2011) p.180, *Ibidem*.
[349] See art.19(2), (4) and (6) of the *Rome Statute of the ICC*. See also CASSESE, (2008) p.400, *supra*, Chapter I, footnote 47.
[350] Art.19(3) of the *Rome Statute of the ICC*.
[351] According to the Office of the Prosecutor's website, over 400 communications of alleged crimes were received, form a wide range of sources. See http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/decision%20not%20to%20proceed/palestine/Pages/palestine.aspx.

examination, art.15(2) of the Statute provides for the possibility to seek evidence from UN bodies, States, intergovernmental organizations, NGOs, other reliable sources of evidence, including testimonies, at the discretion of the Prosecutor[352]. More interesting for the purposes of this work may be the making of the decision to submit for authorization before the Pre-Trial Chamber, which implies a decision to "proceed with an investigation"[353]. On what ground is the Prosecutor to decide in this direction? Art.15(3) of the *Rome Statute* requires a "reasonable basis", in order to proceed with the investigations. Rule 48 of the *Rules of Procedure and Evidence* provides that such a determination shall be made, pursuant to the criteria set out in art.53(1) of the Statute, namely:

> "(a) The information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed; (b) The case is or would be admissible under article 17; and (c) Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice"[354]

A policy Paper issued by the Office of the Prosecutor illustrates the meaning and scope of each of the above mentioned criteria[355]. However, it is not in question what the jurisdiction and admissibility requirements are[356]. Rather, what appears interesting, in the light of the decision of the Prosecutor to defer the determination regarding the Palestinian status for the purpose of triggering the Court's jurisdiction, is the meaning of "reasonable basis to believe".

An extensive explanation of the standard referred to in art.53(1)(a) of the *Rome Statute* can be found in the *Situation in the Republic of Kenya* Pre-Trial Chamber II ruling[357]. First of all, it is to be noted that, given the early stage of the procedure to

[352] See also Rules 46 and 47 of the *Rules of Procedure and Evidence*.
[353] Art.15(3) of the *Rome Statute of the ICC*.
[354] Art.53(1) of the *Rome Statute of the ICC*.
[355] See *Policy Paper on Preliminary Examinations*, Draft, (4 October 2010) The Office of the Prosecutor, available at http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/Pages/communications%20and%20referrals.aspx.
[356] See *supra*, pp.177-183, for a definition of jurisdiction and admissibility.
[357] See *Situation in the Republic of Kenya, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya*, (31 March 2010) ICC-01/09-19, paras.27 and *ff*.

which it is referred, such standard is "the lowest evidentiary standard provided for in the Statute"[358]. Hence, "[t]he information available to the Prosecutor is neither expected to be "comprehensive" nor "conclusive", if compared to evidence gathered during [...]" other steps of the proceeding[359]. The Court continues drawing a comparison between the standard required for the preliminary examination and the one that most resemble it, *i.e.* the standard governing the issuance of an arrest warrant, which is worded as "reasonable grounds to believe"[360]. Obviously, the two standards pursue completely different aims, since the latter is addressed at reasonably attributing an act to an individual, *i.e.* on the ground of individual criminal liability, while the former aims at reasonably establishing whether the evidence and information collected justify the initiation of an investigation. The Court notes that the jurisprudence of the ECtHR has interpreted the wording "reasonable grounds" as "reasonable suspicion", *i.e.* "presuppos[ing] the existence of facts or information which would satisfy an objective observer that the person concerned may have committed the offence"[361]. Yet, the Court underlines that the "reasonable basis" standard does not aim at the issuance of an arrest warrant, but at preventing the Court from proceeding "[...] with unwarranted, frivolous, or politically motivated investigations that could have a negative effect on its credibility"[362]. Recalling a previous ruling of the Appeals Chamber regarding the interpretation of the "reasonable grounds" standard for the purposes of applying art.58 of the *Rome Statute*, the Court underlined that "[...] it is sufficient at this stage to prove that there is a reasonable conclusion alongside others (not necessarily supporting the same finding),which can be supported on the basis of the evidence and information available"[363]. Hence, since the "reasonable basis" standard is even lower than the arrest warrant stage standard, it can be concluded that "the information provided by the Prosecutor certainly need not point towards only one conclusion"[364], if art.53(1)(a) is to be fulfilled.

[358] Para.27, *Ibidem*. See also WILKINSON, p.21, *supra*, Chapter I, footnote 16.
[359] Para.27, *Ibidem*.
[360] Para.29, *Ibidem*.
[361] Para.31, *Ibidem*. See, in particular, footnote 40, for references of the ECtHR judgements referred to.
[362] Para.32, *Ibidem*.
[363] Para.33, *Ibidem*.
[364] Para.34, *Ibidem*.

> "Accordingly, in evaluating the available information provided by the Prosecutor, the Chamber must be satisfied that there exists *a sensible or reasonable justification for a belief* that a crime falling within the jurisdiction of the Court "has been or is being committed". A finding on whether there is a sensible justification should be made bearing in mind the specific purpose underlying this procedure."[365] [emphasis added]

Obviously, a standard has to be referred to something. Hence, what is the "object" to be proved and to which apply the standard defined above? Art.53(1)(a) of the Statute refers to "a crime within the jurisdiction of the Court". Thus, what is expected from the Prosecutor is that he/she *prima facie* assesses whether the four jurisdictional criteria are matched. An investigation into the situation in Gaza during *Operation Cast Lead* has been denied on the ground of the absence of *consensus* regarding the Palestinian statehood. Yet the argument made by the Prosecutor appears to contradict the theoretical construction of the required standard of proof. Professor DAVID E. commented on a similar decision, adopted by the Swiss Government in response to the PLO letter, expressing the will to adhere to the Four Geneva Conventions and the two Additional Protocols on behalf of the State of Palestine[366]. The Government of Switzerland, in its capacity of depositary State of the Geneva Conventions responded that "[...] it was not in a position to decide whether the letter constituted an instrument of accession, "due to the uncertainty within the international community as to the existence or non-existence of a State of Palestine""[367]. DAVID points out that, as the depositary State, Switzerland did not comply with its obligations under art.76(2) of the *Vienna Convention on the Law of Treaties*, which requires that the depositary State acts impartially. As a matter of facts, Palestine was, at that time, recognized by a majority (although not large) of the Member States of the UN. By refusing to include Palestine among the States Parties to the *Geneva Conventions*, "[...] the Swiss attitude was partisan and not impartial"[368]. DAVID reports, as an example of attitude consistent with the requirement of impartiality, the note annexed to the regulations for implementing art.102 of the *UN Charter*, by which the Secretary-General points out that

[365] Para.35, *Ibidem*.
[366] DAVID E., in MELONI and TOGNONI, (2012) pp.24-30, *supra*, Chapter I, footnote 4.
[367] P.27, *Ibidem*.
[368] P.28, *Ibidem*.

"[r]egistration of an instrument submitted by a Member State [...] does not imply a judgement by the Secretariat on [...] the status of a party [...]. It is the understanding of the Secretariat that its action does not confer [...] on a party a status which it would not otherwise have"[369]. By way of comparison, the attitude of the Prosecutor, which deferred the decision as for Palestine statehood to the competent bodies of the UN on the ground that, despite the large recognition that Palestine is granted at the international level, it is still granted an "observer" non-State entity *status*, appears to run contrary to the principle of impartiality to which the Office of the Prosecutor should abide by[370]. At that time, Palestine was granted bilateral recognition by almost 130 States Parties to the UN, as well as different UN bodies[371]. In my view, there was indeed "reasonable basis" for establishing at least the temporal jurisdiction of the Court. In fact, it can reasonably be affirmed that one of the reasonable conclusions, among others, regarding the Palestinian Declaration was that it could amount to a valid delegation of criminal jurisdiction on behalf of the territory of Palestine. If that was not the rightful conclusion, however, nothing would have prevented the ICC Chambers or, earlier, the Pre-Trial Chambers to rule out the ICC jurisdiction, on the ground of the invalidity of the Palestine Declaration and, consequently, dismiss the case[372].

[369] *Ibidem*.

[370] See *Policy Paper on Preliminary Examination*, pp.7-8, *supra*, footnote 353.

[371] The Office of the Prosecutor itself acknowledges the wide list of actors that recognizes Palestine as a State. See para.7 of *Situation in Palestine*, *supra*, footnote 338. It has been argued that the decision of the Prosecutor is apparently in contradiction even with the practice of the Secretary-General to rely also on the determinations made by UN agencies in order to decide on statehood issues. In this sense, the Prosecutor's stance appears to be fully inconsistent with part of the UN system's attitude towards the Palestinian statehood, especially in the light of the admission of Palestine within the UNESCO. See SCHABAS W.A., (3 November 2011) *Relevant Depositary Practice of the Secretary-General and its Bearing on Palestine Accession to the Rome Statute*, PhD studies in human rights Blog, available at http://humanrightsdoctorate.blogspot.com.au/2011/11/relevant-depositary-practice-of.html. See also KEARNEY M., (5 April 2012) *The Situation in Palestine*, Opinio Juris Blog, available at http://opiniojuris.org/2012/04/05/the-situation-in-palestine/.

[372] See LATTANZI F., in MELONI and TOGNONI, (2012) p.55, *supra*, Chapter I, footnote 4. The author notes: "Why should the ICC Chambers not be able to assess the *status* of Palestine, whereas the ICJ judges, as some argued, would be more able to do it? The ICC Chambers have the power to interpret all the provisions of the Statute, not only those having a criminal nature but also the provisions having a stricter international nature". See also SCHABAS W.A., (8 April 2012) *The Prosecutor and Palestine: Deference to the Security Council*, PhD studies in human rights Blog, available at http://humanrightsdoctorate.blogspot.de/2012/04/prosecutor-and-palestine-deference-to.html. The author draws a comparison between artt.12(3) and 125 of the *Rome Statute*, arguing that only art.125 defers the question as to whether a certain entity can become a party to the ICC Statute to the Secretary-General. The article does it expressly. Instead, the Statute does not provide for specific rules as for the body charged with determining whether an entity can accept the ICC jurisdiction, pursuant to a declaration lodged under

A further argument in favour of a deferral to the Chambers rather than to political bodies such as the UN organs or the Assembly of the States Parties may be found, as already noted by MELONI C.[373], in the stance adopted by the Registry of the ICC, which is clearly expressed in the *Question and Answers* on the Palestine Declaration, published on the ICC website[374]. The answer to the first question reads as follows: "The Court has not made any determination on the applicability of article 12(3) to this particular communication. A conclusive determination on its applicability would have to be made *by the judges* at an appropriate moment" [emphasis added]. Such a pronouncement could have been sought also incidentally. As outlined above[375], the Prosecutor is entitled to seek a judicial ruling on admissibility and jurisdiction, pursuant to art.19(3) of the Statute[376].

Finally, it would appear that a decision to defer the determination of the Palestinian statehood for the accession to the ICC Statute to a political body, as the Prosecutor did in its update of the *Situation in Palestine*, may undermine the independence of the Court[377], rather than enhancing it.

3.4 Overcoming the *impasse*. Implications of the newly accorded "Observer State" Status to Palestine

On 29 November 2012, the General Assembly accorded to Palestine the "non-member observer State status", by a large majority[378]. Since that moment Palestine is included in the UN website among the Permanent Observer Non-Member States,

art.12(3) of the Statute. Nonetheless, this does not mean that such a determination should be sought outside the ICC system.

[373] See MELONI C., (25 September 2012) *Palestine and the ICC: Some Notes on Why It Is Not a Closed Chapter*, Opinio Juris Blog, available at http://opiniojuris.org/2012/09/25/palestine-and-the-icc-some-notes-on-why-it-is-not-a-closed-chapter/.

[374] See *Question and Answers* on the Palestine Declaration, available at http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/registry/Pages/declarations.aspx.

[375] See *supra*, pp.177-183.

[376] See also MELONI, (2012) *supra*, footnote 373. The author suggests that, in the light of the features of ongoing preliminary examinations, "[...] it is not consistent to only assign a judge to the situation once the investigation is actually open: judicial control over the operate of the accusation shall be possible also in the phase of the preliminary examination". Providing the Prosecution with a sort of judge-interlocutor during the investigations would enhance the capability of the Court to effectively handle certain issues, such as those relating to admissibility and jurisdiction.

[377] *Ibidem*.

[378] See UNGA Resolution 67/19, UN Doc. A/RES/67/19 (4 December 2012).

alongside with the Holy See[379]. The change may appear of little importance, since Palestine was already included among the "Permanent Observer" at the UN. However, one may note that, while only the Holy See was labelled as a "non-member State", Palestine was placed among a category called "other entity"[380]. Despite such differentiation, it would seem that no much difference distinguishes "non-member States" from "Permanent Observers". According to the UN website:

> "Non-Member States of the United Nations, which are members of one or more specialized agencies, can apply for the status of Permanent Observer."[381]

From a reading of the website, one could reasonably assume that "Permanent Observers" are all "non-member States". Since Palestine, despite being placed within the category "other entity", was, already before the recent GA vote, a "Permanent Observer", it would not be unthinkable to concede that it was also a "non-member State". Hence, as it is been argued above in this chapter, one could assume for granted Palestine statehood well before the UN concession[382]. Whatever the former UN stance was with regard to Palestine, the recent granting of the "non-member observer State" *status* has, at least, the merit, not purely symbolical, of clarifying the issue of the Palestinian statehood, both on a political and linguistic grounds. As for the political level, as it has been noted by MELONI[383], the vote has shown that a large majority of States recognizes Palestine as a State, or, at least, does not oppose its statehood. This is a datum that cannot be ignored. On the linguistic ground, instead, the consequences are even more apparent. What up to November was an "entity", borrowing the expression from the UN website dictionary, is now a "State", by definition. That said, the dilemma raised before the ICC Prosecutor appears to have been cleared up: Palestine is a State for the purposes of art.12(3) of the *Rome Statute*, but one could go even further by also affirming that Palestine is a State and, hence, it could seek full accession to the ICC system, pursuant to art.125 of the Statute. What is still unclear is the temporal scope of

[379] See the website at https://www.un.org/en/members/nonmembers.shtml.
[380] See SCHABAS, (2012), *supra*, footnote 372; MELONI C., (6 December 2012) *Il paradosso del riconoscimento dello Stato palestinese*, Il Fatto Quotidiano, Blog, available at http://www.ilfattoquotidiano.it/2012/12/06/paradosso-del-riconoscimento-dello-stato-palestinese/438272/.
[381] See the UN website at https://www.un.org/en/members/aboutpermobservers.shtml.
[382] See also SCHABAS, (2012), *supra*, footnote 372.
[383] MELONI, (2012), *supra*, footnote 380.

Palestinian statehood. Does it date back well before the UN recent vote? Or does it start with the UN vote? That is an issue that the Court may be called to deal with[384].

[384] See HELLER K.J., (1 December 2012) *Palestinian Statehood and Retroactive Jurisdiction*, Opinio Juris Blog, available at http://opiniojuris.org/2012/12/01/palestinian-statehood-and-retroactive-jurisdiction/.

Conclusions

Four years after *Operation Cast Lead*, justice for the heinous crimes allegedly perpetrated in the Gaza Strip is far from being achieved.

As it has been pointed out in the previous chapters, domestic investigations and prosecutions have revealed to be inadequate, having led to so few convictions that one could count them on one hand. This is striking in the light of the copious allegations that have been filed before Israeli courts, as well as before the competent Palestinian Authorities. Not that one would want to see the presumption of innocence overturned in favour of "justice at any cost", but it seems unlikely that the overriding majority of hundreds of complaints be unfounded, not proven, or not even investigated. Not to speak of the material difficulties encountered in acceding to justice systems that pose entry hurdles capable to discourage those who already lost their confidence in such mechanisms. That been said, one could draw only one conclusion, that Israel and the Palestinian Authorities have been unwilling or, at least, unable to genuinely pursue justice. The UNHRC implicitly acknowledged the same, when, in its resolution 16/32 of 25 March 2011, recommended the General Assembly "[...] to submit that report [the *FFMGC Report*] to the Security Council for its consideration and appropriate action, including consideration of referral of the situation in the Occupied Palestinian Territory to the prosecutor of the International Criminal Court, pursuant to article 13 (b) of the Rome Statute"[1]. Nevertheless, the Security Council, being a political body, failed to take appropriate action. Better said, it did not even deal with the matter.

Yet, the ICC refused to face the issue head on. The declaration accepting the ICC jurisdiction, lodged by the Palestinian Minister of Justice, provided the Prosecutor with a pretext to defer to the competent bodies of the UN the thorny decision regarding whether Palestine was a State or not. Was it really a deferral motivated by a technical

[1] See UN Doc. A/HRC/RES/16/32 (13 April 2011), at para.8.

issue? Or was it a deferral of justice, motivated by the underlying political rationale? There are at least two reasons which may justify such interrogatives: first, as I explained in the previous chapter, there was no need for the Prosecutor to deal with the Palestinian statehood in general, since he could have relied on a functional interpretation of art.12(3) of the *Rome Statute*; secondly, even now, after the GA vote, which clarified that Palestine is in fact a State, certain States are pressuring Palestine not to resort to the ICC. That was one of the issues during the negotiations preceding the GA vote[2]. Most surprisingly, such pressures came from States Parties to the ICC. Should not they encourage instead of discourage other States to join the Court?

As an alternative to the ICC, universal jurisdiction may be used to pursue accountability. However, despite the efforts undertaken in particular by certain NGOs, not much has been achieved. Dramatically, certain countries have amended domestic laws providing national courts with universal jurisdiction, in response to the complaints advanced by Israel[3]. Yet, an encouraging datum has to be noted. Requests for arrest warrants have been denied not on the ground of substantial considerations, but because of procedural hindrances, generally linked with the immunity granted to foreign officials. Conversely, the judges' reasoning appears to have acknowledged the seriousness of the acts perpetrated during *Operation Cast Lead*, as well as the *prima facie* responsibility of certain high-level officials. Thus, universal jurisdiction may be better suited for shedding light on the credibility of allegations of crimes committed, rather than representing an effective tool for accountability. In this sense, it would better be seen as a sort of "interim" stage in the path for justice, as somebody has already argued[4].

In this panorama, the FFMGC played the fundamental role of uncovering the facts, paving the way for further investigations and prosecutions. Despite the shortcomings of the accountability process, one should not forget that much of what has been done was indirectly triggered by the *FFMGC Report*. Even Israel, who decided not to cooperate

[2] See, for instance, Haaretz Online, *Day before the UN vote, U.K. makes clear: We'll support Palestinian bid only if assurances met* (28 November 2012) available at http://www.haaretz.com/news/dip lomacy-defense/day-before-un-vote-u-k-makes-clear-we-ll-support-palestinian-bid-only-if-assurances-me t.premium-1.481184.
[3] See the case of the UK, *supra*, Chapter III, pp.164-167.
[4] MELONI C., pp.46-47, in MELONI and TOGNONI (eds.), (2012), *supra*, Chapter I, footnote 4.

with the Mission, responded to the findings with official investigations, and it does not seem fortuitous that the number of cases investigated rapidly increased after the release of the Report, although much remains unsolved. Certainly, the merit goes to the panel of fact-finders, who demonstrated professionalism and even-handedness in performing their work.

The experience of the FFMGC is telling of more general considerations regarding fact-finding as a tool for addressing egregious violations of human rights. As pointed out above in this work, the legitimacy of fact-finding lies in its credibility in the eyes of the parties investigated and the international community. However, no comprehensive regulations exist on the issue, as it emerges from the analysis carried out in the first chapter. The result is that each mission provides for its own rules so as to better comply with the mandate provided by the parent body. The practice is consequently fragmented and the credibility test varies, jeopardizing the legitimacy of the tool. It is undeniable that strictly regulating a similar instrument may obstacle its capability to deal with certain situations. After all, the mandates are the most different and fact-finding should be subsequently adaptable. However, setting general binding rules may represent a good compromise between having only *soft law* rules and detailed binding rules.

The standard of proof assumes a central role for enhancing credibility. As it has been pointed out in the first chapter, there are different degrees of certainty that may be adopted, but one could wonder whether the standard should be adjusted according to the foreseeable outcome of the fact-finding process. In particular, should it be set upwards if criminal action is expected?[5] The FFMGC adopted a "balance of probabilities" standard, which appears to be sufficient for establishing a *prima facie* case in front of a criminal court, leading to investigations aimed at determining whether the acts appearing to have been committed could be reasonably attributed to particular individuals. The Prosecutor of the ICC is allowed to commence preliminary investigations if there is "a reasonable basis to believe" that a crime within the Court's jurisdiction has been committed, and the Pre-Trial Chamber shall subsequently grant permission for initiating formal criminal investigations when there is "a reasonable basis to proceed". According to the interpretation provided by the Court itself, such

[5] See WILKINSON, p.56, *supra*, Chapter I, footnote 16.

standard must be intended as entailing the possibility, among others, that the crime has actually been perpetrated[6]. Surely, one could argue that this standard matches the "balance of probabilities" test. Hence, one question may arise: is it conceivable a stronger cooperation between the ICC and certain UN non-judicial investigative mechanisms?

There are several arguments in favour of a positive answer, but, for the purpose of this work, it will be sufficient to underline few potentialities of UN human rights fact-finding *vis-à-vis* international prosecutions. First, as it has been underlined in the first chapter, international fact-finding, despite the absence of binding general rules, has developed since its early appearances. The techniques employed by fact-finders have evolved towards refined data-collection methods, new forms of corroboration of evidence and data-analysis, etc. Conversely, International Criminal Law investigations are relatively young and lack both experience and resources to effectively carry out their tasks. In this sense, human rights fact-finding may represent a reliable source of information for the ICC, at least in the early stage of the proceeding. Secondly, international prosecutions need States' cooperation in order to fulfil their goals, while fact-finding can advance in its monitoring function also in the absence of cooperation with national authorities. Obviously, this will certainly result in less far-reaching conclusions, but it will not affect the quality of the activity. This depends on the aim of international prosecutions, namely the establishment of individual criminal liability, which poses limitations to judicial fact-finding, due to the fact that it could result in the limitation of the personal sphere of the individual. Non-judicial fact-finding, instead, does not provide extensive data on individual responsibility, unless differently required by the mandate. Therefore, it can assess certain information relying on sources which would not be admitted in a criminal investigation. That is precisely the reason for which international prosecutors should carry out their investigations independently from other non-judicial enquiries. What fact-finding may serve to is the determination of trends and contextual elements. In international trials this would represent an invaluable resource, since most international crimes require the assessment of the contextual element to

[6] See *supra*, Chapter III, p.199.

qualify as such[7]. Conscious of the potentialities of this instrument, international monitoring bodies entrusted with the task of promoting and protecting human rights are increasingly recurring to fact-finding commissions in order to *prima facie* assess the facts of a case. Their dynamism has been tested especially within one of the most prominent international institution in the field of the protection and promotion of human rights, the UNHRC, as the recently established International Commissions of Inquiry on Libya and Syria have shown. In addition, the international community, despite some reluctance on part of some States, is becoming aware of how fact-finding could pave the way for international criminal justice, pressuring those States unwilling to undertake a genuine process of accountability to lend an ear to denunciations of human rights abuses and adopt those steps that may be necessary to put an end to impunity, and, at the same time, collecting precious information for future proceedings.

To sum up, international human rights fact-finding must not be placed among the instruments of accountability for serious violations of human rights, but, at the same time, its importance should not be underestimated. Facts remain the core issue when triggering a process of accountability, whatever the option chosen. Non-judicial fact-finding, if conducted following certain good practices, may only improve the quality of judicial enquiries and encourage far-reaching solutions for the benefit of justice.

[7] See extensively on the possible interactions between international prosecutions and international non-judicial fact-finding, SUNGA, (2011), *supra*, Chapter I, footnote 195. See also AKANDE D., TONKIN H., (6 April 2012) *International Commissions of Inquiry: A New Form of Adjudication?*, European Journal of International Law Blog, available at http://www.ejiltalk.org/international-commissions-of-inquiry-a-new-form-of-adjudication/; FRULLI M., (2012) *Fact-Finding or Paving the Road to Criminal Justice? Some Reflections on United Nations Commissions of Inquiry*, Journal of International Criminal Justice, Vol.10, No.5.

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