AL-HAQ CENTER FOR APPLIED INTERNATIONAL LAW

INTERNATIONAL COMMISSIONS OF INQUIRY AND PALESTINE: OVERVIEW AND IMPACT

STUDY ANALYSIS

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INTRODUCTION

The present paper is devoted to a study analysis of those international commissions of inquiry and fact-finding missions established in relation to the Occupied Palestinian Territory in order to measure their impact, particularly with regard to the respect and promotion of international law in the area.

The first part will focus on the main factors requiring the establishment of international investigations with regard to Palestine and on an analysis of fact-finding missions and commissions of inquiry as instruments under international law. Then, it will define the object of the study, focusing on those international investigations established in the period between 2000 and 2015.

The second part of the paper will involve a comparative and thematic analysis of the different commissions of inquiry selected. A number of thematic areas will be identified in order to assess the contribution given by each investigation.

The third and final part will be devoted to a general assessment on the role played by these international investigations in shading light over certain events and in the process aimed at ensuring the respect for international humanitarian and human rights law in Palestine. Positive and negative developments will be taken into account in a manner that can positively affect future fact-finding exercises.

The present paper is the result of a work involving the review of the preparatory documents and resolutions, the commissions' reports, a number of scholars' contributions and journals articles. It also takes into account the exchange of views that the author had with a number of stakeholders active on the ground, including local non-governmental organizations and international organizations directly involved in past fact-finding exercise. Finally, it includes the views expressed in an interview with the author by Professor John Dugard, Chair Commissioner of the 2000 Human Rights Inquiry Commission in the OPT and of the 2009 Arab League Independent Fact-Finding Committee on the Gaza Conflict.

1. COMMISSIONS OF INQUIRY AND PALESTINE - ORIGIN AND FRAMEWORK

1.1 The longstanding lack of accountability for violations of international law in the context of Palestine and the need for international independent investigations

Before determining the exact scope of the study and defining what commissions of inquiry/fact finding missions mean in the context of the present work, it is important to explain why commissions of inquiry have become of such relevance in the context of Palestine.

The quest for accountability in relation to grave violations of international law in Palestine is a longstanding one. Throughout the history of the Palestinian-Israeli conflict, such issue has gone hand in hand with the fight against impunity in relation to such violations.

In this regard, authoritative international bodies have, through the years, highlighted the lacunas of internal mechanisms in effectively ensuring accountability for violations of international law in the Occupied Palestinian Territory (OPT). In particular, the UN Fact Finding Mission on the Gaza Conflict established in 2009 by the UN Human Rights Council determined that the system of investigations and prosecutions put in place by Israel did not comply with the universal principles of independence, effectiveness, promptness and impartiality. It further argued in its Report that "the system is not effective in addressing the violations and uncovering the truth",[1] concluding that the lack of accountability and the prolonged situation of impunity "have created a justice crisis in the Occupied Palestinian Territory that warrants action".[2]

More recently, the UN Secretary General has also warned on the deterioration of the human rights situation in the OPT by expressing "its serious concerns […] in relation to accountability for violations of international humanitarian law and human rights law that have been allegedly committed by IDF and the de facto authorities in the Gaza Strip. Information available indicates that neither Israel nor the de facto authorities in Gaza have taken adequate measures to assess the credibility of allegations of violations and, where necessary, carry out effective investigations".[3]

1 Report of the United Nations Fact-Finding Mission on the Gaza Conflict, A/HRC/12/48 (25 September 2009) para 1613 [hereinafter 'Report UN Fact-Finding Mission on Gaza'].

2 *Ibid* [para 1755].

3 Report of the United Nations Secretary General, 'Israeli practices affecting the human rights of the Palestinian people in the Occupied Palestinian Territory, including East Jerusalem', A/68/502 (4 October 2013) para 30.

In particular, the effectiveness of the Israeli judicial system and its non-compliance with international standards has been repeatedly put into question. Such disregard for accountability and the rule of law has been considered a primary factor in perpetuating the cycle of violence and preventing any peaceful solution to the conflict. Notwithstanding the view expressed by certain permanent members of the Security Council and by the block of western States that any initiative aiming at pursuing justice and accountability in Palestine would be detrimental to peace-negotiations,[4] UN human rights bodies have repeatedly stressed how "justice cannot wait for peace to be secured. Rather, no credible, lasting peace can be built upon impunity and injustice".[5]

Lack of accountability often originates from the unwillingness or inability to genuinely conduct independent and impartial investigations. In relation to the specific case of Israel and the OPT, such unwillingness or inability appear inherent to a domestic judicial system, such as the Israeli one, that has progressively marginalised international law and its basic tenets.[6] Hence, it is from this perspective than the longstanding call for international independent investigations to impartially shed light over a number of events and policies that have characterized the sixty-seven years-old conflict must be viewed. In particular, given the absence in the past of an international court or tribunal ruling over human rights violations in the context of the Israeli-Palestinian conflict, the most effective instrument at the disposal of the international community, together with the reporting activities of UN bodies, has been so far the establishment of independent fact-finding missions and commissions of inquiry. Which are the international commissions that have been established so far and what has been their impact on the situation of human rights in Palestine are the questions the present study aims to respond.

4 Al Arabyia News, 'U.S. strongly opposes Palestine ICC membership' (31 December 2014) http://english.alarabiya.net/en/News/middle-east/2014/12/31/EU-cites-urgent-need-to-jumpstart-Mideast-peace-talks.html accessed 28 February 2015; N. Pillay, 'Europe Is Blocking Mideast Peace', The New York Times (6 November 2014) http://www.nytimes.com/2014/11/07/opinion/europe-is-blocking-mideast-peace.html?_r=0 accessed 28 February 2015; Human Rights Watch, 'Why the EU should stop blocking Palestinian membership of the ICC' (12 December 2014) http://www.hrw.org/news/2014/12/12/why-eu-should-stop-blocking-palestinian-membership-icc accessed 28 February 2015.

5 Report of the high-level fact-finding mission to Beit Hanoun established under Human Rights Council resolution S-3/1, A/HRC/9/26 (1 September 2008) para 76.

6 Diakonia IHL Resource Centre, 'Rule of Law: A Veil of Compliance in Israel and the OPT 2010-2013' (March 2014) 18.

1.2 Commissions of Inquiry/Fact-Finding Missions as instruments under international law

Before going into depth in the examination of the practice of commissions of inquiry in Palestine, a preliminary issue should be addressed: what are commissions of inquiry and fact-finding missions under international law?

First of all it should be noted that this study will use the terms 'commission of inquiry' and 'fact-finding missions' interchangeably. In fact, despite the difference in terminology, the notions of 'fact-finding mission' and 'commission of inquiry' can be interpreted in a similar light. In particular, inquiry is defined in legal literature as "a method to ascertain facts, whereby an impartial investigative body elucidates the facts relating to a dispute between states in order to produce a finding on the disputed facts for the purpose of a successful peaceful settlement of the dispute".[7] Similarly, certain authors also define 'fact-finding' as a 'method of ascertaining facts' through the evaluation and compilation of various information sources.[8] Looking more specifically to international law, while a first definition of 'fact-finding' was included in the Hague Conventions of 1907 and linked to the role of commissions of inquiry,[9] Article 33 of the UN Charter lists 'enquiry' among different means of dispute settlement, echoing the 'fact-finding' purpose as codified in the Hague Conventions. As pointed out by certain scholars "the primary UN organs have resorted to fact-finding as a means to receive information about situations of international concern which would enable the recipient organ to determine the best course of action to respond to the situation".[10] On a separate development, Additional Protocol I to the Four Geneva Conventions provided, at Article 90, for the establishment of a permanent international fact-finding commission charged to investigate allegations of grave breaches and other serious violations of international humanitarian law. The commission was formally constituted in 1991 but in practice was never requested to intervene.

Given this context, the UN General Assembly 1991 Declaration on Fact-finding in

7 B.A. Boczek, *International Law: a Dictionary* (Lanham, Md. : Scarecrow Press, 2005) 365.

8 T. Boutruche, 'Credible Fact-Finding and Allegations of International Humanitarian Law Violations: Challenges in Theory and Practice', (2011) Journal of Conflict and Security Law, 2; *KJ* Partsch, 'Fact-Finding and Inquiry' in *R Bernhardt (ed), Encyclopaedia of Public International Law* (North-Holland, Amsterdam-London 1992) 343.

9 B. G. Ramcharan, 'International Law and Fact-Finding in the Field of Human Rights' (The Hague 1982) vii.

10 L. van den Herik – C. Harwood, 'Sharing the Law: The Appeal of International Criminal Law for International Commissions of Inquiry' Grotius Centre Working Paper 2014/016-ICL (2014) 3.

the Field of the Maintenance of International Peace and Security defines 'fact-finding' as "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".[11]

From an accurate analysis of these definitions, it emerges that there are no substantial differences between 'inquiry' and 'fact-finding' as international legal means, both in terms of the content (ascertaining facts) and scope (contributing to dispute settlement) of such activities. This may help explaining why, many legal experts and academics have started referring to the terms 'fact-finding missions' and 'commissions of inquiry' as synonyms, despite the fact that the Commission of Inquiry into Syria established by the Human Rights Council in 2011 referred to 'fact-finding' as just one of its assigned tasks.[12]

What may render each commission's tasks significantly different from those indicated above is their mandate. In fact, as pointed out by certain literature, commissions of inquiry and fact-finding missions have through the years significantly evolved in terms of functions and scopes. In particular, it has been referred that this evolution discloses three distinct fact-finding functions: to inform; to alert; and to seek accountability.[13] The original 'informing' function was linked to the aim of providing impartial accounts of the facts in relation to specific incidents, in order to serve the purpose of disputes settlement. These 'informing' commissions were focusing on factual findings and were rarely permitted to make legal determinations.

In opposition to mere informing, the so-called 'alerting' function relates to the need to "raise alert regarding situations threatening international peace and security and serious human rights violations, and encourage appropriate institutional and stakeholder responses".[14] In this regard, it is important to assess the shift, in the tasks attributed to commissions, from providing mere factual determinations to pointing the attention to legal qualifications, as a necessary step to trigger adequate responses from relevant stakeholders. As it was duly noted, "the mere framing of a fact as a violation of the law solicits some kind of response or corrective action".[15] Also, the development of the 'alerting' function can be viewed in light of the need to place fact-finding as early-warning tool within the framework of the 'Responsibility to Protect' (R2P) model, a concept that has been progressively developed with the turning of the 21st Century and that expressively includes fact-finding within the mechanisms envisaged for the international response to situations of grave human rights violations.[16]

As the ultimate step, the accountability function entails a further effort in encouraging stakeholders' responses. Accountability may refer to both states and individuals and implies not only the characterization of certain conducts as violations of the law but also the identification of the actors responsible. Thus, by being empowered with 'accountability' tasks in their mandates, fact-finding missions started pointing the attention of key actors involved in situations of armed conflict and humanitarian crisis that their actions may be subjected to judicial sanction due to their law infringements. Notwithstanding certain examples dating back to the first half of the 20th Century,[17] commissions charged with a specific accountability mandate represent a relatively recent trend, which is mainly linked with the activism demonstrated in this field by the UN Human Rights Council (HRC) since its establishment nearly ten years ago.[18]

It is now clear that the mandates of fact-finding missions and commissions of inquiry established in recent history provide a broader interpretation than is indicated by their definitions and shed light on the wide spectrum of their functions. In particular, looking at the last twenty years, commissions of inquiry progressively established under UN auspices to investigate conflicts in countries such as former Yugoslavia, Sudan, Guinea, Palestine, Libya and Syria have, in accordance with the mandates received, gone far beyond the task of merely ascertaining facts and uncovering the truth. Their findings have included legal qualifications, identification of perpetrators of violations of international law, determination of both States

11 UNGA 'Declaration on Fact-finding by the United Nations in the Field of the Maintenance of International Peace and Security', A/RES/46/59 (9 December 1991), para 2.

12 Report of the independent international commission of inquiry on the Syrian Arab Republic, A/HRC/S-17/2/Add.1 (23 November 2011) 5.

13 L. van den Herik – C. Harwood (n 10) 7.

14 *Ibid*, 8.

15 *Ibid*, 9.

16 UNGA 'Implementing the Responsibility to Protect, Report of the Secretary General' A/63/677, 12 (January 2009) para 52.

17 See, in particular, 'Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, established at the Paris Peace Conference' (26 January 1919); 'United Nations War Crimes Commission' (1943-1948).

18 In particular, since its establishment in 2006, the Human Rights Council has dispatched commissions of inquiry with an 'accountability mandate' in relation to situations in Ivory Coast, Libya, Syria, North Korea, Eritrea and Palestine.

and individual's responsibility under international law, and recommendations and follow-up measures for the key actors and stakeholders involved in a certain situation, including measures to ensure accountability.[19] This, however, does not mean these missions should be understood as replacing the role traditionally played by a court of law or any other judicial body. As will be explained below, commissions of inquiry and fact-finding missions have not received any power in this regard and have based the credibility of their findings on a standard of proof that is inevitably lower than the one applied in judicial proceedings. This explains why commissions of inquiry and fact-finding missions have reiterated countless number of times their inability to make final judgments as to criminal guilt.

19 See Report of the International Commission of Inquiry on Darfur to the United Nations Secretary General Pursuant to Security Council Resolution 1564 (2004) (25 January 2005); Report of the United Nations Fact-Finding Mission on the Gaza Conflict, A/HRC/12/48 (25 September 2009); Report of the International Commission of Inquiry mandated to establish the facts and circumstances of the events of 28 September 2009 in Guinea, S/2009/693 (18 December 2009); Report of the independent international commission of inquiry on the Syrian Arab Republic A/HRC/S-17/2/Add.1 (23 November 2011); Report of the commission of inquiry on human rights in the Democratic People's Republic of Korea, A/HRC/25/63 (7 February 2014).

1.3 Defining the object of the study: commissions of inquiry and fact-finding missions established with regard to the OPT (2000 - 2015)

It is now important to define and limit the object of the present study. Which are the commissions of inquiry that have been established in relation to the context of the OPT and which ones should form the subject matter of the present analysis?

First of all, it is important to underline that the purpose of this study analysis is to measure the impact of the work of commissions of inquiry on the situation of human rights in Palestine by selecting a number of relevant examples in order to conduct a comparative thematic analysis and highlight certain specific trends. For issues of time constraint, the present study will focus only on those international commissions established with respect to Palestine during the last fifteen-years. Indeed, a number of international inquiry bodies with a focus on Palestine have been established before 2000s. These include the UN Special Committee on Palestine and the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories both established by the UN General Assembly in 1947 and 1968, and the UN Security Council Commission on settlements established in 1979.[20] One of the main reasons to limit the choice of the examples selected to those commissions established after the year 2000 is linked to the evolution that international commissions of inquiry have undergone at the turn of the 21st century in terms of shedding light on international human rights (IHRL) and international humanitarian law (IHL) violations and accountability, as mentioned in the previous paragraph. The aim of this study is, in fact, to measure the impact of commissions of inquiry on the situation of human rights in Palestine. Thus, what is relevant to the present work is to assess not only the commissions' role in ascertaining facts for dispute settlements' purposes but also their ability to resort to the application of IHRL and IHL in order to highlight human rights abuses, determine responsibilities and suggest possible actions by the international community, including avenues to ensure accountability.

In this regard, the passage from the 20th to the 21st century has been characterized by a number of events both in the international arena and in the context of the OPT that suggest using it as starting point for the purpose of this study. These

20 See UN Special Committee on Palestine, GA Res. 106 (S-1) (15 May 1947); Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories, GA Res. 2243 (XXIII), (19 December 1968); Commission established under Security Council Resolution 446 (1979).

events are related firstly to the establishment of international criminal tribunals and the renewed importance of international criminal law as a paradigm in the debate concerning human rights violations. Secondly, the conclusion of the Oslo agreements and the creation of the Palestinian National Authority has led to a new (legal) configuration of the Palestinian-Israeli conflict. In addition, the definition and progressive development of the R2P concept and the establishment of the UN Human Rights Council are also elements whose importance for Palestine should not be underestimated, together with the growing importance that international law has been playing as paradigm to approach the Israeli-Palestinian conflict.

The study will mainly focus on those commissions established at UN level, as it considers the UN to be the most authoritative representation of the international community of States in the fields of the maintenance of peace and security and protection of human rights. However, it will also take into account experiences developed at regional level and, in particular, within the framework of the Arab League. As already mentioned, the examples selected refer mainly to commissions charged with ascertaining facts related to alleged violations of international humanitarian and human rights law. They may be temporally limited to cover specific incidents and war campaigns or investigate long lasting practices. However, it should be clarified that the present study does not purport to provide a comprehensive analysis of all the international commissions of inquiry established in relation to Palestine.

Accordingly, this study will conduct a comparative thematic analysis of nine international commissions of inquiry/fact finding missions that have been established from 2000 to 2012, in order to investigate events occurring in the OPT and Israel. The examples selected are:

1. UN Human rights inquiry commission established pursuant to Human Rights Commission resolution s-5/1 of 19 October 2000;
2. UN Fact-Finding Team on events in Jenin Camps established by the UN Secretary General and welcomed by UN Security Council with resolution 1405(2002);
3. UN Urgent Fact-Finding Mission established by UN Human Rights Council with resolution S-1/1 of 6 July 2006 and headed by the UN Special Rapporteur in the OPT on events in Gaza following the commencement of 'Operation Summer Rains';
4. UN High Level Fact-Finding Mission to Beit Hanoun established pursuant to UN Human Rights Council resolution of S-3/1 of 15 November 2006;
5. Arab League Independent Fact-Finding Committee on the Gaza Conflict established by the Arab League in February 2009;
6. UN Fact-Finding Mission on the Gaza Conflict established by UN Human Rights Council pursuant to resolution S-9/1 of 12 January 2009;
7. Committee of Independent Experts to assess legal actions undertaken by Israeli and Palestinian authorities to investigate alleged violations during Operation Cast Lead established by the UN Human Rights Council pursuant to resolution 13/9 of 14 April 2010;
8. UN Independent International Fact-Finding Mission to investigate violations resulting from the Israeli attacks on the flotilla of ships carrying humanitarian assistance established by UN Human Rights Council with resolution S-14/1 of 2 June 2010;

UN Independent International Fact-Finding Mission to investigate the implications of the Israeli settlements on the rights of the Palestinian people established by UN Human Rights Council with resolution 19/17 of 22 March 2012.

The present study will analyse the work and findings of these commissions and highlight their contribution in a number of different thematic areas. The scope of this work is to measure their impact on the situation of human rights in the OPT in a way that can help future fact-finding exercises.

2. COMPARATIVE THEMATIC ANALYSIS OF COMISSIONS OF INQUIRY ESTABLISHED IN THE OPT (2000-2015)

The second chapter is dedicated to the analysis of the work performed by the different commissions of inquiry established in the OPT. As mentioned above, the study will pursue a comparative and a thematic approach. In lieu of providing an account of each commission separately, this work will select a number of relevant themes and for each of them analyse and compare the contribution provided by the different commissions. The author believes that through such an approach this study will serve the purpose of evaluating the role of these bodies and their impact on the situation in the OPT much more than limiting itself to summarize the main findings of each commission.

However, before such comparative-thematic analysis is undertaken, it is necessary to provide an overview of the work and activities performed by each commission.

2.1 Overview of the Work of the Commissions of Inquiry in the OPT (2000-2015)

1. Human rights inquiry commission established pursuant to UN Human Rights Commission resolution S-5/1 of 19 October 2000

On 19 October 2000, in the aftermath of the outbreak of the second intifada, the UN Human Rights Commission (the predecessor of the Human Rights Council) adopted resolution S-5/1. The Commission, while condemning the provocative visit to Al-Haram al-Sharif on 28 September 2000 by Likud chief Ariel Sharon and being gravely concerned at the widespread, systematic and gross violations of human rights following after, decided "to establish, on an urgent basis, a human rights inquiry commission […] to gather and compile information on violations of human rights and acts which constitute grave breaches of international humanitarian law by the Israeli occupying Power in the occupied Palestinian territories and to provide the Commission with its conclusions and recommendations, with the aim of preventing the repetition of the recent human rights violation".[21]

Prof. John Dugard, (South Africa), Dr. Kamal Hossain (Bangladesh) and Professor Richard Falk (United States of America) were appointed as commissioners. The mandate, whose original wording as included in the resolution appeared as clearly one-sided and perceived as biased towards Israel, was later unilaterally modified by the Commission and limited to "investigate violations of human rights and humanitarian law in the occupied Palestinian territories after 28 September 2000".[22] The Commission was granted access to the territory and visited the OPT and Israel from 10 to 18 February 2001, but did not receive any information from the Israeli authorities who decided not to cooperate.

In its report, published on 16 March 2001, the Commission determined how the IDF, assisted by settlers on occasion, had been responsible for most of the human rights and IHL violations in the OPT.[23] The Commission clarified how such conclusion did not want to undermine the fact that human rights violations had been committed also by Palestinians, whether associated with the Palestinian National Authority (PNA) or not.

In the report, the Commission noted how there was a "disguised link between the modality of Israeli occupation as a result of changes brought about by the Oslo process and the subsequent intifada, with its escalating spiral of violence".[24] It also stressed how the fragmentation of the Palestinian territory following the Oslo Agreements and the continuous entrenchment of settlements and their related infrastructure had played a catalyst role for the outbreak of the intifada.

The report contained a detailed explanation of the different views expressed by the parties regarding the triggering factors of the intifada, without endorsing any of them. It then started analysing the situation from the point of view of international law, in particular looking at human rights law and IHL. While restating that Israel remained an occupying power of the West Bank and the Gaza Strip notwithstanding the developments related to Oslo and the establishment of the PNA (in this way ensuring the application of the Four Geneva Convention and the law of occupation), interestingly enough the Commission did not qualify the situation in the OPT following the outbreak of the intifada neither as international nor as an internal armed conflict. It argued, from one side, how "clearly, there is no international armed conflict in the region, as Palestine, despite widespread recognition, still falls short of the accepted criteria of statehood".[25] From the other, it was also inclined to determine that "sporadic demonstrations/confrontations

21 Commission on Human Rights, Report of the Fifth Special Session 'Grave and massive violations of the human rights of the Palestinian people by Israel', E/CN.4/S-5/5 E/2000/112 (19 October 2000).

22 Report of the human rights inquiry commission established pursuant to Commission resolution S-5/1 of 19 October 2000, E/CN.4/2001/121 (16 March 2001) para 1.

23 *Ibid* [para 12].

24 *Ibid* [para 20].

25 *Ibid* [paras 39-40].

often provoked by the killing of demonstrators and not resulting in loss of life on the part of Israeli soldiers, undisciplined lynching (as in the tragic killing of Israeli reservists on 12 October 2000 in Ramallah), acts of terrorism in Israel itself and the shooting of soldiers and settlers on roads leading to settlements by largely unorganized gunmen cannot amount to protracted armed violence on the part of an organized armed group".[26] This argument seemed to counteract the Israeli claim at the time that an occupation was no longer in place in the OPT as it was replaced by the outbreak of an armed conflict opposing Israel and the PNA as properly organized armed group. It also served the purpose to remind Israel to respect also international human rights law and its law-enforcement duties, while at the same time dismissing any justification for the excessive use of lethal force and live ammunition resorted to by the IDF during the demonstrations. It is interesting to note how the finding concerning the non-existence of an armed conflict has been subsequently put into question by Prof. Dugard speaking in his personal capacity, looking also at how the situation further escalated.[27]

The Report contains an entire chapter dedicated to a number of IHRL and IHL violations such as, excessive use of force in repressing demonstrations, extrajudicial executions (the so-called 'targeted killings'), settlements, deprivation of socio-economic rights and impacts of the violence on Palestinian refugees. In particular, the Commission found that "the IDF has engaged in the excessive use of force and use of live ammunitions at the expense of life and property in Palestine".[28] It also determined that the practice of political assassination could be considered a fundamental violation of international human rights standards as well as a grave breach under the Fourth Geneva Convention attracting individual criminal responsibility.[29]

A remarkable aspect of the Commission's work concerns the fact that it did not limit itself to ascertaining facts about specific incidents, but it also engage in an effort to tie those facts together in order to unveil the existence of patterns and policies for which it highlighted violated norms and responsibilities. As it was pointed out in the report "we have evaluated the relative weight of facts and contending arguments about their legal significance. This process alone enables us to draw firm conclusions about the existence of violations of international legal standards of human rights and of international humanitarian law".[30]

The spirit that has entrusted the report, particularly when it comes to address the merits of controversies concerning alleged violations of IHRL and IHL, is expressed by the Commission's view "that a commitment to objectivity does not imply a posture of neutrality. Judgements can and must be made".[31]

The report was published just one month ahead of the release of the report of the Fact-Finding Committee established by the parties involved in the negotiations of Sharm el-Sheikh in October 2000 (so called 'Mitchell Report'). In this regard, it should be noted how the findings and conclusion contained in the Mitchell Report largely echoed those of the UN Human rights inquiry commission.

2. UN Fact-finding Team on events in Jenin Camp (2002)

In the aftermath of the Israeli assault on Jenin Camp within the framework of 'Operation Defensive Shield' during the Second Intifada, on 19 April 2002 the UN Security Council passed resolution 1405(2002) in which "concerned by the dire humanitarian situation of the Palestinian civilian population" it welcomed "the initiative of the Secretary-General to develop accurate information regarding recent events in the Jenin refugee camp through a fact-finding team".[32]

The Secretary General appointed as members of the Team former Finnish President, Martti Ahtisaari (to act as chair), Cornelio Sommaruga (ICRC former President) and Sadako Ogata, the former UN High Commissioner for Refugees.

After allegations circulated among Israeli governmental officials that due to its composition (and in particular to the absence of military officials) the Mission would extend its mandate covering the whole Israeli campaign in the West Bank and accuse Israel of war crimes, Israel cabinet decided not to allow the Team into the country.[33] While the Security Council convened to discuss Israel's stance, on 30th April UN Secretary General Kofi Annan decided to disband the Team,

26 *Ibid*.

27 Interview with Professor John Dugard (15 March 2015).

28 *Ibid* [para 50].

29 *Ibid* [para 61].

30 *Ibid* [para 34].

31 *Ibid*.

32 UNSC, Resolution 1405(2002) S/RES/1405 (2002) (19 April 2002) para 2.

33 The Telegraph, 'Israel defies UN over Jenin mission' (25 April 2002) http://www.telegraph.co.uk/news/worldnews/middleeast/israel/1392196/Israel-defies-UN-over-Jenin-mission.html accessed 28 February 2015; The Age, 'Israel ban on UN probe may backfire' (2 May 2002) http://www.theage.com.au/articles/2002/05/01/1019441391191.html accessed 28 February 2015.

by stating: "I regret being unable to provide the information requested by the Council in resolution 1405 (2002), and especially that the long shadow cast by recent events in the Jenin refugee camp will remain in the absence of such a fact-finding exercise".[34]

As a consequence, on 7th May the UN General Assembly, convened at its Tenth Emergency Special Session, condemned, with 74 votes to 4 and 54 abstentions, Israeli assaults against Palestinians in Jenin as well as Israel's refusal to cooperate with the UN fact-finding Team.[35]

As a mean to replace the work of the Team, the UN Secretary General was requested by the General Assembly to prepare a report on the events that took place in Jenin and in other cities of the West Bank. The report was submitted to the attention of the Assembly on 30th July.[36]

3. UN Fact-Finding Mission of the Special Rapporteur in the OPT on events in Gaza and Beit Hanoun

On 6 July 2006, the UN Human Rights Council adopted resolution S-1/1, in which it decided "to dispatch an urgent fact-finding mission headed by the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967".[37] Although the mandate of the mission was not spelled out in clear terms, it was obvious that the mission was established to investigate alleged violations of international human rights law in the Gaza Strip, following the commencement of "Operation Summer Rains" by the Israeli Defense Forces in June 2006.

Special Rapporteur John Dugard, once put in charge of the Mission, made immediately clear that the consent of the Israeli Government would have been a necessary prerequisite for the Mission to be deployed, in accordance with the wording of paragraph 6 of UN General Assembly resolution 46/59 concerning

34 UNSG, 'Report of the Secretary General prepared pursuant to General Assembly resolution ES-10/10', A/ES-10/186 (30 July 2002) para 4. On the issue see, also, M. Kearney, 'Empowering the General Assembly to Advance International Criminal Investigations', SSRN-Paper, Draft version submitted for publication in: McGinty & Perterson (eds) Routledge Handbook on Humanitarian Action (Forthcoming 2014) 4, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2467542 accessed 28 February 2015.

35 UNGA, Resolution ES-10/10, 'Illegal Israeli actions in Occupied East Jerusalem and the rest of the Occupied Palestinian Territory', A/RES/ES-10/10 (7 May 2002).

36 Report of the Secretary General (n 34).

37 Human Rights Council, A/HRC/S-1/3 (6 July 2006) para 6.

"Declaration on Fact-finding by the United Nations in the Field of the Maintenance of International Peace and Security".[38]

Through the Presidency of the HRC, Mr. Dugard immediately sought the consent of the Government of Israel. Elapsed one month without receiving any answer, the Special Rapporteur wrote a letter to the President of the HRC, explaining that "We have now waited for more than a month to receive a reply from the Government of Israel. I think we have no alternative but to construe its failure to reply as a refusal. In my view you should notify the Government of Israel that this is the position and that you should report accordingly to the Human Rights Council. […] I request you to kindly inform the Human Rights Council that in my view it is pointless to persist with the fact-finding mission requested on 6 July as the Government of Israel has, by its failure to respond to your request, indicated very clearly that it will not grant permission to the visit of such a fact-finding mission".[39]

It should be noted how during the following months the Special Rapporteur compiled reports on the impact of 'Operation Summer Rains' based on a number of visits it conducted to the Gaza Strip in July and December 2006; however, he made it clear that, in order not to put at risk its coordination efforts with the Israeli authorities, those visits and reports were conducted in its capacity as Special Rapporteur and not based on any fact-finding exercise pursuant to resolution S-1/1.[40]

Despite such clarification, the Human Rights Council, on 27 March 2007, adopted resolution 4/2 calling again for the implementation of resolution S-1/1. As a response, in a report dated 8 June 2007, Mr. Dugard expressed its view that the mission contemplated had become obsolete and impractical.[41]

It is important to underline Mr. Dugard's criticism over a number of aspects concerning resolution S-1/1, clearly reflected in its reports implementing the resolution. First of all, the fact that the resolution did not contain a reporting obligation and failed to clearly indicate which facts were to be investigated.

38 UNGA, 'Declaration on Fact-finding' (n 11) para 6 according to which "the sending of a United Nations fact-finding mission to the territory of any State requires the prior consent of that State".

39 Report of the Special Rapporteur on the human rights situation in the Palestinian territories occupied since 1967 pursuant to resolution S-1/1 of the Human Rights Council, A/HRC/4/116 (20 December 2006) 8.

40 *Ibid* [para 11].

41 Report of the Special Rapporteur on the human rights situation in the Palestinian territories occupied since 1967 on the non-implementation of Human Rights Council resolution S-1/1, A/HRC/5/11 (8 June 2007), para 14.

Secondly, the choice to put himself in charge of the Mission despite his position as Special Rapporteur in the OPT and his previous reports extremely critical over Israel's conduct. At the same time, the Special Rapporteur provided an interesting point of view on the need to clarify the difference between reporting and fact-finding powers within the UN framework, reflected in the following words:

"I am the Special Rapporteur on the situation of human rights in the occupied Palestinian territories. In this capacity, I report on the overall situation in the Occupied Palestinian Territory *without attempting to investigate or resolve any factual dispute*. I am not a one-person fact-finding mission. Consequently, the above report [compiled as Special Rapporteur] raises questions about Israel's justification for the shelling of the Beit Hanoun home […] but *it makes no attempt to pronounce definitively upon the factual dispute* whether the shelling was the result of a "technical failure", as maintained by Israel. The line between situation-reporting and fact-finding is admittedly not absolutely clear" [emphasis added].[42]

4. UN High level Fact-finding Mission to Beit Hanoun

On 15 November 2006, the UN Human Rights Council adopted resolution S-3/1, in which the Council called for a high-level fact-finding mission to be established in relation to the events taking place in the Gaza town of Beit Hanoun, following Israeli military operations carried out there around 8 November 2006.[43]

The President of the HRC appointed two members to serve as commissioners, South African Archbishop Desmond Tutu (to act as chairman) and international law professor Christine Chinkin. The mandate received was to "travel to Beit Hanoun to assess the situation of victims; address the needs of survivors; and make recommendations on ways and means to protect Palestinian civilians against any further Israeli assaults".[44] The Mission interpreted the mandate taking into account the broader context reflected in the wording of the HRC resolution, which referred to collective punishment, the killing of civilians and the perpetration of gross violations of IHRL and IHL, the attacks on medical personnel and extensive destruction of property.

The Mission did not receive any cooperation or access to the territory from the Government of Israel but, departing from previous practice, it decided nonetheless to carry on its mandate. Following a number of attempts, the investigative team was finally able to enter Gaza via Egypt in January 2008 and, based on this visit, it produced two interim reports and one final report that was released on 1 September 2008.

While dwelling on the legal framework applicable to the situation in Gaza, the Mission determined how the Gaza Strip had to be considered still occupied under international law, despite the military and civil disengagement operated by Israel that took place in 2005. Thus, the Mission reiterated Israel's obligation to respect international human rights conventions, the Fourth Geneva Convention and other IHL principles of customary nature.[45]

The team led by Archbishop Tutu took into account the incursions carried out by the Israeli forces in the Beit Hanoun area within the context of 'Operation Autumn Clouds' that led to the events of 8 November 2006 and their impact on the humanitarian situation of Palestinian residents.

The report then contained an extremely detailed account of the events of 8 November, by relying upon the direct testimony of witnesses and survivors, police and hospital staff. In particular, it determined that the shelling started while most of people were asleep or returning from the Morning Prayer. People started running in the streets and tried to assist wounded and victims but more shelling hit the streets killing and injuring more. In particular, testimonies heard by the Mission depicted a horrific scene. "One mother described being faced with one of her children with an open skull wound while trying to help another son as he scooped his intestines back into his abdomen […] As people gathered and attempted to provide assistance to the injured, more shells landed in the street. There was, according to one witness, 'no one left standing' ".[46] The Mission also drew the attention on the fact that, in the aftermath of the attack, ambulances arriving at the scene came under heavy Israeli fire preventing them from rescuing those wounded, while survivors told how significant obstacles were placed in the way of individuals travelling to Israel for emergency treatment.[47]

According to the report, the shelling resulted in the immediate death of 19 civilians, including seven children and six women, while over 50 people were

42 *Ibid* [para 12].

43 Human Rights Council, Special session resolution S-3/1 (15 November 2006).

44 *Ibid* [para 7].

45 Report of the high-level fact-finding mission to Beit Hanoun (n 5) paras 11-14.

46 *Ibid* [para 28].

47 *Ibid* [para 29].

wounded during the attack. The Mission then examined Israeli claims that civilians were used as human shields by Palestinian fighters, noting how it did not receive any evidence of shelling or launching rockets in the area close to Beit Hanoun before the Israeli attack. It is important to note, from the point of view of IHL, how the Mission's findings seem to question the very choice of means and method of warfare implemented by Israel in Gaza. In this regard, it strongly endorsed "the position put forward by others, particularly human rights organizations, that the use of artillery in urban areas, especially in densely populated urban settings such as Gaza, is wholly inappropriate and likely contrary to international humanitarian and human rights law".[48] The report then highlighted the impact of the blockade and of Israeli operations in a context of long-standing occupation on the humanitarian situation of the people in Gaza, and its calamitous repercussions on a number of economic and social rights such as right to health and adequate standard of living.

As a consequence, in its 'conclusions and recommendations' section, the report highlighted how "one victim of the Beit Hanoun shelling was the rule of law".[49] This led the Mission to conclude that "one of the most effective and immediate means of protecting Palestinian civilians […] is to insist on respect for the rule of law and accountability".[50]

5. UN Fact-Finding Mission on the Gaza Conflict

'Operation Cast Lead' was launched by the Israeli Defence Forces in the Hamas controlled Gaza Strip on 27th December 2008 with the declared aim to stop rockets fire from the Strip. It resulted in a three weeks military campaign ended on 18 January 2009 that resulted in 1.400 Palestinians victims and 13 Israeli casualties.

When the conflict was at its peak, the UN Human Rights Council passed resolution S-9/L in which it decided to establish an international fact-finding mission "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, due to the current aggression".[51] The Council appointed former prosecutor of the ICTY, South African Justice Richard Goldstone as chairman of the Mission and Professor Christine Chinkin, former colonel Desmond Travers and advocate Hina Jilani as the other commissioners.

Following Goldstone's objections concerning the one-sided character of the mandate, the terms of reference of the Mission were informally revised. Hence, the new mandate, included in the report published on 15 September 2009, referred more neutrally 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".[52]

Since the beginning, the Mission was publicly denounced by the Israeli authorities as being the fruit of the HRC's bias against Israel, citing the one-sided character of the Mission's founding resolution. Thus, since the inception, Israel decided not to cooperate with the fact-finding team, denying it access to Israel and the West Bank. The Mission was allowed to enter the Gaza Strip via Egypt and spent there two weeks, while at the same time holding meetings in Amman and Geneva.

What has been commonly referred as the 'Goldstone Report' was the result of the Mission's three months intensive work. In particular, the fact-finding team based its findings on a variety of different sources including review of reports and affidavits, interviews with victims and witnesses, site visits to specific incident locations in Gaza, analysis of video and photographic images (including satellite imagery), review of medical reports about injuries to victims, forensic analysis of weapons and ammunition remnants collected and meetings with a variety of interlocutors and stakeholders. An important innovation introduced by the Fact-finding Team was the decision to conduct public hearings in Gaza and in Geneva of witnesses, victims and experts. According to the Mission, the purpose of the public hearings - which were broadcasted live - was to enable victims and witnesses from all sides to the conflict to speak directly to as many people as possible and convey their message to the whole international community.[53]

48 *Ibid* [para 42].

49 *Ibid* [para 76].

50 *Ibid* [para 80].

51 Human Rights Council, A/HRC/RES/S-9/1 (12 January 2009) para 14.

52 Report UN Fact-Finding Mission on Gaza (n 1) para 131.

53 *Ibid* [para 22].

The Mission interpreted its mandate broadly in order to encompass not only alleged violations perpetrated during the three-weeks military campaign in Gaza, but also the context of prolonged military occupation in which the military confrontation took place. In particular, beside selecting and investigating 36 incidents occurring during 'Operation Cast Lead', the report analysed overall policies and patterns such as the impact of the blockade in Gaza, the effects of launching rockets in Southern Israel, the excessive use of force against demonstrations in the West Bank, restrictions to freedom of movement, appropriation of property and settlements expansion in the West Bank and the conditions experimented by Palestinian prisoners in Israeli jails. It also provided an unprecedented examination of the Israeli and Palestinian systems of investigations and prosecutions, in light of adequately approaching the issue concerning the long lasting lack of accountability in the OPT.

The report, 576 pages long, provided a detailed account of the incidents occurred during the war. It posed particular attention in the selection of incidents in light to uncover the existence of specific patterns and policies analysed from the point of view of international law. Indeed, IHRL and especially IHL played a prominent role in the Mission's legal analysis of the facts ascertained. Also, the Mission did not show too much restraint in referring to paradigms of international criminal law whose rules and definitions were regarded "as crucial to the fulfilment of its mandate to look at all violations of IHL and IHRL by all parties to the conflict".[54]

The report determined how both parties to the conflict had committed grave violations of IHL and IHRL and, in particular, that both sides may had been responsible for the commission of war crimes and possibly crimes against humanity. In particular, the Mission found Israel to be responsible for a number of indiscriminate attacks against life and property of civilians in Gaza and for its failure to take feasible and effective precautions before attacking. In addition, in relation to eleven incidents examined, the report accused the IDF of launching deliberate attacks against civilians amounting to grave breaches of the Fourth Geneva Convention. With regard to the conduct of the Gaza authorities, the Mission determined how the firing of rockets towards southern Israel constituted indiscriminate attacks and that, where there was no intended military target and mortars were directed into a 'civilian area', they could constitute a deliberate attack against a civilian population.

54 *Ibid* [para 286].

One of the most remarkable and controversial aspects of the report concerns its findings on the overall aims and scopes of the Israeli military campaign. In particular, the Mission found how there was a deliberate and systematic policy on the part of the Israeli armed forces to target the foundations of civilian life in Gaza. In a section named 'Objectives and strategy of Israeli military operation in Gaza', the Mission took the view that "the incidents and patterns of events […] have resulted from deliberate planning and policy decisions throughout the chain of command".[55] In this regard, it noted how "the reframing of the strategic goals has resulted in a qualitative shift from relatively focused operations to massive and deliberate destruction".[56] The Mission was thus left with little doubt on the fact that the "disproportionate destruction and violence against civilians were part of a deliberate policy" and that "what occurred in just over three weeks at the end of 2008 and the beginning of 2009 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".[57]

As already mentioned, the report also addressed the long-standing issue of the lack of accountability for violations of international law in Palestine. In particular, while analysing the Israeli military system of investigations and prosecutions, the Mission posed "serious doubts about the willingness of Israel to carry out genuine investigations in an impartial, independent, prompt and effective way as required by international law".[58] It also expressed the view that "the Israeli system presents inherently discriminatory features that have proven to make the pursuit of justice for Palestinian victims very difficult".[59] As a consequence, the Report urged, in the recommendation section, the UN Security Council to refer the situation to the International Criminal Court in the absence of effective accountability efforts.

55 *Ibid* [para 1188].

56 *Ibid* [para 1190].

57 *Ibid* [para 1211 § 1690].

58 *Ibid* [para 1832].

59 *Ibid*.

6. Arab League Independent Fact-finding Committee on the Gaza Conflict

The Independent Fact-finding Committee was established by the League of Arab States in February 2009 "with the tasks of investigating and reporting on violations of human rights law and international humanitarian law during the Israeli military offensive against Gaza from 27 December 2008 to 18 January 2009 and collecting information on the responsibility for the commission of international crimes during the operation".[60] The Committee represented the first international inquiry to be ever appointed by the Arab League and, although receiving strong support from the Organisation's Secretariat, its establishment was met with some resistance by certain member States. This may help to explain the absence of adequate follow-up measures after the publication of the Committee's report.[61]

The Committee was composed by former UN Special Rapporteur on the situation of human rights in Palestine, Prof. John Dugard (acting as chairman), Professor Paul de Waart (Netherlands), Judge Finn Lynghjem (Norway), Advocate Gonzalo Boye (Chile/Germany), Professor Francisco Corte-Real (Portugal) and Ms Raelene Sharp (Australia). The Committee sought but did not receive any cooperation from the Government of Israel. However, it was able to enter Gaza via Egypt and conduct a number of site visits from 22 to 27 February.

The Committee met with a wide range of persons, including victims of 'Operation Cast Lead', witnesses, members of the Hamas Authority, doctors, lawyers, businessmen, journalists and members of NGOs and United Nations agencies. It conducted site visits to hospitals, schools, universities, mosques, factories, businesses, police stations, government buildings, United Nations premises and private homes affected by the attacks. It also collected information from a variety of different sources including, the websites of the Israeli Foreign Ministry and Israel Defence Forces (IDF), reports of Palestinian and international NGOs, United Nations reports and documentation.[62]

The Committee released its report after two months of work on 30th April 2009. Unlike the UN Fact-finding Mission, the Committee was mandated only to cover the three-weeks military operation in Gaza, without broadening the material scope of its investigation to encompass the 'general context' in the OPT and the West Bank. Another distinctive feature of the Committee's approach vis-à-vis the UN Mission was its great emphasis on the application of international criminal law as principal legal paradigm inspiring the legal analysis of the report.

The Committee's report, entitled 'No Safe Place', is divided into three parts: an account of the facts investigated; a legal analysis including possible remedies, and a conclusions and recommendations section mainly focused on measures to ensure accountability.[63]

In its findings, the Committee acknowledged the vast scale destruction of the Israeli military offence in Gaza, both in terms human lives and property. In particular, the report determined that the IDF had systematically not distinguished between military and civilian targets in its attacks. As a result, both the loss of life and the damage to property were considered disproportionate to any threat of harm suffered by Israel. It should be noted how, unlike the UN Mission, the Committee's report could not determine with absolute certainty that violations were the consequences of 'deliberate attacks' against civilians. However, it underlined how, if not deliberately, the IDF was acting recklessly, thus raising in any case profiles of criminal responsibility.[64]

On the contrary, the Committee adopted similar views to those included in the UN report in terms of 'policy aspects', affirming how 'Operation Cast Lead' was the implementation of a policy designed to terrorise the entire civilian population of Gaza, to punish it for its perceived support to Hamas and to reduce it to a state of submission.[65]

In the legal analysis, considerable attention was devoted to aspects related to international criminal law and individual responsibility. Thus, the Committee considered whether war crimes, crimes against humanity and genocide were committed in the context of the three-weeks military campaign. In this regard, the report determined that both sides were responsible for the commission of the war crimes of killing, causing great suffering and terrorizing civilians. With regard to crimes against humanity, the Committee determined how there were reasonable grounds for finding that the crimes against humanity of murder, extermination, persecution and other inhuman acts were perpetrated by the IDF

60 Report of the Independent Fact-Finding Committee on Gaza Presented to the League of Arab States (30 April 2009) para. 1.

61 Interview with Professor John Dugard (n 27).

62 Report of the Independent Fact-Finding Committee on Gaza to the Arab League (n 60) [para 4].

63 *Ibid* [para 6].

64 *Ibid* [para 485]; see also interview with Professor John Dugard (n 27).

65 *Ibid* [paras 502 § 521].

in the Gaza Strip.[66] Finally, in relation to genocide, the team led by Prof. Dugard found that, although Israel's actions could meet the requirements for the *actus reus* of the crime as enshrined in customary international law, the facts available failed to meet the high threshold required for the mental element. In other words, according to the report, the main purpose behind 'Operation Cast Lead' was not to destroy Palestinians as a group but rather "to engage in a vicious exercise of collective punishment designed either to compel the population to reject Hamas as the governing authority of Gaza or to subdue the population into a state of submission".[67]

The report casted serious doubts about the impartiality, independence and effectiveness of the Israeli judicial system to genuinely investigate and prosecute grave violations of IHL and IHRL. As a consequence, the Committee recommended the League of Arab States to ask the UN Security Council to refer the situation to the International Criminal Court and the UN General Assembly to request the International Court of Justice to provide an advisory opinion on the legal consequences for states, including Israel, of the conflict in Gaza.[68]

7. UN Fact-Finding Mission into Flotilla incident

On 31 May 2010, the Israeli Defence Forces intercepted on the high-seas six vessels carrying humanitarian assistance in the Gaza Strip (so-called 'Gaza Flotilla'), in defiance of Israeli naval blockade. Following the seizure of the ships by the Israeli authorities, a confrontation took place between the IDF and members of the crew in one of the vessels (the Mavi Marmara), as a result of which nine Turkish passengers were killed, more than 24 passengers received serious injuries caused by live ammunition and a large number of others were arrested, harassed and subjected to different forms of mistreatment. The incident sparked international attention and criticism over Israel's reaction, leading to a freeze of diplomatic relations between Israel and Turkey.

On 2 June 2010, the UN Human Rights Council, convened in an emergency session, adopted resolution 14/1, in which it decided "to dispatch an independent international fact-finding mission to investigate violations of international law, including international humanitarian law and human rights law, resulting from the Israeli attacks on the flotilla of ships carrying humanitarian assistance" to Gaza.[69] The HRC appointed Judge Karl T. Hudson-Phillips as chairman and Sir Desmond de Silva of the United Kingdom and Ms. Mary Shanthi Dairiam of Malaysia to serve as other commissioners.

It should be noted that, along with the HRC inquiry, other panels were established to investigate on the events. In particular, the UN Secretary General separately established a Panel of Inquiry. However, the Panel was not given a primary fact-finding task as it was charged to "receive and review interim and final reports of national investigations into the incident" and, in the light of the information so gathered, to "examine and identify the facts, circumstances and context of the incident; and consider and recommend ways of avoiding similar incidents in the future".[70] The Secretary General's aim was to "positively affect the relationship between Turkey and Israel, as well as the overall situation in the Middle East".[71] Also, Israel and Turkey decided to appoint internal inquiries on the events. In particular, the findings and witnesses' examinations published by the Israeli Committee headed by Judge Turkel provided an extremely important contribution to the HRC Mission's report in providing information and statements from the Israeli side, given Israel's lack of cooperation.

The HRC Mission held meetings in Geneva, Istanbul and Amman. While receiving full cooperation from the Turkish authorities, it was neither recognized nor supported by the Government of Israel. The report was released on 27th September 2010. The document provides an extremely detailed account on the events prior, during and after the seizure of the Mavi Marmara and other five vessels by the Israeli authorities. It also engages in an assessment concerning the legality of Israel's naval blockade of the Strip under international law, while also providing a review of the events following the seizure from the point of view of IHL and IHRL.

In particular, by referring to basic principles of *jus ad bellum*, the Mission determined how the naval blockade imposed to Gaza was inflicting disproportionate damage upon the civilian population and had to be considered illegal under international

66 *Ibid* [paras 511-529].

67 *Ibid* [para 29].

68 *Ibid* [para 614].

69 Human Rights Council, A/HRC/RES/14/1 (2 June 2010) para 8.

70 Report of the Secretary General's Panel of Inquiry on the 31 May 2010 Flotilla Incident (September 2011) para 3.

71 UN News Centre, 'UN Chief announces panel of inquiry into Gaza flotilla incident' (2 August 2010) http://www.un.org/apps/news/story.asp?NewsID=35607#.VMtPamSG-6o accessed on 28 February 2015.

law.[72] In addition, it recalled the findings of the UN Special Rapporteur and of the UN Fact-finding Mission on the Gaza conflict that had considered the blockade a form of collective punishment and, thus, prohibited under article 33 of the Fourth Geneva Convention. As a consequence, the Mission found that also the interception of the flotilla on the high seas could not be justified and therefore had to be considered illegal.[73]

The report then analysed the events related to the seizure of the vessels from the point of international law. It determined how the conduct of the IDF on board of the Mavi Marmara and in the aftermath of the seizure should not be assessed only according to the law of armed conflict, but also subject to international human rights conventions and instruments such as the Code of Conduct for Law Enforcement Officials and the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.

While noting how there was no evidence suggesting that any of the passengers used firearms or that any firearms were taken on board the ship, the Mission determined how Israeli forces engaged in the use of live ammunition once they boarded the Mavi Marmara.[74] It then found out that, in most of the incidents analysed, the investigations clarified that fire was directed against people posing no immediate threat to the soldiers. As a result, the Mission stated that "lethal force was employed by the Israeli soldiers in a widespread and arbitrary manner which caused an unnecessarily large number of persons to be killed or seriously injured".[75]

On this basis, looking at the forensic and medical analysis, the Mission underlined how "the circumstances of the killing of at least six of the passengers were in a manner consistent with an extra-legal, arbitrary and summary execution".[76] The Mission was also satisfied that "much of the force used by the Israeli soldiers on board the *Mavi Marmara* and from the helicopters was unnecessary, disproportionate, excessive and inappropriate and resulted in the wholly avoidable killing and maiming of a large number of civilian passengers".[77]

In relation to the events involving the detention of the passengers of the vessels and their transfer into Israel, the report determined how their treatment and conditions of detention amounted to cruel, inhuman and degrading treatment and, insofar as the treatment was additionally applied as a form of punishment, torture.[78] In particular, the Mission referred to incidents of unprovoked and extreme violence by the Israeli security forces throughout all the process of inspection and detention. Such scale of violations culminated with the allegations, referred in many of the witnesses' statements, of physical abuses and beatings perpetrated against the passengers of the vessels at Ben Gurion Airport before their deportation. In this regard, the Mission found Israel to be in breach of its obligation to protect individuals from arbitrary arrests and detention (article 9 ICCPR) and from torture and other inhuman and degrading treatment (article 7).[79] It also found Israeli security agents' conduct to be in violation of the right of fair trial and of security of person as enshrined in articles 14 and 9 of the ICCPR.[80]

This led the Mission to conclude that "the conduct of the Israeli military […] towards the flotilla passengers was not only disproportionate to the occasion but demonstrated levels of totally unnecessary and incredible violence", betraying an unacceptable level of brutality. According to the report "such conduct cannot be justified or condoned on security or any other grounds. It constituted a grave violation of human rights law and international humanitarian law".[81]

72 Human Rights Council, 'Report of the international fact-finding mission to investigate violations of international law, including international humanitarian and human rights law, resulting from the Israeli attacks on the flotilla of ships carrying humanitarian assistance', A/HRC/15/21 (27 September 2010) paras 52-53.

73 *Ibid* [paras 56-58].

74 *Ibid* [paras 101 § 114].

75 *Ibid* [para 166].

76 *Ibid* [paras 170].

77 *Ibid* [paras 172].

78 *Ibid* [para 181].

79 *Ibid* [paras 215 § 218].

80 *Ibid* [paras 217 § 221].

81 *Ibid* [para 264].

8. UN Fact-finding Mission on Settlements

On 22 March 2012, at its 19th Session, the UN Human Rights Council adopted resolution 19/17, in which it decided to dispatch an independent, international fact-finding mission to "to investigate the implications of the Israeli settlements on the civil, political, economic, social and cultural rights of the Palestinian people throughout the Occupied Palestinian Territory, including East Jerusalem".[82]

The resolution was adopted in the framework of the HRC's grave concerns over continuous Israeli plans and announcements related to the expansion of settlements. In particular, the Council noted how, after forty-five years of occupation, the continuous expansions of the settlements had become one of the main obstacles undermining the peace process, constituting a threat to the two-State solution and to the creation of a contiguous, sovereign and independent Palestinian State.[83]

The resolution sparked harsh criticism from the Israeli side. As a result, Israel decided to halt all sort of cooperation with the UN Human Rights Council, causing the deferral of its 2013 Universal Periodic Review.[84]

The Mission was headed by Ms. Christine Chanet and comprised by Ms. Asma Jahangir and Ms. Unity Dow. It convened in Geneva and, assisted by a investigate team provided by the OHCHR, held meetings and consultations in order to set up its methodology.

Due to Israel's lack of cooperation and denial of access to the territory, alternative arrangements were made to obtain direct and first-hand information by holding a series of meetings with a wide range of interlocutors between 3 and 8 November 2012 in Jordan.[85]

62 submissions were received from interested parties and organizations, while the Mission based its accounts on a variety of different sources, including interviews with witnesses and victims and information provided by governments, inter-governmental organisations, international and local NGOs, professional bodies, academics and the media.

The Mission's findings were translated into a report published on 7th February 2013. The report contains the first and only definition of Israeli settlements provided by an authoritative international body so far. In particular, the Mission understood Israeli settlements "to encompass all physical and non-physical structures and processes that constitute, enable and support the establishment, expansion and maintenance of Israeli residential communities beyond the 1949 Green Line in the OPT".[86] In this regard, the Mission decided not to differentiate between 'settlements', 'outposts' or any other Israeli structures that have been erected, established or expanded beyond the Green Line.

The Mission then decided to refer to IHL and IHRL as principal legal frameworks. In relation to international criminal law and individual responsibility, it only mentioned that, on 3 December 2012, Palestine sent letters to the UN Secretary-General and the UN Security Council, citing article 8(2)(b)(viii) of the Rome Statute of the International Criminal Court and affirming that "Israeli settlement activities constitute war crimes, and that Israel must be held accountable for such acts".[87]

The report provides a brief overview on the history of settlements activities in the West Bank. It noted in particular how "since 1967, Israeli Governments have openly led and directly participated in the planning, construction, development, consolidation and/or encouragement of settlements by including explicit provisions in the fundamental policy instrument".[88] Based on these developments, the report divided settlers into three categories: those moving on 'quality-of-life' grounds, Ultra-Orthodox Jews and those motivated by political and religious ideologies, living in the central part of the West Bank and often very close to Palestinian communities.

The Mission was keen in highlighting the role of 'quasi-institutional' entities such as the World Zionist Organization in furthering settlements interests by providing financial assistance. It also underlined the solid ties linking governmental officials and settlements' representatives, by pointing the attention from one side on the

82 Human Rights Council, A/HRC/RES/19/17 (22 March 2012) para 9.

83 *Ibid* [para 3].

84 Al-Jazeera, 'Israel cuts ties with UN human rights body' (26 March 2012) http://www.aljazeera.com/news/middleeast/2012/03/201232614191837437.html accessed 28 February 2015. For the decision of the Human Rights Council to defer Israel's UPR see, Human Rights Council, A/HRC/OM/7/L.1 (28 January 2013).

85 Human Rights Council, 'Report of the independent international fact-finding mission to investigate the implications of the Israeli settlements on the civil, political, economic, social and cultural rights of the Palestinian people throughout the Palestinian Territory, including East Jerusalem', A/HRC/22/63 (7 February 2013) para 7.

86 *Ibid* [para 4].

87 *Ibid* [para 17].

88 *Ibid* [para 20].

governmental scheme of subsidies and incentives to encourage Jewish migrants to Israel to move to settlements and by emphasizing from the other the role of Government's master plans in encouraging settlements expansion.[89] The Mission further noted how the 'Second Netanyahu Government' in place since 2009 had contributed to the consolidation and expansion of settlements, by increasing the expenditure on the settlements during 2011 of 38 percent with respect to 2010.[90]

Coming to analyse the impact of settlements on the situation of human rights in Palestine, the report highlighted how such effect "is manifested in various forms and ways. These are interrelated, forming part of an overall pattern".[91] It further determined how settlements violate a number of basic human rights and freedoms, including the Palestinian people's right to self-determination, their right to equality and non-discrimination before the law, freedom of movement, freedom of expression and religion, right to adequate housing, right to water and a number of economic rights.

In particular, the Mission referred to the International Court of Justice's Advisory Opinion in emphasizing how "the construction of the wall, coupled with the establishment of Israeli settlements, was altering the demographic composition of the Occupied Palestinian Territory, and thus was severely impeding the exercise by the Palestinian people of their right to self-determination".[92] Furthermore, it argued that the twofold legal system applicable to settlers and Palestinians in the OPT was translating into a "stark inequality before the law".[93] In this regard the Mission took the view that "the legal regime of segregation operating in the OPT has enabled the establishment and the consolidation of the settlements through the creation of the privileged legal space for settlements and settlers [resulting] in daily violations of a multitude of the human rights of the Palestinians".[94]

The Mission also took note of the widespread pattern of settler violence targeting Palestinian communities in the West Bank, including the practice of 'price-tag' attacks,[95] at the same time emphasizing the climate of impunity in which these attacks had been able to flourish. It also acknowledged the policy of extensive demolitions and appropriation of Palestinian property enforced in order to allow the expansion of settlements, in particular in key-areas such as East Jerusalem and the E-1 zone.[96]

In its conclusions, the report highlighted how "the establishment of the settlements in the West Bank including East Jerusalem is a mesh of construction and infrastructure leading to a creeping annexation that prevents the establishment of a contiguous and viable Palestinian State and undermines the right of the Palestinian people to self-determination".[97] While underlying their illegal character under both IHL and IHRL, the Mission determined that "settlements are being maintained and developed through a system of total segregation between the settlers and the rest of the population living in the OPT". Hence, in the view of the Mission, settlements and their related infrastructure should be considered serious breaches of Israel's duty to respect the right to self-determination and certain obligations under international humanitarian law.[98] In this regard, it emphasized how, given their criminal character under the Rome Statute, the accession by Palestine to the International Criminal Court would have led to accountability and justice for victims.

89 *Ibid* [paras 20-23].

90 *Ibid* [para 30].

91 *Ibid* [para 31].

92 *Ibid* [para 33].

93 *Ibid* [para 46].

94 *Ibid* [para 49].

95 The practice of 'price tag' attacks, in place since 2008, consists mainly in attacks against Palestinian persons and property in response to restrictions by the Israeli authorities on settlement construction or settler groups. In particular, "the stated aim of 'Price Tag' attacks is to prevent the Israeli authorities from adopting such restrictive measures by threatening them with potential counter-attacks against Palestinians". See, Al-Haq, 'Institutionalised Impunity: Israel Failure to Combat Settler Violence in the Occupied Palestinian Territory' (Al-Haq 2013) 13.

96 *Ibid* [paras 50 § 62].

97 *Ibid* [para 101].

98 *Ibid* [para 104].

2.2 A 'Thematic Comparative Analysis' of the Different Commissions of Inquiry

This section aims to compare the different experiences of international commissions of inquiry/fact-finding missions highlighted above, by selecting a number of areas of interests or thematic issues in order to assess their contribution to improve respect for human rights and international humanitarian law in the OPT.

The thematic issues selected for the comparative analysis are the following: mandate received; standard of proof implemented; impact of cooperation/non cooperation by the parties; use of sources and evidence; contribution to the development of international law as applicable to the situation in Palestine; the use of international criminal law (the emphasis on accountability); the impact of conclusions and recommendations on the type of response provided by the international community.

1. Mandate

As already mentioned in chapter one, the mandate represents an extremely important factor in shaping the commissions of inquiry's work and in directing their findings towards specific conclusions. At a first sight, it is also an element that escapes the commissions' control as their mandates are normally framed in their founding resolutions. In this regard, it is important to highlight a potential tension existing between the commission's establishment phase and its implementation. While the implementation phase fully falls under the commissions' control and appear to be more technical in nature, the establishment of commissions of inquiry under the UN framework has always been a prerogative of political organs such as the Security Council, the Secretary General and, most recently, the Human Rights Council. This entails that political organs have also the authority to frame the commission's mandate and, in this way, indirectly affecting its work and findings.

In principle there is nothing wrong with political organs such as the Security Council or the Human Rights Council setting up commissions of inquiry and laying down their mandates. In effect, appointing fact-finding bodies falls within their prerogatives and powers under international law. Problems may arise when political organs decide to resort to international legal paradigms in order to serve their political scopes and agenda. This not only appears in contrast with the very nature of commissions of inquiry as independent technical bodies entrusted to impartially establish facts and discover the truth. It may also negatively affect their work and prejudice the credibility of their findings. This is even more the case in a context such as Palestine, where the political and extremely polarized rhetoric of the different parties continues to seriously jeopardize the correct and impartial application of international law.

Looking at the different examples analysed above, it is important to note that in more than one case the commissioners have underlined the one-sided character of the mandate received and decided either to interpret it in a more balanced manner or to unilaterally modify the terms of references under which they were appointed. For example, in the case of the establishment of the commission of inquiry charged to investigate events related to the outbreak of the second intifada in 2000, the Human Rights Commission in its resolution entrusted it with the mandate "to gather and compile information on violations of human rights and acts which constitute grave breaches of international humanitarian law *by the Israeli occupying Power in the occupied Palestinian territories*" (emphasis added).[99] Interestingly enough, in its report, the Commission of inquiry referred to its mandate as being "to investigate violations of human rights and humanitarian law in the occupied Palestinian territories after 28 September 2000"[100] without referring specifically to one parties to the conflict. The report does not contain any criticism towards the initial drafting of the mandate as contained in the resolution of the Human Rights Commission, but the Team led by Professor Dugard decided that its investigation should look into violations committed by both sides of the conflict. In particular, it determined that "human rights violations has been committed by Palestinians, either under the authority of the PA or by individual Palestinians acting seemingly without authority. Where necessary, the present report draws attention to these violations".[101]

Unfortunately, the one-sided wording included in the founding resolutions of international commissions of inquiry into events in the OPT has not been a practice circumscribed to the work of the Human Rights Commission. The UN Human Rights Council, which replaced the Commission in 2006 and proved extremely active in appointing international investigations into alleged human rights violations, adopted a similar approach. As an example, the High-Level Mission on Beit Hanoun was tasked in November 2006 with the mandate to "travel to Beit Hanoun to assess the situation of victims, address the needs of

99 Commission on Human Rights, Report of the Fifth Special Session (n 21).

100 Report of the human rights inquiry commission (n 22) para 4.

101 *Ibid* [para 12].

survivors and make recommendations on ways and means *to protect Palestinian civilians against any further Israeli assaults*" (emphasis added).[102] The Mission interpreted its mandate by posing attention in particular on the needs and prerogatives of victims.

On the same vein, the Human Rights Council resolution establishing the Fact-finding Mission into the Gaza War in 2009 referred 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, due to the current aggression".[103] Such one-sided wording was informally amended by the Mission itself, after Justice Goldstone initially refused the appointment citing the 'biased' and 'uneven-handed' character of the mandate.[104] Thus, the mandate as included in the report published in September 2009 made reference 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", thus entailing a legal assessment of the conducts of all actors.[105] As already mentioned, in its findings the Mission highlighted how both parties were responsible for serious violations of IHL and IHRL amounting to war crimes and possibly crimes against humanity.

Finally, also the UN HRC Fact-finding Mission on the Flotilla events, once charged with the mandate 'to investigate violations of international law, including international humanitarian law and human rights law, resulting from the Israeli attacks on the flotilla of ships carrying humanitarian assistance' reflected upon the one-sided character of the mandate received. In particular, it noted how, by referring to terms such as 'Israeli attacks on the flotilla' or 'violations of international law', the resolutions seemed to determine that such conducts had in fact occurred prior to any investigation.[106] The resolution also appeared to find as

102 Report of the high-level fact-finding mission to Beit Hanoun (n 5) para 5.

103 Human Rights Council, A/HRC/RES/S-9/1 (n 51) para 14.

104 Joint Action Committee for Political Affairs, 'United Nations Fact-Finding Mission on the Gaza Conflict: the Goldstone Report' https://www.jacpac.org/issues/44-issues/issues/117-goldstone-analysis accessed on 28 February 2015.

105 Report UN Fact-Finding Mission on Gaza (n 1) para 131.

106 Report of the international fact-finding mission to investigate violations of international law resulting from the Israeli attacks on the flotilla (n 72) para 5.

a well-substantiated fact that there had been Israeli attacks on the flotilla of ships and that the ships were carrying humanitarian assistance.[107] In this regard, the Mission decided not to interpret its task as proceeding on any such assumptions and reiterated its position in the report's conclusions, where it determined that "it found it necessary to reinterpret its mandate because of the manner in which the resolution appointing it was couched. It is important in the drafting of matters of the sort that the impression is not given of the appearance of any prejudgment".[108]

As a general trend, from one side one should note a clear attitude by UN political bodies such as the Human Rights Council to pass resolutions containing one-sided and often prejudicial language, while making use of their power to set up international investigations over events in the OPT. From the other, it is equally important to acknowledge the remarkable role played by the commissioners themselves in amending the mandates received or interpreting them in a way that did not harm the independence and credibility of their work. Looking at the records of the commissions analysed above, one cannot cast any doubt on the high level of integrity and independence demonstrated by the commissioners as well as on their commitment to the truth and to a firm and impartial application of the law. Whether such efforts have led to a truthful and reliable overview of the events, it is something that is honestly difficult to assess in its entirety. Indeed, a first concrete result achieved by these international investigations is the contribution provided in shifting the attention from the highly-politicized debate surrounding any development in the OPT to the need of impartially and independently applying international law as tool for achieving a stable and just solution to the conflict.

It is possible to conclude that the one-sided character of the mandates that commissions of inquiry in the OPT initially received has played a negligible role in the reports' findings. Indeed, the high level of integrity, independence and impartiality with which the commissioners have set up their methodology and directed their investigations has adequately counteracted such initial flaw. More problematic remains the shadow casted by such 'original sin' in terms of 'perception of credibility' of the commissions' findings in the eye of the international community, which, combined with Israel's continuous demonization of these international investigations, has negatively affected the follow-up process.

107 *Ibid*.

108 *Ibid* [para 272].

The second important aspect related to the mandate concerns the issue of individual criminal responsibility for the violations and the reference to international criminal law (ICL). It should be noted, in this regard, a certain consistency among the practice of the HRC in entrusting commissions of inquiry with mandates limited to alleged violations of IHL and IHRL, without explicitly addressing ICL and the need to ensure accountability or to identify possible perpetrators. This may be linked to the cautious approach undertaken by the international community vis-à-vis the issue of individual criminal responsibility in a highly political context such as Israel and the OPT. However, it remains difficult to explain why a body such as the HRC, which has not abstained from adopting resolutions containing one-sided wording towards Israel and that has established commissions of inquiry with an ICL-based mandate elsewhere,[109] has refrained from tackling directly the long-standing issue of individual accountability in Palestine. In this regard, it should be considered an extremely important development the recent establishment, by the HRC, of a commission of inquiry mandated "to investigate all violations of international humanitarian law and international human rights law […] in the occupied Gaza Strip, in the context of the military operations conducted since 13 June 2014 […] *to establish the facts and circumstances of such violations and of the crimes perpetrated and to identify those responsible, to make recommendations, in particular on accountability measures*, all with a view to avoiding and ending impunity and ensuring that those responsible are held accountable" (emphasis added).[110]

In this light, the only example so far of international commissions set up with a mandate expressively addressing ICL in its wording remains the Fact-finding Committee established by the League of Arab States in February 2009 with the tasks of investigating and reporting on violations of human rights law and international humanitarian law occurring during 'Operation Cast Lead' and collecting information on the responsibility for the commission of international crimes.

The fact that international commissions of inquiry established in relation to Palestine have not been charged with a specific ICL mandate does not mean in any way that they have not been able to address the issue concerning the commission of international crimes in the OPT. However, this issue will be dealt more in depth in the section dedicated to international criminal law and accountability.

109 Since its establishment in 2006, the Human Rights Council has dispatched commissions of inquiry with an 'individual-accountability-focused' mandate in relation to situations such as Ivory Coast, Libya, Syria, North Korea and Eritrea.

110 Human Rights Council, A/HRC/RES/S-21/1 (23 July 2014) para13.

2. Standard of proof

In the first chapter a number of definitions of what commissions of inquiry/fact-finding missions are under international law have been given. It is now time to provide some clarity also on what these bodies are not. Certainly, commissions of inquiry are not mechanisms charged with making binding judicial decisions. In particular, such non-judicial character is inherent to their nature, their procedures and methodology. It also derives from the standard of proof they refer to in order to justify the credibility of their findings. Commissions of inquiry and fact-finding missions have themselves repeated countless number of times their inability to make judicial findings. In this regard, judicial bodies in criminal trials deliver their determinations on the responsibility of individual based on the standard of proof of 'responsibility beyond reasonable doubt'. This standard is grounded on the need to respect a number of fundamental guarantees, such as the right of the defendant to a fair trial and it makes the reliance on 'open source' material and 'unchallenged evidence' (which are inherent to the work conducted by commissions of inquiry) more difficult. On the contrary, if one looks at the methodology implemented by international commissions of inquiry, it finds out that they normally rely upon a much lower standard of proof. Such standard appears met when the commissions determine that there are 'reasonable grounds to believe' that a certain event took place.[111] The 'reasonable grounds' or 'balance of probabilities' standard has been adopted by a number of different fact-finding experiences, including those commissions of inquiry charged to investigate events in Guinea, Darfur, Libya, Syria and North Korea. Although it represents a lower standard than the one used in criminal trials, 'reasonable grounds to believe' is not an unknown formula to international criminal proceedings. Looking at the practice, the ICC Statute determines that different standards of proof apply to the different stages of the proceeding, ranging from the 'reasonable basis to proceed with an investigation' to 'the responsibility beyond any reasonable ground' of an individual in trial. Within this spectrum, the Statute disposes at article 58 that, for the Pre-Trial Chamber to issue a warrant of arrest, the Prosecutor should demonstrate that there are 'reasonable grounds to believe' that an individual

111 Such standard is also defined by certain literature as the 'balance of probabilities' test. S. Wilkinson, 'Standards of Proof in International Humanitarian and Human Rights Fact-Finding and Inquiry Missions', Geneva academy of international humanitarian law and human rights (2011) http://www.geneva-academy.ch/docs/Standards%20of%20proo%20report.pdf accessed on 28 February 2015; Interview with Professor John Dugard (n 27).

has perpetrated the crimes in question.[112] This, in a way, renders the work of international commissions of inquiry not completely avulsed from the context of international criminal investigations.[113] On the contrary, it may suggest that the commissions' findings may play a relevant role in the preliminary phases of the proceedings within the ICC framework.[114]

Unfortunately, looking at the commissions established in relation to Palestine, there is no clear sign that the 'reasonable grounds to believe' standard has been applied in a consistent manner. While their practices suggest that commissions may have resorted to it in their investigations,[115] in most of the examples analysed there is no formal acknowledgment of the adoption of such specific standard.

For example, the UN Fact-finding Mission on the Gaza Conflict refers to the formula of "sufficient information of a credible and reliable nature for the Mission to make a finding in fact" in order to draw its conclusion on the events occurred.[116] Indeed, the Mission was aware that its report contained determinations concerning the perpetration of international crimes. In this regard, it highlighted how in all of such cases it had "sufficient information to establish the objective elements of the crimes in question. In almost all of the cases [the Mission had also been able] to determine whether or not it appears that the acts in question were done deliberately or recklessly or in the knowledge that the consequence that resulted would result in the ordinary course of events".[117] However, the Mission wished also to emphasize the importance of the principle of the presumption of innocence as cornerstone of criminal procedures. In this regard, it expressively underlined how its findings "do not attempt to identify the individuals responsible for the commission of offences nor do they pretend to reach the standard of proof applicable in criminal trials".[118]

While the Arab League Committee on the Gaza War resorted to the standard set up by the ICJ in the Nicaragua case for weighing and collecting evidence and to the 'reasonable grounds for finding' formula,[119] a 'balance of probabilities' standard seems also to have been adopted by the Fact-finding Mission on the Flotilla events, where it states that "in assessing the evidence and information available to it, the Mission paid particular attention to the content of the evidence and demeanour of the persons appearing before it in deciding whether, and if so, what part of the information provided should be accepted. More weight of necessity was accorded to such evidence if believed than to information from other sources. In addition, with respect to information in the nature of hearsay evidence, due regard was paid, giving to it such weight as the circumstances merited. Matters were decided on the basis of the preponderance and quality of the evidence so as to satisfy all the members of the Mission in order that they felt sure of their conclusions".[120]

Finally, the UN Inquiry Commission of 2000 explained how, to determine the reliability of its findings, "every attempt has been made to confirm their accuracy by reference to reports on the same incidents from other sources. Where there is any doubt about the accuracy of a particular factual situation, no statistics are given about it".[121]

Hence, looking at these examples, more clarity is expected from future commissions in spelling out, in the section dedicated to the methodology, the standard of proof they are applying in order to ascertain the credibility of their findings. This will help contextualizing the findings of the commissions and probably render less complicated the work of those bodies, such as international tribunals, that may be involved in the so-called 'follow-up phase' of the reports.

3. Cooperation/Non-Cooperation by the Parties

Cooperation by the parties involved in a conflict is extremely important for the work of those commissions of inquiry charged to investigate over allegations of violations of IHL and IHRL. This is for two main reasons. The first relates to the need

112 Rome Statute of the International Criminal Court, Article 58(1)(a), http://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf accessed 28 February 2015.

113 For a parallelism between the standard of proof adopted by commissions of inquiry and the one implemented at the 'warrant of arrest stage' in criminal proceedings see Wilkinson (n 110) 19.

114 In particular, as it will be explained in depth in the section dedicated to international criminal law, the findings commissions of inquiry can play a relevant role in the pre-investigative and investigative phases of international criminal proceedings. On this issue, C. Stahn – D. Jacobs, 'Human Rights Fact-Finding and International Criminal Proceedings: Towards a Polycentric Model of Interaction' Grotius Centre Working Paper 2014/017-ICL (2014) 13.

115 Interview with Professor John Dugard (n 27).

116 Report UN Fact-Finding Mission on Gaza (n 1) para 171.

117 *Ibid* [para 172].

118 *Ibid*.

119 Report of the Independent Fact-Finding Committee on Gaza to the Arab League (n 60) paras 12 § 526.

120 Report of the international fact-finding mission to investigate violations of international law resulting from the Israeli attacks on the flotilla (n 72) para 24.

121 Report of the human rights inquiry commission (n 22) para 11.

to grant the commissions' access to the territory and facilitate their movements in situations that are often extremely volatile from the point of view of security. Past experiences indicate that where commissions of inquiry have been given access to the territory, the accuracy of their findings has increased both in terms of methods used and of the quality and quantity of the information collected.[122] Site-visits to locations where incidents or attacks have taken place and direct contact with witnesses and victims on the ground and with affected communities often play a critical role in advancing the process of collecting evidence, especially in case where commissions are tasked with investigating violations of IHL and IHRL or allegations of international crimes.

The second reason for the importance of parties' cooperation is related to their support in providing the commissions with evidence and information. Information in possess of those parties involved in situations of armed conflict are often decisive in assessing whether violations of IHL or IHRL have taken place or in determining responsibilities. A clear example is represented by the assessment of whether an attack has breached the obligation to respect distinction and proportionality under IHL. Such an evaluation cannot be properly conducted without the information available to the party of the conflict responsible for launching the attack.

These elements may help understanding why the cooperation by the parties involved is such a critical factor for a successful accomplishment of the international fact-finding exercise. For this reason, international inquiries or 'fact-finding' missions - as originally conceived - were allowed to carry out their tasks only in case full consent, support and cooperation were ensured by the parties involved. This finds echo in the 1991 UN General Assembly Declaration on Fact-finding in the Field of the Maintenance of International Peace and Security. According to paragraph six of the Declaration, in fact, "the sending of a United Nations fact-finding mission to the territory of any State requires the prior consent of that State".[123]

122 Commissions of inquiry that were granted cooperation and access to the territory such as those in Darfur and former Yugoslavia have shown a level of accuracy in reporting about specific incidents that is much higher than those commissions, such as in the case of Syria, that were not allowed into the territory. See, in particular, Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), S/1994/674 (27 May 1994); Report of the International Commission of Inquiry on Darfur to the United Nations Secretary General, (25 January 2005); Report of the independent international commission of inquiry on the Syrian Arab Republic, A/HRC/S-17/2/Add.1 (23 November 2011).

123 UNGA, 'Declaration on Fact-finding by the United Nations' (n 10) para 6.

If we look at the recent history of commissions of inquiry established in the OPT, those Missions have initially paid due respect to the principle of State consent as necessary requirement for the implementation of their mandates. The UN Inquiry Commission on the events related to the outbreak of the Second Intifada in 2000 made sure that Israel was granting it access to the territory and facilitation of movements before commencing its work on the ground.

It follows the same direction the decision, in May 2002, by former UN Secretary General Kofi Annan to dismantle the international fact-finding team mandated to investigate over events in Jenin camp due to Israel's decision not to cooperate with the inquiry and to deny it access to the territory. The same approach was later endorsed by former UN Special Rapporteur John Dugard in 2006, when Israel provided no response to his request for cooperation in the fact-finding activity he was entrusted to by the Human Rights Council in relation to events connected to 'Operation Summer Rains' in Gaza.

In this regard, the experience of the UN High-Level Mission to Beit Hanoun can be considered a watershed, with its decision to proceed with its investigation despite Israel's lack of recognition. The example of the Beit Hanoun Mission has been subsequently followed by the UN Fact-Finding Mission and the Arab League Committee on the Gaza Conflict (2009), the UN Fact-Finding Mission on the Flotilla events (2010), the UN Fact-Finding Mission on Settlements (2013) and, most probably, the UN Commission of Inquiry into the Third Gaza War (2015).

While it should be acknowledged that Israel does not represent the only party involved in the situation and the commissions have always received support from the Palestinian side (including access to the territory of Gaza), a trend has recently emerged in which commissions of inquiry have been set up by the HRC despite the concerned State's refusal to engage with them.[124] In the case of Israel, its lack of support for the commissions has represented not only a serious obstacle for the complete fulfilment of the commissions' tasks but has also represented an attempt to seriously undermine their legitimacy in the international arena.

Israel has often justified such stance due to the 'anti-Israeli' bias inspiring the UN Human Rights Council as the mandating body of these commissions. While the one-sided language found in the resolutions establishing certain commissions

124 This trend can be noticed not only in relation to Israel but also to other cases such as Syria, North Korea, Sri Lanka and Eritrea.

may cast doubt over the impartiality of the Human Rights Council,[125] commissions of inquiry have been established by the same Council in relation to a range of different situations such as Libya, Syria, North Korea and Eritrea. These states are known for not being particularly 'Israel friendly' and have all followed Israel's example in refusing to recognize the legitimacy of the investigations and to cooperate with them. In addition, as already specified, the prejudicial language contained in the HRC resolutions had negligible impact on the independent and impartial character of the work carried out by the commissions on the ground. In the case of one-sided mandate, the commissions have made sure either to amend it or to interpret it in a way that their investigations could encompass violations committed by all parties to the conflict. This has been the case of the 2000 Human rights inquiry commission, the 2009 UN Fact-finding Mission and Arab League Committee on the Gaza conflict and the 2010 Fact-finding Mission on the flotilla events. Hence, commissions have implemented their mandates by scrutinising both the actions of Israel and of Palestinian armed groups in terms of their compliance with international law standards. In all the examples analysed, evidence has been collected from a variety of different sources, including site-visits, witness' testimonies and reports of authoritative and independent international organizations and local NGOs active on the ground pursuing a legal rather than a political approach. Commissions have always sought, to the extent possible, the cooperation of the Israeli authorities, by forwarding them many requests to provide information and evidence. Once they realized that no cooperation whatsoever would have been provided, they resorted to statements and declarations released publicly by the Israeli authorities in order to ensure that the Israeli view of the events was included in the reports.[126]

Indeed, one cannot deny the importance, in contexts of urban warfare and armed conflict such as the Gaza Strip, of the information that Israel military intelligence possessed at the time of launching attacks in order to provide a comprehensive evaluation on the respect of basic IHL principles during Israeli military campaigns.

125 This is especially the case for those resolutions establishing the 2000 Human rights inquiry commission, the 2009 UN Fact-Finding Mission on the Gaza Conflict and the 2010 UN Fact-finding Mission on the flotilla events. See the section above dedicated to the mandate.

126 In this regard the Report of the UN Fact-Finding Mission on the Gaza Conflict contains, for each specific section, a sub-paragraph exposing the Israeli view over a particular incident or attack. See Report UN Fact-Finding Mission on Gaza (n 1) paras 372 § 464 § 498 § 570. The same approach had been previously undertaken by the UN High Level Mission to Beit Hanoun. See, Report of the high-level fact-finding mission to Beit Hanoun (n 5) paras 36-40. With regard to the UN Fact-Finding Mission on the flotilla events, as already mentioned, it relied extensively to the findings released by the Israeli internal investigation led by Judge Turkel.

It is also a fact that Israel's lack of cooperation has rendered the work of the commissions much harder and, in certain cases, diminished the accuracy of their findings which are often based only on testimonies of victims and witnesses from the Palestinian side.[127] In countless occasion, this has been acknowledged by the same commissions. However such limitations cannot be used as a tool to delegitimise these commissions. On the contrary, the decision not to cooperate with the commissions and to negatively affect their findings should entirely fall under Israel's responsibility.

With the exception of those inquiries set up by the Secretary General,[128] it seems that since 2002 Israel has engaged in a consistent policy with regard to the efforts put in place by the international community to dispatch international investigations to shed lights into events in the OPT. This policy is based upon two pillars. The first-one entails not recognising these investigations as legitimate and refusing to formally engage with them, referring to the political biases behind their establishment.[129] The second pillar consists in a constant denigration of the international investigation's work and findings. Such denigration is often based on the one-sided evidence presented to these commissions and on the fact that they did not take into consideration Israel's information and views. What appears to be a schizophrenic behaviour from the point of view international law, seems on the contrary to work effectively in the political arena. A perfect example is represented by the follow-up to the report of the 2009 UN-Fact Finding Mission on the Gaza Conflict. Israel's refused any sort of cooperation with the Mission, which was denied access to the territory of Israel and the occupied West Bank and was forced to enter Gaza via Egypt. The Mission's findings contained numerous assessments on the compliance by Israel and Palestinian armed groups

127 See in particular those sections of the UN Fact-Finding Mission on the Gaza Conflict related to attacks against hospitals in Gaza and deliberate attacks against civilians. Report UN Fact-Finding Mission on Gaza (n 1) paras 620 § 707. Another example concerns the account of the events immediately following the seizure of the Mavi Marmara vessel by the Israeli soldiers and the exchange of fire on board. See, Report of the international fact-finding mission to investigate violations of international law resulting from the Israeli attacks on the flotilla (n 72) para 115.

128 Report of the Secretary General's Panel of Inquiry on the 31 May 2010 Flotilla Incident (September 2011) para 3. Again, it should be noted that the Secretary General's Panel was not given a primary fact-finding task as it was instructed to "receive and review interim and final reports of national investigations into the incident" and, in the light of the information so gathered, to "examine and identify the facts, circumstances and context of the incident; and consider and recommend ways of avoiding similar incidents in the future" (see, *Supra*, n. 70).

129 This does not mean that Israel may have engaged in informal ways of cooperation, for example by facilitating the travelling of certain witnesses and legal and military experts, which provided testimonies before these commissions. Unfortunately, the lack of formal channels of communication does not permit to assess the impact of such 'informal' cooperation in its entirety.

of basic principles of IHL. Based on the evidence that, for obvious reasons, did not include intelligence information coming from Israel, it concluded that the "disproportionate destruction and violence against civilians were part of a deliberate policy".[130] It also expressed the view that "what occurred in just over three weeks at the end of 2008 and the beginning of 2009 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".[131]

As it will be explained more in details in the section dedicated to 'follow-up measures', some of the findings were unilaterally retracted by Justice Goldstone in an editorial of 2011 on the basis of alleged information subsequently disclosed to him by the Israeli authorities. It should be noted how Goldstone's retraction was used by many Israeli political figures to undermine the legal validity of the report of the UN Mission. In particular, according to Prime Minister Netanyahu it was time, after Goldstone retraction, "to throw [the report] into the dustbin of history".[132] Consistently, the US Senate unanimously passed a resolution calling on the UN "to reflect the author's repudiation of the Goldstone report's central findings, rescind the report and reconsider further Council actions with respect to its findings",[133] while the American Jewish Committee, through its director David Harris, declared that "Judge Goldstone should apologize to the State of Israel for the accusations of intentionally targeting civilians, which he now admits were unfounded. He should present his updated conclusions to the UN Human Rights Council, as well as to the General Assembly, which endorsed the skewed report, and press for its rejection".[134]

Regardless of whether the information subsequently disclosed to Goldstone could have had a significant impact on the Mission's findings, these reactions do not seem to take into account that the reason why the Mission could not have examined all the information available at the time was precisely because of Israel's

130 Report UN Fact-Finding Mission on Gaza (n 1) para 1211. 1690

131 *Ibid* [para 1690].

132 The Jerusalem Post, 'PM: Throw Goldstone Report into dustbin of history', (2 April 2011) http://www.jpost.com/Diplomacy-and-Politics/PM-Throw-Goldstone-Report-into-dustbin-of-history accessed 28 February 2015.

133 See *supra* (n 77).

134 The Jerusalem Post, 'US Jewish groups urge Goldstone to retract report', (3 April 2011) http://www.jpost.com/International/US-Jewish-groups-urge-Goldstone-to-retract-report accessed 28 February 2015.

deliberate choice not to cooperate with it.

While it is not for the purpose of this study to engage in a review of Israel's political strategy in the international arena, it is important to assess how Israel' lack of cooperation and lack of recognition affected the performances of international fact-finding missions. In this regard, once again, it should be underlined how, in order for international investigations to be as truthful and reliable as possible, it is extremely important that all affected actors provide full assistance in the investigative process. Israel's decision not to engage with any of these investigations not only places obstacles on the work of such bodies but also raises serious doubts over Israel's commitment to ensure an impartial and independent process of revision of its actions from the point of view of international law. This attitude, coupled with the structural deficiencies characterizing Israel's internal system of investigations and prosecutions, goes into the direction of reinforcing the persistent climate of impunity and lack of accountability over violations in the OPT. While Israel has always referred to the political biases of the HRC to undermine the credibility of the commissions, it is a fact that it has denied cooperation to investigative missions established by other UN bodies and prior to the establishment of the HRC, such as the Fact-Finding Team set up by the Secretary General under the auspices of the Security Council to investigate over events in Jenin in 2002.

All the above arguments find corroboration in the wording of the UN High-Level Mission to Beit Hanoun, which stated in its report how "Israel feels that the mandate of the mission is biased against it. That is a matter for the Council. The mission has, however, gone to great lengths to execute its mandate in as balanced a way as possible. The effective ban on its visiting Israel and meeting with Israeli actors (including victims of Kassam rocket attacks in southern Israel) has itself been an obstacle to the balance that Israel seeks".[135]

Indeed, as mentioned above, the lack of support and cooperation by Israel has had calamitous effects both in relation to the missions' work and their legitimacy in terms of follow-up measures by the international community. However, Israel's lack of cooperation, although representing an important burden, has not proved insurmountable, given that many of the commissions had been granted access to the critical part of the affected territory that is the Gaza Strip through the Rafah border crossing. In addition, the Commission had the possibility to seek

135 Report of the high-level fact-finding mission to Beit Hanoun (n 5) para 73.

information from a variety of different sources such as UN agencies, the ICRC and international and local NGOs with access to the affected territory of both the West Bank and the Gaza Strip. The commissions have always commended the efforts of these organizations, while often finding their documentation to be 'reliable' and 'credible'. These sources have complemented first-hand evidence collected by the commissions such as interviews with victims and first-hand witnesses of the events. In addition, commissions have always engaged in an effort to collect sources indirectly portraying Israel's view and positions on the events as well as evidence 'indirectly' provided by the Israeli side, such as the testimonies of Israeli soldiers with 'Breaking the Silence' during the 2009 Gaza War or the hearings of the Turkel Committee in relation to the flotilla events.

Hence, the constant lack of cooperation from the Israeli side has not undermined the value and credibility of the commissions' reports nor the way in which commissions have scrupulously applied international law according to the information available. In this regard, this author feels to share the view expressed by Prof. Dugard that commissioners should go ahead with their investigations also in cases where support from the affected states is lacking.[136] Such argument may find further corroboration in the existence of a general duty to cooperate with United Nations' efforts to end conflict, even if falling outside from the Security Council's remit.[137] This challenge to the traditional idea of fact-finding may also be linked with the new dimension of fact-finding that focuses mainly on IHL and IHRL violations, domains that are extremely sensitive for States.[138] In this regard, recent fact-finding missions' experience shows that, even in cases where states' cooperation was missing, inquiry commissions provided with their reports authoritative findings to be used by those actors of the international community entrusted with taking further actions and responses to human rights emergencies.

136 Interview with Prof. John Dugard (n 27).

137 Z. Yihdego, 'The Gaza Mission: Implications for International Humanitarian Law and UN Fact-Finding' 13 Melbourne Journal of International Law (2012) 16.

138 *Ibid* 16.

4. Use of sources and evidence

In the work of commissions of inquiry and fact-finding missions, the selection of sources and evidence and the process of combining them together are of pivotal importance in order to support the credibility of their findings. Hence, it is relevant to assess not only the choice of sources but also the manner in which different sources have been used and combined by the commissions. Such an exercise should be mindful of the primary importance played by parties' cooperation in influencing the quality and quantity of information put at disposal of international commissions.

Starting from the 2000 Human rights commission, the investigative team led by Professor Dugard was granted access to the territory but did not receive Israel's cooperation. It conducted field visits of the West Bank, the Gaza Strip and Israel and met with a variety of relevant stakeholders including the PNA President, PNA officials, different UN Bodies, the ICRC and witnesses and victims of alleged violations. In order to provide an Israeli view on the events, it also arranged meetings with Israeli NGOs and academics, Israeli political scientist and a former Israeli IDF General.[139] Hence, the Commission did not consider the lack of cooperation from the Israeli authorities as an impeding factor, believing that "it was adequately informed as to the official Israeli position through its study of the Israeli submissions to the Mitchell Commission and the Government's response to the report of the High Commissioner for Human Rights and by speaking to informed Israeli interlocutors".[140]

Consequently, the Commission findings were based on both first-hand and second-hand sources. First-hand sources included interviews with victims and witnesses, site visits of some of the worst confrontations between Palestinians and the IDF. Second-hand sources included reports on alleged violations of IHL and IHRL prepared by both international organizations and local NGOs. In particular, the Commission emphasized the importance of the role played by NGOs in the determination of its findings. In this regard, the Commission's final report underlined how "the impressions and interpolations of the Commission and the testimony received by the Commission [confirmed] the views expressed by the most respected and reliable NGOs in the region. The Commission [had], therefore, relied to varying degrees on the findings of respected NGOs where

139 Report of the human rights inquiry commission (n 22) para 8.

140 *Ibid* [para 9].

they were supported by reliable eyewitness accounts and where they coincided with other evidence received by the Commission".[141]

It should be noted how such an attitude towards generally endorsing the findings and conclusions provided by local NGOs has a double-side effect. From one hand, local NGOs possess relevant experience of the specific context, particularly when it comes to collecting facts on the ground and selecting relevant testimonies on the violations. This may prove extremely helpful for an international body that has often no extensive experience of the dynamics characterizing a specific situation. On the other hand, the high degree of familiarity of those NGOs with the context may sometimes affect their level of impartiality in assessing certain incidents. In these situations, the ideal solution would be for international commissions to combine information provided by NGOs with the use of first-hand sources. Indeed, this is not always possible in contexts, such as the OPT, where commissions do not often receive full access to the territory. When this has been the case, the information provided by NGOs active on the ground has assumed a paramount importance and has often inspired large sections of the commissions' reports. This, of course, may raise doubts on the independent contribution provided by international commissions in ascertaining facts and discovering the truth, as the line between fact-finding exercises and NGOs reporting becomes more blurred.

It is important to look at how the combined use of different sources has led the 2000 Human rights commission to adopt certain findings. In particular, with regard to the excessive use of force employed by the IDF in repressing Palestinian demonstrations at the outbreak of the Intifada, the report referred to a number of statistics to underline how the vast majority of Palestinian causalities had been caused by an excessive and unjustified use of live ammunition during protests. In particular, according to the Commission there was no evidence that members of the IDF responsible for such killings or the infliction of such injuries were killed or seriously injured. On the contrary, the evidence suggested "that members of the IDF, behind concrete bunkers, were in most cases not exposed to life-threatening attacks".[142] The Commission duly noted the official position of the IDF, which maintained that rubber-coated bullets and live ammunition had only been used in life-threatening situations. However, it determined that a number of different sources were clearly opposing such view. In particular, "statistics, reflected in the

141 *Ibid* [para 10].

142 *Ibid* [paras 44-45].

number of Palestinian deaths at demonstrations and the absence of IDF deaths or serious injuries at such confrontations, the evidence of eyewitnesses who testified before the Commission and the reports of NGOs and international bodies place the IDF assessment in serious question".[143]

The Commission made also extensive use of those statements publicly released by Israeli military and political officials, particularly while analysing the practice of 'targeted killings'. In particular, in relation to the assassination of Dr. Thabat, a Fatah affiliated, the Commission concluded that "Israel [had] produced no evidence of his complicity in violence against Israeli targets, beyond the vague allegation of his involvement in terrorist activities".[144] Indeed, the fact that Israel decided not to cooperate with the Commission entailed that the investigative team may not have been provided with all the intelligence information available to the Israeli authorities at the time. Again, without dwelling on issues concerning lack of cooperation, it is superfluous to remind that such a responsibility cannot be ascribed to the Commission.

Unlike the 2000 Commission, the 2006 High-Level Mission on Beit Hanoun neither received cooperation nor access to the affected territory by Israel. Nevertheless, it was allowed to enter the Gaza Strip and visit the site of the Beit Hanoun shelling via Egypt. This enabled the Mission to collect first-hand information and conduct an inspection of the sites affected, while also interviewing a number of direct victims and witnesses of the events. In this regard, the team led by Archbishop Tutu explained that, in order to corroborate its findings, it had adopted an inclusive approach of receiving evidence, information and views from all concerned parties. With regard to the lack of information coming from the Israeli side, the Mission decided to rely upon public statements and supporting material provided by Israeli NGOs.[145]

While in terms of figures and statistics the report referred extensively to information collected by UN agencies and NGOs active on the ground, with regard to the impact of the shelling on civilians and their recovery it is important to highlight the outstanding contribution provided by the interviews conducted with witnesses, doctors and medical personnel. Although all belonging to the Palestinian side, the direct testimonies of those present at the scene played a

143 *Ibid*.

144 *Ibid* [para 56].

145 Report of the high-level fact-finding mission to Beit Hanoun (n 5) para 6.

pivotal role in the reconstruction of the events operated by the Mission in its final report.[146] Moreover, the testimonies provided by doctors and medical personnel represented a precious contribution to the report's assessment on both the kind of injured sustained by the victims (in terms of the respect for the principle of distinction and proportionality) and the impact of the shelling on the functioning of the health-care system in Gaza.[147] In this regard, while the absence of testimonies from the Israeli side and the unavailability of Israel's intelligence information may have rendered the evaluation less balanced, the impossibility of obtaining direct Israeli sources is not something whose responsibility can be ascribed to the Mission.

The Mission reviewed also the information publicly released by the Israeli authorities through the media and the Israeli version of the events, according to which the shelling was ordered as deterrent to the firing of rockets from an area close to Beit Hanoun, and that some shells targeted the affected area but some were not directed properly and caused the causalities. According to the Mission, this view was in conflict with the information it received. In particular, "numerous sources [showed] that 12 shells hit the area around Hamad Street, possibly 13. The mission received no evidence of [launching military attacks] in a field near Beit Hanoun before the shelling, which resulted in casualties […]Thus, the mission received no evidence that the shelled area of Beit Hanoun was a legitimate military target and notes that it had been occupied by Israeli military earlier in the week".[148] While we believe that the Mission was in possession of relevant first-hand evidence given its access to the territory and contacts with people directly present at the scene, the choice not to specify the information and sources used to counteract the Israeli claim remains unjustified.

Also the UN Fact-Finding Mission on the Gaza Conflict, given Israel's lack of cooperation, was allowed access to the territory of Gaza only via Egypt while was denied entry in the West Bank and had to meet local interlocutors, witnesses and stakeholders in Amman. With regard to the use of sources and evidence, it decided to base its accounts on those international investigative standards developed by the UN.[149] Such approach included: a) review of reports and affidavits from different sources b) interviews with victims, witnesses c) site visits in Gaza concerning specific 'incident locations' (d) the analysis of video and photographic images, including satellite imagery; (e) the review of medical reports about injuries to victims; (f) the forensic analysis of weapons and ammunition remnants collected at incident sites; (g) meetings with a variety of interlocutors; (h) invitations to provide information relating to the Mission's investigation requirements; (i) the wide circulation of a public call for written submissions; (j) public hearings in Gaza and in Geneva of both witnesses/victims and experts.[150]

The Mission met with a variety of relevant stakeholders, including UN bodies, representatives from local and international civil society, PNA and Gaza authorities officials, military analysts, medical doctors, mental health experts, representatives of the business and private sector and former governmental and military officials of the Government of Israel.[151] It collected a total of 188 interviews, 300 reports (including 31 submissions prepared by local and international organizations). In relation to the distinction between first-hand and second-hand sources, the team led by Justice Goldstone "sought to rely primarily and whenever possible on information it gathered first-hand. Information produced by others, including reports, affidavits and media reports, was used primarily as corroboration".[152] In this regard, the Mission explained how the section of Gaza, for obvious reasons, had more first-hand information than those chapters concerning alleged violations in Israel and the West Bank.[153] The Mission also provided an explanation on the standard used in order to assess the reliability of the information received. In particular, "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".[154]

While it was not allowed to engage in any official dialogue with Israeli authorities,

146 *Ibid* [paras 24-30 § 41].

147 *Ibid* [paras 20 § 29 § 31 § 55-60].

148 *Ibid* [paras 39-40 § 47].

149 Report UN Fact-Finding Mission on Gaza (n 1) para 161.

150 *Ibid* [para 159].

151 *Ibid* [para 137].

152 *Ibid* [para 168].

153 *Ibid* [para 169].

154 *Ibid* [para 170].

the Mission nevertheless collected a wide variety of information coming from the Israeli side. In particular, the team led by Justice Goldstone was able to review a number of documents, including official statements of Israeli authorities and exchange views with persons familiar with Israel planning military operations as well as benefit from the testimonies provided by Israeli soldiers to the organisation 'Breaking the Silence'.[155]

Moving to the content of the report, a first remark concerns the use of witnesses by the Mission. In relation to a vast majority of the incidents examined the fact-finding team relied extensively on the testimonies of victims or people directly present at the scene. In almost all cases, the Mission found these testimonies to be reliable and credible. Such complete trust has been criticised by certain scholars and may cast substantiated doubts on the procedures implemented by the Mission to test the reliability of witnesses.[156] In this regard, the Mission decided as general policy in the report not to explain the methodology developed to test the reliability of each witness, a choice that can be considered quite unjustified although there are a number of exceptions. For example, in investigating the attacks by the Israeli forces to the Al-Quds hospital, the report noted that "the Mission met staff from the hospital on six separate occasions, three of them on site visits. […] Three long interviews were carried out with one doctor individually, another was carried out with two doctors together and there were two group meetings with four and five doctors, respectively".[157] In this regard, it should be considered quite unfortunate the decision not to replicate such level of detail in assessing testimonies in relation to other incidents contained in the report. By considering, as general policy in the report, all Palestinian witnesses to be credible without further explanation, the Mission has left the door open for criticism and missed an important opportunity to provide insight on the procedures adopted to assess the credibility of these sources.

Leaving aside the issue of the reliability of witnesses, the report of the UN Mission on the Gaza Conflict provides an outstanding contribution in the way of combining sources together in order to corroborate its findings. An insightful example of the comprehensive approach implemented by the Mission in matching sources

155 *Ibid* [para 1176 § 1180 § 1183].

156 A. Bell, 'A Critique of the Goldstone Report and Its Treatment of International Humanitarian Law', ASIL Annual Meeting (2010) http://ssrn.com/abstract=1581533 accessed 28 February 2015, 8.

157 *Ibid* [para 595].

together concerns the shelling of UNRWA school in Al-Fakoura street, in relation to which "the Mission interviewed four men who had lost family members in the attack, the Director of the UNRWA premises that were being used as a shelter for civilians and a number of journalists who covered the story. In addition, the Mission had seen a number of statements provided to organizations in Gaza in the form of affidavits. The Mission had also considered to the degree possible the information available from Israeli sources on the circumstances of the strike".[158]

With regard to one of the most controversial sections of the report, that concerning 'deliberate attacks against civilians', the Mission mainly based its findings on site visits, photographic images, interviews with victims and witnesses of the events, interviews with medical personnel and ambulance drivers and reports coming from international organizations and local NGOs.[159] In relation to the specific incident of the shelling of the Al-Samouni house, the accounts of witnesses and survivors were corroborated not only by interviews with personnel of ICRC and PRCS but also through those provided by Israeli soldiers to 'Breaking the Silence' in explaining the 'war entry' practice.[160] This led the Mission to conclude that ""the information [available led] to believe that the Israeli armed forces arbitrarily prevented the evacuation of the wounded from the al-Samouni area, thereby causing at least one additional death, worsening of the injuries in others, and severe psychological trauma in at least some of the victims, particularly children".[161] While the absence of information coming from the Israeli authorities remains problematic in a case like that, it is difficult to imagine how the Mission could have been more accurate in the selection of sources given Israel's lack of cooperation. In this regard, evidence provided by soldiers' interviews with 'Breaking the Silence' and information contained in the Protocol for training of cadets in the IDF were matched with the facts ascertained independently by the Mission in order to prove that that the instructions received by soldiers provided for a low threshold in relation to opening fire on civilians.[162]

The same scheme is replicated in the section dedicated to the 'attacks on foundations of civil life in Gaza'. In assessing the extensive destruction of

158 *Ibid* [para 652].

159 *Ibid* [para 706].

160 *Ibid* [paras 716-725].

161 *Ibid* [para 732].

162 *Ibid* [paras 800-806].

industrial and agricultural property, the Mission combined the result of site visits and witness testimonies with information provided by interviews of soldiers with 'Breaking the Silence'. Such exercise allowed the Mission to corroborate the facts ascertained with information coming from Israeli sources and prove in this way that the unprecedented scale of destruction was the result of deliberate policies implemented at military level.[163] In particular, according to the report, "the facts ascertained […] indicate that there was a deliberate and systematic policy on the part of the Israeli armed forces to target industrial sites and water installations. In a number of testimonies given to Breaking the Silence, Israeli soldiers have described in detail the way in which what is at one point euphemistically referred to as 'infrastructure work' was carried out. The deployment of bulldozers for systematic destruction is graphically recounted. Soldiers confirm in considerable detail information provided to the Mission by witnesses".[164]

One of the distinctive features of the report is the extensive use by the Mission of 'indirect' Israeli sources (such as public statements released by political and military figures) in order to prove the 'deliberate' character, thus revealing the intention, behind the widespread violations of IHL perpetrated during the military campaign. In particular, it is interesting to note the Mission's argument that it did not have to consider whether Israeli military officials were directly influenced by public statements. It was enough for it "to conclude from a review of the facts on the ground that it witnessed for itself that what is prescribed as the best strategy [appeared] to have been precisely what was put into practice".[165] This approach may raise some criticism and certainly cannot be used in the context of a criminal trial to support findings concerning individual criminal intent beyond reasonable doubt. However, it may help providing important indications in unveiling the link between violations of IHL perpetrated on the ground and the policies and strategies designed by high-level military and political elites. In this regard, one should remind that the UN Mission on Gaza was not mandated to secure individuals to justice but rather to ascertain facts and discovery the truth over the commission of alleged violations of IHL and IHRL. For this reason, such extensive reliance on 'indirect' Israeli sources may be justified given the low standard of proof implemented and the objectives behind such fact-finding exercise.

163 *Ibid* [para 998].

164 *Ibid* [para 1022].

165 *Ibid* [para 1195].

In conclusion, despite some controversial passages highlighted above, the methodology generally implemented by the Mission lies on solid and credible standards. As it has been expressed in legal literature, "the efforts made by the Mission(s) to find the truth and engage the parties, provide strong evidence for the overall credibility and validity of the exercise. As a result, the Mission and its report have particular implications for IHL and UN fact-finding".[166]

The UN Fact-Finding Mission on the flotilla events also conducted its activities without any cooperation from the Israeli side. On the contrary it received assistance from the Turkish and Jordanian authorities, which helped in facilitating its visits to Istanbul, Ankara and Amman and in providing relevant information. Consequently, different sources of information were made available to the Mission, including the evidence of eyewitnesses, forensic reports and interviews with medical and forensic personnel in Turkey, as well as written statements, video film footage and other photographic material relating to the incident" as well as reports coming from NGOs.[167]

In this regard, the Mission explained how "it gave particular weight to the direct evidence received from interviews with eyewitnesses and the crew, as well as the forensic evidence and interviews with government officials".[168] On the contrary it decided to treat information provided by Israeli authority and conflicting with evidence of eyewitnesses with caution, given the seizure of camera and footage operated by the IDF. The Mission interviewed 112 witnesses of the events and conducted an inspection of the Mavi Marmara vessel. In addition, similarly to precedent international inquiries, it relied extensively upon Israeli sources that were made publicly available. In particular, it should be underlined the important role played in the Mission's report by the findings of the Israeli appointed Turkel Committee, specifically in relation to the testimonies of soldiers and military commanders.

According to the Mission, the information it obtained directly and through second-hand sources enabled a comprehensive picture of the events. With regard to the assessment of the credibility of the information, the Mission paid particular attention "to the content of the evidence and demeanour of the persons appearing

166 Z. Yihdego (n 134) 48.

167 Report of the international fact-finding mission to investigate violations of international law resulting from the Israeli attacks on the flotilla (n 72) para 19.

168 *Ibid* [para 20].

before it in deciding whether, and if so, what part of the information provided should be accepted".[169]

The Mission's report can be mainly divided into two parts. The first part concerns the events related to the seizure of the flotilla vessels and represented the most challenging in terms of ascertaining facts. The second part relates to the transfer of passengers into Israel, their detention and expulsion from the country and it is mainly based on witnesses and victims' accounts.

With regard to the first part, despite the circumstances concerning the seizure of the Mavi Marmara and other flotilla vessel by the IDF are described with a considerable level of detail, the Mission acknowledged that "with the available evidence it [was] difficult to delineate the exact course of events on the top deck between the time of the first soldier descending and the Israeli forces securing control of the deck".[170] However, given the evidence collected, the Mission was able to determine that, while no firearms were brought on board of the vessels by the crew, live ammunition was used by Israeli soldiers during the seizure of the Mavi Marmara resulting in the fatal injuries to four passengers, and injuries to at least 19 others, 14 with gunshot wounds.[171] Unfortunately, in the report there is no mention of the specific evidence that had led the Mission to produce these findings.

More specific details are given on the circumstances concerning the shooting of certain members of the crew resulting in casualties and injuries. In this regard, the Mission referred extensively to the testimonies of eyewitnesses and the use of forensic analysis.[172] In particular, in describing the circumstances of the killing of two passengers in the top deck, the Mission highlighted how forensic analysis supported the conclusion that the victims received wounds compatible with being shot at close range while lying on the ground.[173]

Furthermore, the report contains a specific section dedicated to the circumstances of each of the incidents involving the killing of nine passengers. In this regard, the Mission relied extensively on clinical exams operated on the wounds and forensic analysis of the trajectories of bullets in order to assess the dynamics of each incident.[174]

In relation to the second part, the findings are mainly based on the testimonies given by the passengers of the vessels transferred into Israel and then deported. In particular, in assessing the procedures for the deportation of the passengers, the Mission determined that "perhaps the most shocking testimony, after that relating to the violence on the *Mavi Marmara*, [was] the consistent accounts of a number of incidents of extreme and unprovoked violence perpetrated by uniformed Israeli personnel upon certain passengers during the processing procedures inside the terminal at Ben Gurion International Airport on the day of deportation".[175] The Mission considered these accounts to be "consistent and vivid, in a way that is beyond question".[176]

The last example of international investigations, the UN Fact-Finding Mission on settlements, based its findings on a variety of sources including governments, inter-governmental organisations, international and national NGOs, professional bodies, academics, victims, witnesses and the media.[177] It received 62 submissions from interested stakeholders while, at the same time, was provided evidence from 50 people affected by the settlements or working in the OPT and Israel. It also met with victims of human rights violations, officials from the Jordanian Government and the PNA, international organisations, NGOs and UN agencies.[178] The Mission did not receive any sort of cooperation by the Israeli Government and was denied access to the territory of Israel and the occupied West Bank. In this regard, the report specified how "alternative arrangements were made to obtain direct and first-hand information by holding a series of meetings with a wide range of interlocutors […] in Jordan".[179]

The object of the Mission's investigation can be considered as an unusual one from the point of view of traditional fact-finding exercise. Unlike previous international

169 *Ibid* [para 24].

170 *Ibid* [para 115].

171 *Ibid* [para 114 § 117].

172 *Ibid* [para 118 § 121].

173 *Ibid*.

174 *Ibid* [paras 128-129].

175 *Ibid* [para 202].

176 *Ibid*.

177 Report of the independent international fact-finding mission to investigate the implications of the Israeli settlements (n 85) para 6.

178 *Ibid* [para 8].

179 *Ibid* [para 7].

inquiries, the 'settlements Mission' was not created to ascertain facts related to a circumscribed event or military operation. On the contrary, it was mandated to assess a forty-five-year-long policy from the point of view of its impact on the human rights of the Palestinian people. Given the broad material and temporal scope of its investigation, the Mission relied extensively on those international organizations and local NGOs with an in-depth experience on the ground. In addition, in order to corroborate the impact of certain policies with some specific examples, it referred to the testimonies of victims and of former Israeli officials.[180]

To compensate the lack of cooperation by Israeli authorities, the Mission resorted extensively to public statements of high-level Israeli political representatives, to documents such as the Sasson and Levy reports and to the testimonies of former public officials.[181] Such information played a pivotal role in the section of the report dedicated to the overview of the Israeli government's policies concerning the support and expansion of settlements. With regard to those sections highlighting the impact of settlements over the rights of Palestinians, the Mission relied extensively upon information coming from UN agencies (and, in particular, OCHA), NGOs such as Al-Haq, B'Tselem and Yesh Din and the media. Especially, it should be underlined the role played by local NGOs active on the ground not only through their reports but also in providing the Mission with victims and witnesses of violations. Such testimonies had a relevant impact on those sections of the report dedicated to settler violence and repression of peaceful demonstrations in order to corroborate with specific examples the existence of overall patterns of violations.[182]

5. Contribution to the development of international law

The contribution to the development of international law is not among the primary functions of international fact-finding missions and commissions of inquiry. In fact, their original scope relates to the need to ascertain facts and establish the truth over certain events. However, one cannot ignore how the role of these bodies has developed in modern international law. Commissions of inquiry nowadays resort to the application of international law as part of the mandates received and their findings contain not only an overview of the facts investigated but also their analysis according to the relevant international legal framework. With commissions of inquiry undisputedly entrusted to make legal determinations, the question arises concerning which kind of value these legal findings possess under international law.

There is no controversy over the fact that commissions' findings are not binding under international law. They cannot be compared with a Security Council's resolution under Chapter VII or with a ruling of an international court or tribunal. On the contrary, the main scope of these commissions is to inquire over alleged violations of international law in a way that their findings may help those relevant actors within the international community to set up an adequate and effective response to armed conflicts or human rights emergencies. Nevertheless, such findings, when they concern legal matters, can play a role in the process of development, advancement and consolidation of international law. This is especially the case in a context, such as the OPT, where the traditional application of international law paradigms encounters many challenges derived by the unique character of the prolonged occupation of the Palestinian territory.

Which exactly is this role is difficult to assess, and the answer may vary depending on each particular situation. In any case, at least some of the commissions of inquiry and fact-finding missions previously analysed can be included in the range of authoritative international bodies whose determinations should be taken into account in assessing the customary nature of certain international law provisions.

Looking at those commissions analysed above, it is important to assess not only their contribution to the development of international law in general but also as applicable to the specific context of Israel and Palestine.

In this regard, the 2000 Human rights inquiry commission delivered important determinations over the legal status of the conflict, particularly as a result of the Oslo Agreements and the consequential territorial fragmentation of the West Bank. In this context, the Commission argued that, notwithstanding the creation of the PNA exercising authority over Area A, the West Bank should have been considered still entirely occupied by Israel. In particular, according to the team led by Prof. Dugard, "Israel's strained interpretation of article 2 [of the Geneva Convention], fails to take account of the fact that the law of occupation is concerned with the interests of the population of an occupied territory rather than those of a displaced sovereign […] The test for the application of the legal regime of occupation is not whether the occupying Power fails to exercise effective control

180 *Ibid* [paras 23 § 46 § 51 § 53 § 77]. In particular, in relation to Israeli Master Plans, the Mission heard the testimony of a former official of the Israeli Civil Administration, while it mainly referred to interviews with victims of violations to assess the impact of settlements to Palestinian people's rights.

181 *Ibid* [para 26].

182 *Ibid* [paras 50-57 § 78].

over the territory, but whether it has the ability to exercise such power".[183] The Commission continued by arguing that, as Occupying Power, Israel was bound to respect both the Geneva Conventions and its human rights obligations, a stance that was later endorsed by the International Court of Justice in the 'Wall Opinion'.[184]

Another important contribution of the Human rights inquiry commission relates to its review of Israel's law enforcement duties, in particular in relation to the means of crowd-control resulting in the massive employment of lethal weapons such as live-ammunitions and rubber bullets.[185] Even more remarkable is its legal assessment of the 'targeted killings' practice, which was widely employed at the time, while its legality under international law was still debated. While investigating a number of 'targeted assassinations' in the West Bank and Gaza, the Commission took a resolute stance by arguing that "whatever the truth of various allegations directed against specific individuals, the practice of political assassination is a fundamental violation of international human rights standards, as well as a grave breach of the Fourth Geneva Convention".[186] Such assessment was based on the premises that the individuals targeted could not be considered as combatants for two related reasons: "they were not participating in the hostilities at the time they were killed; and no evidence was provided by Israel to back up its contention of a combat role despite their civilian appearance".[187]

Also, it is worth noting certain remarks of the Commission on settlements, paving the way for the work later carried on by the UN Fact-Finding Mission on settlements. In particular, in its report, the Dugard Team stressed out not only their illegal character under IHL but also their detrimental effects on Palestinians' human rights and on any possibility of a peaceful solution to the conflict. It is interesting to note how the Commission's remarks, dated well before the Israeli disengagement from Gaza in 2005, already emphasized the significant difference existing between the settlements network in the Gaza Strip and the West Bank, the latter considered the most troublesome due to the permanent character of

183 Report of the human rights inquiry commission (n 22) para 41.

184 *Ibid* [para 37]. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) ICJ Rep 2004, para 149.

185 *Ibid* [para 45].

186 *Ibid* [para 61].

187 *Ibid* [para 62].

their related infrastructure.[188] In particular, when it came to the West Bank the Commission described settlements programs as a form of 'creeping annexation' aimed at permanently altering the factual situation on the ground and raising "troubling questions about Israel's long-term intentions for the West Bank".[189] While drawing attention to the discriminatory system and the fragmentation of the OPT associated to the expansion and consolidation of settlements, the Commission acknowledged their role in fuelling the spiral of violence that led to the Second Intifada, by concluding that "without settlements or settlers, there can be no doubt that the number of deaths and injuries in the present intifada would have been but a small fraction of their current number and, quite possibly, the present intifada might not have occurred".[190]

Finally, the 2000 Team led by Professor Dugard should be rewarded for representing one of the few international bodies that raised concerns over the negative implications related to the 'unique' legal status accorded to Palestinian refugees. In particular, the Commission felt to raise alarm over "the anomalous status of Palestinian refugees due to their exclusion from the protective mechanisms and responsibility of UNHCR", highlighting how "no other refugee community in the world is so excluded".[191] It further noted that UNRWA was given responsibility for humanitarian aspects only, without being entrusted with any protective functions and that Palestinian refugees were enduring hardship precisely because of UNRWA's lack of protective powers. Therefore, in its recommendations, the Commission stressed the need to ensure "the application of article 1D of the 1951 Convention relating to the Status of Refugees [in a manner] that a regime of protection under the authority of the United Nations High Commissioner for Refugees is extended to Palestinian refugees, especially those currently residing in West Bank and Gaza camps".[192]

Coming to the UN High-Level Mission on Beit Hanoun, a first important remark concerns the determination of the legal status of the Gaza Strip following the disengagement by Israel of its military and civil presence in 2005. By putting

188 *Ibid* [para 21].

189 *Ibid* [paras 68-70].

190 *Ibid* [para 73].

191 *Ibid* [paras 97-101].

192 *Ibid* [para 131].

forward an argument later endorsed by other authoritative international bodies,[193] the Mission determined how Gaza should have been considered still as military occupied according to the 'effective control' test. In particular, the Mission described the level of control exercised by Israel over the Strip including the difficulties in gaining access to the Strip without Israel's facilitation, the constant surveillance of Gaza by Israeli forces, the effective control on basic aspects of the daily life of Gazans, notably through the fuel blockade in force when the mission visited the territory.[194]

A further remarkable aspect of the report concerns its victim-based approach. In particular, the Mission led by Archbishop Tutu provided a broad definition of 'victims', drawn from the UN General Assembly 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. Accordingly, the term 'victim' as defined in the report encompasses those persons "who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights as a result of the shelling".[195] In particular, the Mission stressed how "the situation of victims and needs of survivors was addressed from the perspective of international law in general and human rights in particular".[196] In this regard, the feeling of 'victimization' of the entire population of Gaza seems emerging repeatedly in the investigative team's findings, leading the Mission to argue how "the extremely difficult conditions of life facing all Gazans in many instances constitute gross violations of human rights and international humanitarian law".[197] While such statement may trigger interesting academic debates on how international law should cope with the developments related to 'unique situations' such as civilian life in Gaza, the language adopted by the Mission seems lacking solid legal basis. While it is true that the combination of Israeli measures affecting Gaza may amount to gross violations of IHL and IHRL norms, these norms are regrettably not expressively named by the report, missing an important opportunity to advance the application of international law to the deteriorated context of Gaza.

Other important remarks contained in the report relate to the assessment of Israel's methods of warfare, and in particular the use of heavy artillery shelling in urban areas. These determinations, made in 2008, were the first addressing one of the distinctive features of the three conflicts involving the Gaza Strip in the period between 2008 and 2014. Hence, it is important to assess how these findings affected the subsequent stances of other authoritative international bodies charged to ensure the application of IHL in the context of Gaza. In analysing the shelling that took place on 8th November 2006, the Mission noted in particular Israel's change in its rules of engagement, through the decision to reduce the so called 'safety zone' from 300 to 100 meters from the shelling target while being aware that this would have put Palestinians lives at greater risk. This, according to the Mission, appeared as a move almost certain to inflict casualties once employed at a systematic level.[198] In this regard, the Mission strongly criticised Israel's resorting to heavy-artillery shelling in urban areas, especially in densely populated settings such as the Gaza Strip. It determined how this method of warfare was "wholly inappropriate and likely contrary to international humanitarian and human rights law" for its disproportional and reckless disregard for civilian life, while calling the incident of Beit Hanoun a potential case of war crime.[199]

Finally, it is important to note the Commission's effort, in the recommendations section, to remind third states about their responsibility under human rights conventions in relation to the rights' infringement originating from the intensive blockade of the Gaza Strip.[200] While the reference to third states' responsibility vis-à-vis the blockade in Gaza is certainly appropriated, the reference to the *erga omnes* obligations deriving from international human rights treaties appears too much circumscribed. In this regard, the Mission could have taken a more comprehensive approach and reminded third states about their obligations to ensure humanitarian relief *ex* article 59 of the Fourth Geneva Conventions. It could also make reference to the International Law Commission's Draft Articles on States Responsibility and the obligations for third states stemming from serious breaches of peremptory norms of international law, something that the prolonged blockade of the Gaza Strip could reasonably lead to. It is also worth noting the

193 UN Watch, 'UN: We still consider Gaza "occupied" by Israel', (27 January 2012) http://blog.unwatch.org/index.php/2012/01/27/un-we-still-consider-gaza-occupied-by-israel/ accessed 28 February 2015.

194 Report of the high-level fact-finding mission to Beit Hanoun (n 5) para 11.

195 *Ibid* [para 43].

196 *Ibid* [para 44].

197 *Ibid* [para 44].

198 *Ibid* [para 42].

199 *Ibid* [paras 42§ 49].

200 *Ibid* [para 61].

appeal made by the Mission to the Gaza authorities not only to respect IHL but also 'to ensure' its respect in the territory under their control.[201] This seemed to prevent any justification by the Hamas regime that some episodes of rockets launched into Israel fell under the responsibility of armed groups not aligned with its policy. Also, such reference to the 'ensure respect' obligation adds more fuel to the debate on whether non-state armed groups could be bound by common article 1 of the Geneva Conventions, which in its wording expressly refers only to 'High Contracting Parties'.

Passing to analyse those investigations related to 'Operation Cast Lead', it should be noted that, while the main contribution provided by the Arab League Committee on the Gaza Conflict relate to the application of international criminal law (and as such will be dealt in the following section), the UN Fact-Finding Mission on the Gaza Conflict continued on the path traced by the High-Level Mission on Beit Hanoun, by engaging in a number of insightful reflections on the application of IHL to the particular context of Gaza.

Firstly, the Mission scrutinised Israel's policy of attacking 'everything related to Hamas terrorist group's supporting infrastructure'. In the military campaign such policy led to the systematic targeting of governmental and police facilities. In its legal analysis, the UN Mission report determined how Hamas should be considered an organization with its civil and military branches, a differentiation that is relevant for the application of the principle of distinction, one of the cornerstones of IHL. In this regard, the Mission expressed the view that the Israeli policy failed to explain how the buildings targeted effectively contributed to military action.[202] This led the Mission conclude that the test proposed by Israeli military officers to target all Hamas' infrastructure "is not the test applied by international humanitarian law and accepted State practice to distinguish between civilian and military objects".[203] While refusing the categorization of such objects as of 'dual-use' nature, it concluded by arguing that "the attacks on these buildings constituted deliberate attacks on civilian objects in violation of the rule of customary international humanitarian law", amounting also to the grave breach of extensive destruction of property under the Fourth Geneva Convention.[204] The

201 *Ibid* [para 76].

202 Report UN Fact-Finding Mission on Gaza (n 1) para 383.

203 *Ibid* [para 384].

204 *Ibid* [para 387].

Mission went even further by expressing the view that Israel's justifications for the strikes were dangerous arguments that should be vigorously rejected as incompatible with the cardinal principle of distinction, in this way adding more fuel to the debate concerning the application of the 'group membership doctrine' to assessments related to the direct participation in the hostilities and the respect for the principle of distinction under IHL.[205]

More controversial appear the Mission's findings in relation to the use by Palestinian armed groups of civilians as human shields. While not disputing the fact that both Palestinian armed groups and Israeli forces were fighting within an area populated by civilians and acknowledging that such method of warfare constituted a failure to take all feasible precautions to spare civilians,[206] the Mission determined how such elements were not alone sufficient for a finding that a party was using the civilian population as a human shield. For the Mission in fact, "as the words of article 57 (1) [of Additional Protocol I] show ("shall not be used to render", "in order to attempt to shield"), an intention to use the civilian population in order to shield an area from military attack is required" and from the facts available such a specific intent could not be detected.[207] In this regard it should be noted that the Mission engaged in a restrictive interpretation of Article 57 reflective of a conservative approach in assessing the extent of the warring parties' obligations to spare civilians. On the contrary, the Mission, following the example of the 2006 HRC Commission of Inquiry in Lebanon,[208] was keen in underlying how the system of warning implemented by Israel during the campaign (including the 'roof-knocking' practice) did not

205 In this regard the findings of the Mission seem to contradict the notion of 'direct participation' as envisaged in a Guidance published by the ICRC in 2006. In particular, the Guidance has widened the definition of direct participation as traditionally envisaged by the Geneva Conventions, by determining that the status of civilian should be preserved only for those people who engage in hostile acts, which are spontaneous, sporadic and unorganized. When the participation of an individual goes beyond that level of engagement, that individual cannot be considered a civilian anymore but becomes automatically a member of an organized armed group. In this case the protection accorded by IHL is waived for as long as the individual remains part of the group, as the rest period between acts is considered nothing other than preparation for the next hostile act. In this context, the so called "revolving door" of protection thus operates no longer based on the notion of active participation but on mere membership. Whether such development has consolidated in the creation of a customary law norm is a matter of debate among scholars. See N. Melzer, 'Interpretative Guidance on the Notion of "Direct Participation in Hostilities" under International Humanitarian Law', ICRC Geneva (2006) 72.

206 Report UN Fact-Finding Mission on Gaza (n 1) para 494.

207 *Ibid* [para 492].

208 Report of the Commission of Inquiry on Lebanon pursuant to Human Rights Council resolution S-2/1, A/HRC/3/2 (23 November 2006) paras 149-161.

meet the 'effective warning' standard as enshrined by article 57 of Additional Protocol I.[209] In assessing the policy implemented by the IDF, according to which those who did not act according to warnings were automatically to lose their protection, it also determined that "the fact that a warning was issued does not, however, relieve a commander or his subordinates from taking all other feasible measures to distinguish between civilians and combatants".[210]

In relation to means of warfare and to the choice of weapons used during the military campaign, it should be noted the call made by the Mission to relevant international bodies to ban the use of white phosphorous in any built-up area.[211] Furthermore, with regard to the attacks on foundations of civil life in Gaza, the objectives of 'Operation Cast Lead' and the application of the so-called 'Dahiya Doctrine',[212] the team led by Justice Goldstone again endorsed the view previously expressed by the Commission of Inquiry in Lebanon that this policy, replicated in a number of different contexts such as Southern Lebanon and Gaza, violated basic tenets of IHL and IHRL.[213] In particular, the Mission argued how such policy could amount to the grave breach of extensive destruction of property and to the violation of the prohibition of using the starvation of civilians as a mean of warfare enshrined in article 54 of Additional Protocol I.[214] It further noted how "the cumulative effect of the blockade policies […] and of the military operations […] strongly suggest that there was an intent to subject the Gaza population to conditions such that they would be induced into withdrawing their support from Hamas".[215] In other words, according to the UN Mission, "Israel, rather than fighting the Palestinian armed groups operating in Gaza in a targeted way, has chosen to punish the whole Gaza Strip and the population in it with economic, political and military sanctions", in this way violating the prohibition of collective punishment enshrined in article 33 of the Fourth Geneva Convention.[216]

But the findings of the Fact-Finding Mission to Gaza on questions of law have not been limited to a revision of Israeli military policies on the grounds of IHL. They also entailed a comprehensive scrutiny of the Palestinian authorities' conducts, in light of their international obligations. For example, in assessing the violations committed against Fatah affiliated by the Hamas authorities in Gaza, the report provides an important contribution to the on-going debate concerning the IHRL obligations of non-state actors. In this regard, the Mission, while acknowledging that the Hamas de-facto government was not bound by any international human rights treaty, determined nonetheless that "the Gaza authorities have an obligation to respect and enforce the protection of the human rights of the people of Gaza, inasmuch as they exercise effective control over the territory, including law enforcement and the administration of justice".[217] While it remains questionable whether such obligation is expression of a customary law norm, the solid arguments built up by the Mission to corroborate its argument should be underlined, in particular the reference to the Human Rights Council Special Rapporteurs' findings on Hezbollah and Hamas controlled territories as well as the opinion of authoritative scholars.[218]

Another important aspect of the report concerns the review of the military conducts of the Gaza authorities against Israeli and Palestinian civilians, including the launching of rockets from Gaza into Southern Israel. The UN Mission has been harshly criticized (and not only by the Israeli Government) for its alleged 'double standard' in reviewing Israeli and Hamas military conducts. Looking at the entire report, these accusations seem losing ground. It is certainly the case that the vast majority of the sections forming part of the report are dedicated to Israel's conducts. At the same time one cannot deny the level of destruction produced by Israeli aerial and ground operations in the Strip compared with the damages provoked by Palestinian armed groups' attacks. This indeed should not affect the genuine assessment of the responsibility of all actors involved in the conflict under international law but may justify the decision of the Mission to allocate more

209 Report UN Fact-Finding Mission on Gaza (n 1) paras 537-40.

210 *Ibid* [para 520].

211 *Ibid* [para 897].

212 The so called 'Dahiya Doctrine' is a military strategy designed by the IDF general Gadi Eizenkot that foreseen, through the employment of disproportionate force, the destruction of the civilian infrastructure of so called 'hostile regimes', in order to punish such regimes, impose long reconstruction processes and deter future reactions. The doctrine was named after a densely populated southern suburb in Beirut was flattened by the Israel Defense Forces (IDF) during the 2006 Lebanon War. See Richard Falk, 'Humanitarian Interventions and Legitimacy Wars: Seeking Peace and Justice in the 21st Century' (Routledge 2014) 38; Yedioth Ahronoth, 'Israel finally realises that Arabs should be accountable for their leaders' acts –Interview with IDF Northern Command Chief Gadi Eizenkot' (10 June 2008).

213 *Ibid* [paras 1200-1211]. Report of the Commission of Inquiry on Lebanon (n 202) paras 110 § 331.

214 *Ibid* [para 928].

215 *Ibid* [para 1324].

216 *Ibid* [para 1325].

217 *Ibid* [paras 1363 § 1633].

218 *Ibid* [para 1364].

space to investigations of incidents involving Israeli military attacks, also in light of the justifications put forward by Israel. Moving to the criticism that the Mission has not been enough resolute in condemning the Hamas regime for its breaches of international law rules, this is contradicted by the report's findings. While it is true that on certain issues such as the use of civilians as human shields or the use of civilian objects for military purposes, also due to insufficient evidence, the Mission could not determine with sufficient certainty the Hamas authorities' responsibilities for violations of the law, it should be noted the unequivocal stance taken by the report against other practices. In particular, the indiscriminate launching of rockets was unequivocally labelled as indiscriminate and intentional attacks against the civilian population, entailing individual criminal responsibility.[219] In this regard, the Mission carefully considered Hamas' arguments that these actions were to be considered as a form of resistance against the Israeli occupation and denial of Palestinian people's self-determination. While noting that the right to (armed) resistance against colonial regimes violating self-determination has been affirmed by authoritative international bodies such as the UN General Assembly,[220] the Mission nonetheless argued that the exercise of such right cannot result itself in a violation of the law. In particular, according to the report, "the peremptory norms of customary international law, both of human rights law and humanitarian law, apply to all actions that may be undertaken in response to, or to oppose, human rights violations", in this way implicitly affirming that Hamas actions could amount to serious breaches of peremptory norms.[221]

Finally, in the conclusions section, the report included important references on the obligations of third states in relation to the situation in Gaza. In particular, by referring to the R2P framework to the obligation to the international community to intervene in case serious international crimes have been committed, the Mission seemed to support the consolidation of a principle of customary nature within the R2P framework.[222] It also resumed (without developing the matter in detail) the power of the General Assembly to intervene, in case of protracted inaction by the Security Council, under the framework of the 'Uniting for Peace' resolution, granting it those coercive powers accorded exclusively to the Council by the UN Charter.[223]

Unlike the UN Mission on Gaza, the UN Fact-Finding Mission on the seizure of the humanitarian flotilla was tasked with investigating a specific incident, which entailed a review of law-enforcement actions rather than methods of warfare. This inevitably affected the nature of its findings. First of all, in assessing the legality of the naval blockade affecting the Gaza Strip, the Mission resorted to the application of paradigms involving the combined application of *jus ad bellum* and *jus in bello*, an approach that attracted the criticism of certain scholars.[224] On this basis, it found that the blockade imposed on Gaza was not only illegal in its inflicting disproportionate damage upon the civilian population but also that its indiscriminate effects amounted to a form of collective punishment in violation of article 33 of the Fourth Geneva Convention.[225]

With regard to the review of the performance of Israel's law enforcement agents, it is important to note how the Mission not only relied upon the obligations stemming from international human rights treaties but also on internationally recognized codes of conduct. In particular, the report contains extensive references to instruments such as the 'Code of Conduct for Law Enforcement Officials' and the 'Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment'.[226] Once determined that none of the members of the crew seized could be considered a combatant under IHL, it then assessed the methods employed by Israeli forces in their law enforcement duties by highlighting how the use of live-ammunitions by the Israeli soldiers on board of the *Mavi Marmara* was "unnecessary, disproportionate, excessive and inappropriate", resulting in the wholly avoidable killing and maiming of a large number of civilian passengers.[227] Indeed, the question concerning the methods employed by the Israeli security forces to suppress demonstrations of dissent over Palestinian-related issues is long-standing and has received the attention of different international legal

219 *Ibid* [paras 1717-1724].

220 UNGA, 'Importance of the universal realization of the right of peoples to self-determination and of the speedy granting of independence from colonial countries and peoples for the effective guarantee and observance of human rights', A/RES/3246/XXIX (29 November 1974) 3.

221 Report UN Fact-Finding Mission on Gaza (n 1) para 1369.

222 *Ibid* [para 1712].

223 Report UN Fact-Finding Mission on Gaza (n 1) para 1768.

224 C. Scott, 'Israel's seizure of the Gaza bound flotilla: applicable laws and legality', SSRN Paper (16 October 2010), http://ssrn.com/abstract=1694682 accessed 28 February 2015. Report of the international fact-finding mission to investigate violations of international law resulting from the Israeli attacks on the flotilla (n 72) paras 51-56.

225 *Ibid* [paras 53-54].

226 *Ibid* [paras 74§ 169 § 171 § 178].

227 *Ibid* [para 172].

stakeholders.[228] In this regard, the Mission determined how a number of deaths, in the way that were caused, could be considered a form of 'extra-legal, arbitrary and summary executions', triggering international criminal responsibility for the war crimes of 'wilful killing' and 'causing serious physical and mental suffering'.[229]

Finally, the UN Fact-Finding Mission on settlements was tasked with a completely different mandate, not to investigate a specific incident but a forty-five years long-lasting policy. It has been already acknowledged its contribution to define settlements as "to encompass all physical and non-physical structures and processes that constitute, enable and support the establishment, expansion and maintenance of Israeli residential communities beyond the 1949 Green Line in the OPT".[230] Important is also the characterization in the report of settlements as an overall pattern of combined measures infringing upon different rights of the Palestinian people.[231] In particular, the Mission duly emphasized the two-fold ultimate effect of continued settlements activities in the West Bank leading from one hand to a 'creeping annexation' of the OPT and from the other to the denial of the Palestinians' right to self-determination.[232] According to the Report, "the right to self-determination of the Palestinian people, including the right to determine how to implement self-determination, the right to have a demographic and territorial presence in the OPT and the right to permanent sovereignty over natural resources, is clearly being violated by Israel through the existence and on-going expansion of the settlements [which represent] a central feature of Israel's practices and policies".[233]

More restrained appears the Mission's analysis on the effects arising from the institutionalised system of discriminatory laws and measures affecting Palestinians in comparison with settlers. While acknowledging that the prevailing legal regime of segregation in force in the OPT translates into 'stark inequality before the law' and amounts to a gross violations of economic, social and cultural rights

228 Report of the human rights inquiry commission (n 22) para 45; Amnesty International, 'Trigger Happy: Israel use of excessive force in the West Bank' (2014) http://www.amnesty.org/fr/library/asset/MDE15/002/2014/en/349188ef-e14a-418f-ac20-6c9e5c8d9f88/mde150022014en.pdf accessed 28 February 2015.

229 Report of the international fact-finding mission to investigate violations of international law resulting from the Israeli attacks on the flotilla (n 72) paras 170 § 182.

230 *Supra* [n 110].

231 Report of the Fact-Finding mission on settlements (n 85) para 31.

232 *Ibid* [para 101].

233 *Ibid* [para 38].

of a specific national and ethnic group,[234] the Mission did not touch upon the issue involving the application of the international legal framework concerning apartheid. This, notwithstanding a UN body such as the CERD Committee referred to its 'General Recommendation 19 (1995) concerning the prevention, prohibition and eradication of all policies and practices of racial segregation and apartheid' in addressing the system of 'de facto segregation' in place in the OPT, although not clearly spelling out the equation.[235] The debate concerning the application of apartheid paradigms to Palestine is an extremely delicate one. The term, despite being incorporated in legal frameworks such as the Apartheid Convention and the ICC Statute, has always been vested with strong political and emotional significance, while being associated with the racist features of South African former regime. Therefore, the cautious approach undertaken by the Mission can be understood, as it tried to avoid endangering the credibility of its findings by entering a field that would have generated a harsh political debate. At the same time, by renouncing to scrutinise the Israeli settlement enterprise in force in the West Bank through the lens of the Apartheid Convention (and this regardless of what could have been the outcome of such an exercise), the Mission missed an extremely precious opportunity to advance the application of international law in the context of the OPT. Indeed, the term 'apartheid' was not mentioned in its mandate, but precisely because of the characterization of the settlement enterprise as an overall pattern infringing upon various different rights, an evaluation of whether such policies could or could not be associated with an apartheid regime would have opened the door to a fruitful legal debate. While it is true that Israel has not ratified the UN Convention on the Suppression and Punishment of the Crime of Apartheid, the prohibition of apartheid is a principle universally recognised as reflecting customary international law and even a peremptory norm of international law, as such binding Israel as a state member of the international community.

The UN Mission on settlements provided also an important contribution, by unveiling the link existing between the widespread phenomenon of settler violence and the aim of forcibly transfer Palestinians communities. In particular, in its final remarks the Mission was lead to the conclusion that "the motivation behind this violence and the intimidation against the Palestinians as well as their

234 *Ibid* [paras 46 § 50].

235 Concluding observations of the Committee on the Elimination of Racial Discrimination, CERD/C/ISR/CO/14-16 (9 March 2012) para 24.

properties is to drive the local populations away from their lands and allow the settlements to expand".[236]

Finally, another interesting aspect concerning the 'settlements report' is related to third party responsibility. The continuous entrenchment and expansion of settlements by Israel is defined in the report as 'serious breach' of the principle of self-determination and of basic IHL rules in the conclusions' section.[237] While the Mission, unlike the UN Mission on the Gaza Conflict,[238] did not spell out in clear terms the fact that Israeli settlements may amount to serious breaches of peremptory norms of international law, the reference to third party responsibility emerges in the section dedicated to businesses. In particular, the report identifies a number of business activities and related issues that raise particular human rights concerns, specifying how such activities contribute to the development and maintenance of settlements.[239]In this regard, while dealing with the issue concerning 'labelling' of settlement produce, the Mission noted how "[t]his situation poses an issue of traceability of products for other states wishing to align themselves with their international and regional obligations".[240] Unfortunately, the report did not go as far as spelling out which are the set of obligations third parties face in relation to settlements.

6. Use of international criminal law (emphasis on accountability)

As already mentioned before, the use of international criminal law and the emphasis on individual accountability represent recent trends in the history of international commissions of inquiry. At the same time, Palestine constitutes one of the contexts where the long lasting absence of accountability has produced the most detrimental effects. In the wording of the UN Fact-Finding Mission to Gaza, "longstanding impunity has been a key factor in the perpetuation of violence in the region and in the re- occurrence 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".[241] As it has been highlighted in the first chapter, one of the main reasons for the establishment of so many international independent investigations in the OPT lies in the continuous disregard for the role of international law that has enabled violations to flourish unabated.

Before analysing how these international investigations have coped with this issue, it is important to explain the role of commissions of inquiry in the field of international criminal law. As already specified, a commission of inquiry is not an international criminal tribunal. Thus, it is not entrusted to make final and binding determinations over the liability or non-liability of individuals. On the contrary, the capacity of producing ICL findings represents just one of the most recent developments of commissions of inquiry, whose traditional function did not envisage the role of ensuring individual criminal accountability. Many authors have even expressed doubts over the legitimacy of commissions of inquiry to apply ICL paradigms or have at least emphasized the need for a differentiation in the application of ICL by commissions of inquiry and international tribunals.[242] But, the fact that commissions of inquiry are not a court of law and are not entitled to make judicial determinations does not mean that they cannot play a role in the process of ensuring individual accountability for international crimes.

In this regard, it should be highlighted that commissions of inquiry are often charged to intervene in the immediate aftermath of a situation where grave violations of IHL and IHRL have been committed. This means that they are entrusted with the opportunity to collect fresh first-hand evidence, which can prove extremely precious for criminal investigators, given the fact that international criminal tribunals are often vested with jurisdiction over a certain situation months or years after the relevant facts occurred.

As already explained in the section dedicated to the standard of proof, international criminal proceedings are made up of a variety of different stages. In particular, in the phase of preliminary examinations, where the standard of proof required is lower and the need to collect prima facie evidence on the ground is required, the contribution of international commissions can prove extremely useful, especially in contexts where international prosecutors are not granted access into the territory. In addition, one should look at the very nature of international crimes. Unlike most of the ordinary crimes, international crimes are not perpetrated in

236 *Ibid* (para 107).

237 *Ibid* (para 104).

238 Report UN Fact-Finding Mission on Gaza (n 1) para 1581.

239 Report of the Fact-Finding mission on settlements (n 85) paras 96-97.

240 *Ibid* [para 99].

241 Report UN Fact-Finding Mission on Gaza (n 1) para 1761.

242 D. Richemond-Barak, 'The Human Rights Council and the Convergence of Humanitarian Law and Human Rights Law', in W. Banks (ed), *Shaping a Global Legal Framework for Counterinsurgency: New Directions in Asymmetric Warfare* (2013); T. Marauhn, 'Sailing Close to the Wind: Human Rights Council Fact-Finding in Situations of Armed Conflict – the Case of Syria', 43 *California Western International Law Journal* (2013) 401; L. van den Herik – C. Harwood (n 10) 13, 14, 15.

isolation. On the contrary, they form part of an overall pattern of violations that allows and supports the commission of criminal actions. This is why international crimes, in the way they are legally constructed, are constituted by a material element (the *actus reus*), a subjective element (the *mens rea*) and a contextual element (which in case of 'war crimes' consists in the existence of an armed conflict and in the case of 'crimes against humanity' in the presence of a widespread and systematic attack directed against the civilian population).[243] Hence, given the specificity of international crimes and of how an individual case is brought before an international criminal tribunal, reports of commissions of inquiry might provide an extremely relevant contribution in defining the contextual elements of the crimes and in identifying specific incidents within the overall pattern that can be more suitable for filing a criminal case.

One example relates to the role played by the findings of the 2005 international commission of inquiry on Darfur the investigations subsequently conducted by the Office of the Prosecutor of the International Criminal Court, which, unlike the commission, was not granted access into the territory of Sudan. The commission's report - after finding that there were reasonable grounds to believe that war crimes and crimes against humanity had been committed in the context of the Sudanese government's counterinsurgency campaign in Darfur- had recommended the UN Security Council to refer the situation to the ICC. Such recommendation was endorsed by the Council in its resolution 1593 (2005). The report of the commission then played an extremely relevant role as source of information during the ICC preliminary examination and investigation over the situation. In particular, both the ICC Prosecutor and Pre Trial Chamber extensively referred to it in their requests for and decisions issuing warrant of arrests.[244]

While it is true that the importance of commissions of inquiry's findings may be linked especially with preliminary stages of criminal proceedings, this does not mean that they cannot play a role in subsequent phases, such as trials. As an example, the ICTY Trial Chambers in the *Jelisic* and *Tolimir* decisions endorsed the view adopted by the international commission of experts to investigate into violations committed in the former Yugoslavia in relation to consider the combination of measures of forcible transfer of a targeted group and elimination of its total leadership (including political and administrative leaders, religious leaders, academics and intellectuals, business leaders and others) as acts incarnating the crime of genocide regardless of the actual numbers killed.[245]

Now, it is important to link this role to the experience of commissions of inquiry in Palestine. Since 2000 international investigations into events in the OPT have, in fact, paid due respect to the issue of accountability and of individual criminal responsibility, stressing its compelling nature in relation to the on-going violations of international law occurring in the area. In particular, as also underlined by Prof. Dugard, it should be noted a growing attention by commissions of inquiry towards the application of ICL paradigms in relation to the OPT.[246] This may be related to the fact that the gravity and scale of the violations have progressively increased in the course of the last fifteen years.

In particular, the 2000 Human rights inquiry commission was entrusted with the mandate "to gather and compile information on violations of human rights and acts which constitute grave breaches of international humanitarian law […] with the aim of preventing the repetition of the recent human rights violations".[247] Thus, the issue of individual accountability associated with the need to prevent the repetition of human rights violations was already present in the radar of the Commission at the time. In particular, in relation to the excessive use of force employed by the Israeli army in repressing Palestinian demonstrations, the Commission noted that the vast majority of Palestinian causalities had been caused by live ammunition, despite the fact that IDF soldiers were not confronted with serious threats on their lives.[248] Thus, the report underlined that, "by and large the evidence suggests that the IDF is either not trained or equipped to deal adequately with violent demonstrations (despite its long experience in coping with such demonstrations) or that it has deliberately chosen not to employ [less lethal] methods".[249] This led the Commission to conclude that the massive use of live ammunition and rubber bullets suggested "an intention to cause serious

243 As an example, International Criminal Court, 'Elements of Crimes', Article 6(c), http://www.icc-cpi.int/nr/rdonlyres/336923d8-a6ad-40ec-ad7b-45bf9de73d56/0/elementsofcrimeseng.pdf accessed 28 February 2015.

244 See Prosecutor v Bashir (Prosecutor Application) ICC-02/05-157-AnxA (14 July 2008) paras 52 § 68 § 79 § 88.

245 ICTY, *Jelisic*, Trial Judgment, IT-95-10-T (14 December 1999) para 82; ICTY, *Tolimir*, Trial Judgment, IT-05-88/2-T (12 December 2012) paras 777, 781.

246 Interview with Professor John Dugard (n 27).

247 Commission on Human Rights, 'Grave and massive violations of the human rights of the Palestinian people by Israel' (n 21) para 6(a).

248 Report of the human rights inquiry commission (n 22) paras 44-45.

249 *Ibid* [para 46].

bodily injury rather than to restrain demonstrations/confrontations".[250]

In this regard, the Commission did not expressly refer to the commission of grave breaches but, referring to article 146 of the Fourth Geneva Convention, it noted how it had received no evidence about effective steps be taken by the IDF as to investigate the killing or wounding of Palestinians. In particular, "the excuse that no investigations are required on account of the characterization of the conflict as armed conflict is not convincing and shows a disregard for the provision of the Fourth Geneva Convention which requires the occupying Power to prosecute those guilty of committing grave breaches and other infractions of the Convention (art. 146). Equally unconvincing are the reasons given by the Palestinian Authority for its failure to investigate and prosecute the killings of Israelis, particularly those responsible for the Ramallah lynching".[251] The Commission adopted a stronger language in the conclusions and recommendations section. While noting the use of disproportionate and excessive force by Israeli security forces and the fact that practices such as 'targeted executions' amounted to a breach of international humanitarian law attracting international criminal responsibility, it recommended that immediate instructions be given in order to end these practices.[252] It further urged that "complaints regarding the use of lethal force or the excessive use of force which has caused death or serious injury should be investigated and persons found responsible should be held accountable and should not enjoy impunity".[253]

Also the mandate of the UN High-Level Mission to Beit Hanoun contained a reference to accountability in so far as the Mission was required to make recommendations on ways and means to protect Palestinian civilians against any further Israeli assaults. Looking at the criminal side of the conducts examined, in its final report the Mission described the shelling of Beit Hanoun as a 'deliberate act' in the context of long-term military occupation of Gaza. According to the Mission, "taken together with further facts (such as the reduction of the safety zone for artillery use referred to above) and the nature of the 'intransgressible obligation' to protect civilian life, […] there is evidence of a disproportionate and reckless disregard for Palestinian civilian life" which is contrary to basic IHL norms and "raise legitimate concerns about the possibility of a war crime".[254] In this regard, the choice of the wording used indicates an extremely cautious approach in formulating the accusation of war crimes. Such caution is replicated in the concluding remarks where it is argued that "in the absence of a well-founded explanation from the Israeli military (who is in sole possession of the relevant facts), the mission must conclude that there is a possibility that the shelling of Beit Hanoun constituted a war crime as defined in the Rome Statute of the International Criminal Court".[255] Such passages perhaps represent one of the most striking indicators of the way in which these commissions has conceived their role in terms of assessing individual criminal responsibility given the terms of reference received and the standard of proof implemented.

With regard to the need to assess internal efforts on accountability, the High-Level Mission reviewed the Israeli investigations on the event. In particular, it took note of the fact that, as a result of an inquiry whose findings had not been disclosed, the Military Advocate General (MAG) ruled that no legal action had to be taken against any military official regarding the incident.[256] This led the Mission to condemn in strong terms both the methodology chosen and the outcome of the internal investigation, expressing the view that "the lack of transparency for a process that is in effect to date the only means for accountability for the deaths of 19 civilians, [is] highly disturbing".[257]Such stance was reinforced in the section dedicated to the right to an effective remedy, where the Mission emphasized that "the investigation of the Israeli military referred to above was not independent (it was carried out by a committee comprised of Israeli military personnel) and the lack of transparency makes it impossible to determine whether or not it was rigorous or effective, in particular survivors have come to perceive the rule of law as having no meaning for them".[258] As a consequence, in its 'conclusions and recommendations' section, the report highlighted how "one victim of the Beit Hanoun shelling was the rule of law".[259] This led also the Mission to conclude that "one of the most effective and immediate means of protecting Palestinian civilians

250 *Ibid* [para 47].

251 *Ibid* [para 52].

252 *Ibid* [paras 116-119].

253 *Ibid* [para 120].

254 Report of the high-level fact-finding mission to Beit Hanoun (n 5) para 49.

255 *Ibid* [para 75].

256 *Ibid* [para 36].

257 *Ibid* [para 37].

258 *Ibid* [para 51].

259 *Ibid* [para 76].

[…] is to insist on respect for the rule of law and accountability. We have seen that even the flawed Israeli investigation into the Beit Hanoun shelling resulted in a decision to discontinue use of artillery in Gaza, one of the main causes of civilian death and injury in the territory. The knowledge that their actions will be scrutinized by an independent authority would be a powerful deterrent to members of the Israeli military against taking risks with civilian lives".[260]

An important turning point for furthering an ICL approach to the context of violations occurring in the OPT was represented by 'Operation Cast Lead'. As expressed by the view of those international bodies charged with investigating the December 2008 three-weeks military campaign, such operation had no comparison with the past in terms of its gravity, magnitude and scale. It also saw, for the first time on Palestinian soil, the application of a set of military policies (such the 'Dahiya Doctrine') that contributed maximising the destructive effects on civilian life. In this regard, 'Operation Cast Lead' marked a change in the attitude of the PLO towards international law, and particularly with regard to international criminal law. It is not a coincidence that when the operation was at its peak, the Palestinian Minister of Justice submitted in January 2009 a declaration, ex Article 12(3) of the Rome Statute, accepting the jurisdiction of the ICC. This represented just the first of a series of steps aimed at upgrading the status of Palestine as an entity with international rights and duties, culminated with the decision on 31 December 2014 to accede the Rome Statute.[261]

As a consequence, the international inquiries set up to shed light on the events related to 'Operation Cast Lead' devoted large attention to the criminal side of the military conducts of the parties involved. In particular, despite the fact that its mandate was not mentioning international criminal law and individual accountability, the UN Fact-Finding Mission on the Gaza Conflict acknowledged how both parties - the Israeli armed forces and Palestinian armed groups – were allegedly responsible for a number of war crimes and crimes against humanity. The Mission recognized the importance of international criminal law, by considering its role "as crucial to the fulfilment of its mandate to look at all violations of international humanitarian law and human rights law by all parties to the conflict".[262]

In relation to the 36 incidents examined, the report found Israel to be responsible of war crimes for deliberately attacking civilian objects (such as governmental buildings and police stations), for targeting objects of humanitarian character such as hospitals and mosques, for using Palestinian civilians as human shields and for extensive destruction and appropriation of property.[263] In one of the most controversial sections of the report, the Mission also found out that, in a number of incidents, the Israeli forces were responsible for deliberately attacking civilians, thus perpetrating the grave breaches of wilfully killing and causing great suffering to protected persons within the meaning of article 147 of the Fourth Geneva Convention.[264]

In relation to crimes against humanity, the Team led by Goldstone, while analysing the effects of the Israeli blockade in Gaza, emphasized the combined effect of a series of acts that had deprived the population of the Gaza Strip of their means of subsistence, employment, housing and water, while also denying their freedom of movement and right to leave and enter their own country.[265] By recalling the ICTY jurisprudence, it further noted that "the [crime against humanity] of persecution encompasses a variety of acts, including, inter alia, those of physical, economic or judicial nature, that violate an individual's right to the equal enjoyment of his basic rights".[266] On this basis, it concluded that "from the facts available […] some of the actions of the Government of Israel might justify a competent court finding that crimes against humanity have been committed".[267] Such stance was reiterated in the section dedicated to Israeli systematic violations against the Palestinian population in the West Bank, in particular in relation to those measures resulting in the application of a discriminatory legal framework and in widespread arrests and detentions.[268]

With regard to the conduct of Palestinian armed groups, the report highlighted

260 *Ibid* [para 80].

261 Firstly, it should be recalled the UNGA vote in November 2012 to upgrade the status of Palestine from mere observer to non-member State observer. The recognition of Palestine as a State allowed the Palestinian government to accede to a number of international conventions in April and December 2014, including a number of core human rights treaties and the Statute of the International Criminal Court.

262 Report UN Fact-Finding Mission on Gaza (n 1) para 286.

263 *Ibid* [paras 418 § 624 § 928 § 999 § 1090].

264 *Ibid* [paras 813 § 837 § 877].

265 *Ibid* [para 1328].

266 *Ibid* [para 1329].

267 *Ibid*.

268 *Ibid* [para 1534].

how these groups were responsible for the indiscriminate launching of rockets and mortars towards southern Israel. According to the Mission, "the fact that they are continuing launching rockets indiscriminately in civilians areas shows their intent to target civilians. These kind of attacks break the fundamental principle of distinction and amount to deliberate attacks against civilian population".[269] Hence, the report found Palestinian armed groups in Gaza to be responsible for the commission of indiscriminate attacks on the civilian population of southern Israel, a war crime, and possibly a crime against humanity.[270]

Indeed, the Mission duly took note that, in the absence of information coming from the Israeli side, it was extremely difficult to make precise findings on possible violations of IHL and ICL.[271] In this regard, it should be highlight how the legal analysis included in the report is much more IHL oriented rather than ICL oriented. The Mission normally referred to international crimes as a result of a legal analysis entirely focused on the application of IHL norms. There are no references to elements of crimes or modes of responsibility necessary to build-up a finding concerning the perpetration of an international crime. In this regard, the only exception relates to the section on the attacks on civil life and basic infrastructure in Gaza, whose legal analysis contains a detailed screening of the requirements and elements composing the war crime of extensive destruction and appropriation of property.[272]

The chapter related to the objectives and strategy of the military operation in Gaza, although not constructed through an approach mindful of the elements of command responsibility under ICL, contains relevant evidence on the links existing between those violations perpetrated on the ground and the expected outcomes of a deliberate military strategy framed at high political and military level and scrupulously implemented on the field through the chain of command.[273] Giving Israel's lack of cooperation, the report refers extensively to public statements released by the high-level military and politically elite on the main objectives of the Gaza campaign.[274] However, notwithstanding such declarations were coherent

269 *Ibid* [para 1721].

270 *Ibid* [para 1724].

271 *Ibid* [para 585].

272 *Ibid* [para 953].

273 *Ibid* [paras 1184-1188].

274 *Ibid* [para 1193-1200].

with some of the military conducts implemented during the campaign, the absence of evidence related to the specific military orders provided to operational units represented a great impediment for more substantiated findings on alleged individual criminal responsibility at the highest level.

In such a context, probably the most important contribution of the UN Mission concerned the assessment and evaluation of the parties' efforts in ensuring accountability for the violations perpetrated. Such analysis represented an unprecedented exercise and, given the recent 'involvement' of the ICC in the situation, may provide an important contribution to the complementarity assessment that the Court is expected to undertake in its preliminary examination in order to determine whether there are reasonable basis to open an investigation.[275] The report contains in fact an entire part devoted to accountability and judicial remedies. Firstly, it provides an in-depth assessment on the functioning of the Israeli and Palestinian judicial systems, based on the review of a variety of different sources, including public Israeli military documents, Human Rights Watch reports, B'Tselem reports and interviews with retired Israeli military officers.[276] It then scrutinised the possible means at disposal of Israeli investigators, including disciplinary proceedings, operational debriefings (also known as "operational investigations"), special investigations and military police investigations.

The report then referred to the actions undertaken by the Israeli and Palestinian judiciary to ensure independent investigations and prosecutions over the violations that took place during the conflict. In its analysis, the Mission noted some substantial structural deficiencies in the Israeli system of investigations, as the Military Attorney General was considered not in a fair position to start investigation given its dual role as also legal advisor for military authority in decision-making.[277] It then took notice of the results of Israeli internal military investigations, which indicated that "throughout the fighting in Gaza, the IDF operated in accordance with international law".[278]

Similar findings emerged in relation to accountability and access to justice for Palestinians in the West Bank, in particular those victims of settler violence. On

275 Rome Statute of the International Criminal Court (adopted 18 July 1998, entered into force 1 July 2002), Article 53(1)(a)-(c).

276 Report UN Fact-Finding Mission on Gaza (n 1) paras 1575-1585.

277 *Ibid* [para 1577].

278 *Ibid* [para 1578].

this basis, the Mission concluded that that the system put in place by Israel did not comply with international standards of independence, effectiveness, promptness and impartiality and it was not effective in addressing violations and discovering the truth.[279] It noted in particular a number of structural flaws that rendered the Israeli investigative system "inherently discriminatory, [making] the pursuit of justice for Palestinian victims very difficult".[280] Looking at future developments, the Mission "expressed serious doubts about the willingness of Israel to carry out genuine investigations"[281].

Similarly, in relation to the efforts undertaken by the Gaza authorities, the Mission, referring to the work conducted on the ground by the Palestinian Independent Commission for Human Rights, noted how there was no evidence of any system of public monitoring or accountability for serious IHL and IHRL violations.[282] This led the Mission to raise serious doubts over the existence of "any genuine and effective initiatives have been taken by the authorities to address the serious issues of violation of IHL in the conduct of armed activities by militant groups in the Gaza Strip".[283] Criticism was expressed also in terms of the actions undertaken by the PNA in the West Bank. In this regard, the Mission "was unable to consider the measures taken by the Palestinian Authority as meaningful for holding to account perpetrators of serious violations of international law and [believed] that the responsibility for protecting the rights of the people inherent in the authority assumed by the Palestinian Authority must be fulfilled with greater commitment".[284]

This framework led the Mission to see "little potential for accountability for serious violations of international humanitarian and human rights law through domestic institutions in Israel and even less in Gaza".[285]

Such deficiencies in the domestic records of ensuring accountability pushed the Mission to consider possible alternatives, in particular at international level. In this regard, it described universal jurisdiction as "a potentially efficient tool for

279 *Ibid* [para 1612].

280 *Ibid* [paras 1620-1629].

281 *Ibid* [para 1758].

282 *Ibid* [para 1635].

283 *Ibid* [para 1637].

284 *Ibid* [para 1645].

285 *Ibid* [para 1761].

enforcing international humanitarian law and international human rights law, preventing impunity and promoting international accountability" (par. 1654).[286] Furthermore, in the recommendations section it pushed the UN Security Council to refer the matter to the International Criminal Court, becoming the first UN organ to recommend the Hague-based tribunal's involvement in the conflict.[287]

The Mission motivated its request for an ICC referral in terms of "the impact of the situation in the Middle East, including the Palestinian question, on international peace and security", issues which fall under the mandate of the Security Council.[288] In this regard, the Mission felt persuaded that, "in the light of the long standing nature of the conflict, the frequent and consistent allegations of violations of international humanitarian law against all parties […] meaningful and practical steps to end impunity for such violations would offer an effective way to deter such violations recurring in the future. The Mission is of the view 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".[289]

Unlike the UN Fact-Finding Mission, the Arab League Committee on the Gaza Conflict was expressively entrusted with investigating allegations of international crimes in its mandate.[290] Consequently, in the legal analysis, considerable attention was devoted to aspects related to international criminal law and individual responsibility. The Committee adopted a cautious approach in leaving aside determinations involving the application of legal concepts, such as 'aggression' and 'terrorism', whose definition and status were still uncertain under customary international law. On the contrary, it decided to focus its attention on the criminal side of those conducts entailing grave violations of IHL and IHRL. As explained by the Committee itself "the focus of the report is on international crimes and the available remedies for prosecuting such crimes. Consequently little attention is paid to violations of human rights law and international humanitarian law that do

286 *Ibid* [para 1654].

287 *Ibid* [paras 1763 § 1766].

288 *Ibid* [para 1763].

289 *Ibid*.

290 In particular, the ToR of the Committee expressly mentioned the need to investigate over war crimes and crimes against humanity allegations. After a discussion within the Committee, it was decided also to look into the issue of whether the crime of genocide had been perpetrated. See, interview with Prof. John Dugard (n 27).

not constitute international crimes".[291] Thus, the Committee considered whether war crimes, crimes against humanity and genocide were committed in the context of the three-weeks military campaign.

In relation to war crimes, it found both the IDF and Hamas to be responsible for indiscriminate and disproportionate attacks against civilians. It also concluded that both sides were responsible for killing, causing great suffering and terrorizing civilians. The Committee then determined that the Israeli forces were responsible for the wanton destruction of property which was not justified on grounds of military necessity, while it also acknowledged that considerable evidence pointed to the IDF and its officials being responsible for the bombing and shelling of hospitals and ambulances and obstructed the evacuation of the wounded.[292]

With regard to crimes against humanity, the report found how the violations occurring during 'Operation Cast Lead' were committed as part of a widespread and systematic attack directed by the Israeli army against the Palestinian civilian population, with the knowledge of such an attack. In particular, according to the Committee, the number of civilian deaths and injuries, and the destruction of civilian property including hospitals, mosques, schools, cultural centres and farms, "provides prima facie evidence of the fact that Israel's attack was predominantly directed against a civilian population".[293] Moreover, for the Mission, there could be little doubt that Israel's military campaign against the Gaza Strip was 'widespread', given that "there were consistent and regular aerial attacks in many parts of Gaza from 27 December to 3 January, followed by a massive ground offensive accompanied by aerial attacks".[294] At the same time, the attack was considered 'systematic' as "it was the result of an organized and sustained campaign in pursuance of government policy".[295]

On this basis, the Committee determined how there were reasonable grounds for finding that the crimes against humanity of murder, extermination, persecution and other inhuman acts were perpetrated by the IDF in the Gaza Strip.[296] It

291 Report of the Independent Fact-Finding Committee on Gaza to the Arab League (n 60) para 17.

292 *Ibid* [paras 441-510].

293 *Ibid* [para 514].

294 *Ibid* [para 516].

295 *Ibid.*

296 *Ibid* [paras 511-529].

should be noted how, unlike the UN Fact-Finding experience, the structure of the Committee's report reflects the frameworks of individual criminal indictments. In particular, the legal analysis devoted attention to each of the requirements for the commission of the crimes, which were examined separately and confronted with a description of Israel's conducts. Another relevant aspect concerns the adoption of the standard of proof that the Committee identified in the formula 'reasonable grounds for finding'.[297] The choice of such a low standard reflects once again the Committee's need to clarify its role as fact-finding rather than judicial body. It is also corroborated by the indication that the criminal conducts are generically referred to Israel or the Palestinian armed groups rather than to specific individuals. In this regard, the Committee, although tasked with findings on international crimes, was not requested to identify those responsible in its mandate.[298]

Finally, in relation to genocide, the report contains one of the rare, authoritative legal determinations on whether such a crime had been perpetrated in the context of Israel and the OPT. As explained by Prof. Dugard, genocide was a matter of extensive discussion among the Committee both in relation to the decision on whether to look into the issue and with regard to the final finding that excluded the existence of a State-led policy of genocide in Gaza.[299] In this regard, although acknowledging how any accusation of genocide should be approached with extreme care, the Committee believed that "operation Cast Lead was of such gravity it was compelled to consider whether this crime had been committed".[300] It therefore determined that Israel's actions could meet the requirements for the *actus reus* of the crime as enshrined in the Genocide Convention and the ICC Statute. In particular, it noted how actions such as killing and causing serious bodily and mental harm were perpetrated against members of a 'protected group', defined as the Palestinians of the Gaza Strip. However, the Committee admitted how the facts available failed to meet the high threshold required for the mental element of the crime. In particular, the Committee could not demonstrate that the acts in question had been committed with a special intent to destroy in whole or in part a national, ethnical or religious group, as required by customary

297 *Ibid* [para 526].

298 In this aspect the Committee differed from other inquiries, such as the commissions of inquiry on Darfur, Syria and North Korea, that were explicitly required to identify those responsible for the violations and produced a sealed list of perpetrators.

299 Interview with Prof. John Dugard (n 27).

300 *Ibid* [para 28].

international law. On the contrary the report determined how the main purpose behind 'Operation Cast Lead' was not to destroy Palestinians as a group but rather "to engage in a vicious exercise of collective punishment designed either to compel the population to reject Hamas as the governing authority of Gaza or to subdue the population into a state of submission".[301] However, the Committee wished to emphasize that, although Israel did not pursue a genocidal policy in the Gaza Strip, individual soldiers may well have acted with genocidal intent and might therefore be prosecuted for this crime.[302]

In terms of steps to ensure accountability, the Committee, while casting serious doubts about the impartiality, independence and effectiveness of the Israeli judicial system to genuinely investigate and prosecute grave violations of IHL and IHRL, recommended the League of Arab States to ask the UN Security Council to refer the situation to the International Criminal Court and the UN General Assembly to request the International Court of Justice to provide an advisory opinion on the legal consequences for states, including Israel, of the conflict in Gaza.[303] The Committee handed over its report to the Prosecutor of the International Criminal Court, pending at the time a preliminary examination by the ICC on the situation in Palestine. Unfortunately, given the subsequent decision by the Prosecutor not to proceed with an investigation due to controversies around the definition of Palestine as a 'state' under international law, it has not been possible to assess the role played by the Committee's report (as well as by the UN Mission's findings) at the level of international criminal investigations.

Finally, although charged to investigate an event whose scale and magnitude were significantly inferior to 'Operation Cast Lead', also the UN Fact-Finding Mission on the flotilla events resorted to the application of ICL formulas in its findings. In particular, it referred to the 'grave breaches' paradigms to characterize a number of conducts performed during the seizure by the IDF of the Mavi Marmara vessel.

With regard to the use of force employed by the IDF, defined as 'unnecessary, disproportionate, excessive and inappropriate' by the Mission, the report determined that "factual circumstances provide prima facie evidence that protected persons suffered violations of international humanitarian law committed by Israeli forces during the interception, including wilful killing, torture or inhuman treatment and wilfully causing great suffering or serious injury to body or health within the terms of article 147 of the Fourth Geneva Convention", which contains the list of grave breaches.[304] This stance was reiterated in the conclusions where the Mission determined how there was 'clear evidence to support prosecutions' of crimes within the terms of article 147 of the Fourth Geneva Convention including wilful killing, torture or inhuman treatment and wilfully causing great suffering or serious injury to body or health.[305]

Less motivated appears the choice of the Mission not to resort to the crimes against humanity formula. The Flotilla incident and its immediate aftermath entailed in fact a legal review of Israel's respect of its law enforcement duties rather than an assessment of its military conduct during armed conflict. In addition, looking at the treatment of the members of the crew once detained and transferred into Israel, the Mission found out that acts of torture and inhuman and degrading treatment were perpetrated along with other violations of basic human rights.[306] In this regard, the missed reference to torture as crime against humanity might be explained with the circumscribed nature of the event investigated, which may not fulfil the requirement of 'widespread and systematic character' of the attack against a civilian population as contextual element for the crime. Such view finds confirmation in the decision by the ICC Prosecutor to close the preliminary examination on the flotilla incident referred by the Comoros Island. In its decision, Prosecutor Bensouda emphasized that, although there were evidence that war crimes may have allegedly being committed during the seizure, the incident was lacking the 'gravity' requirement necessary for opening a formal investigation.[307]

301 *Ibid* [para 29].

302 *Ibid* [para 564].

303 *Ibid* [para 614].

304 Report of the international fact-finding mission to investigate violations of international law resulting from the Israeli attacks on the flotilla (n 72) para 183.

305 *Ibid* [para 265].

306 *Ibid* [paras 174 § 215 § 218 § 221].

307 Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on concluding the preliminary examination of the situation referred by the Union of Comoros: "Rome Statute legal requirements have not been met" (6 November 2014) http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/reports%20and%20statements/statement/Pages/otp-statement-06-11-2014.aspx accessed 28 February 2015.

7. Impact on the response by the international community

One of the main purposes of commissions of inquiry is to provide competent bodies within the international community with the relevant facts concerning a certain situation in order to set up strategies and carry out further actions.

Hence, the type of response provided by the international community may provide a useful indicator of the effectiveness of the work conducted by international commissions of inquiry. At the same time, this indicator should not be overestimated. Looking at the international practice, it would be unfair to put the blame on the commissions for any failure or inaction by the international community. This is even more the case in a situation like Palestine where the persistence of a status quo where basic human rights are systematically violated can be ascribed also to the lack of political will of key international actors in taking effective and resolute actions. Nevertheless, it remains useful to assess the kind of contribution that international commissions of inquiry have given, in providing the international community with relevant information, suggesting tools and recommending possible courses of actions.

Starting with the 2000 Human rights inquiry commission, the investigative team led by Prof. Dugard expressively acknowledged its role in 'calling attention' of the international community, through a number of conclusions and recommendations, on the violations of human rights and international humanitarian law occurred since 29 September 2000.[308] The Commission divided its set of recommendations into four different sections named: conditions for a just and durable peace, human rights and international humanitarian law imperatives, urgent measures for the protection of human rights and transforming the climate of hostility. In particular, the Commission insisted on the need for the international community to tackle the root causes of the conflict. In this context, policies such as the entrenchment and expansion of settlements in the Palestinian territory and the maintenance of the occupation were conceived as factors undermining any prospect of a peaceful solution as "peace can be reached only through agreement that ends the occupation and affirm Palestinians' self-determination".[309] In this light, the Commission urged competent international actors in engaging to the conflict using an approach mindful of the respect for human rights and humanitarian law and

308 Report of the human rights inquiry commission (n 22) para 104.

309 *Ibid* [para 112].

the full application of international human rights standards.[310] As an example, the report referred to the duty of High Contracting Parties of the Geneva Conventions to urgently take action according to common article 1 and the obligation 'to ensure respect' in order to halt the emergency situation resulting from violations of IHL. The report also supported the creation of an international presence in the OPT to monitor respect by the parties of IHL and IHRL norms.[311] It should be noted how, in this framework, the Commission called in particular the European Union to play a more proactive role in the negotiations and also in urging Israel to respect human rights in accordance with EU-Israel agreements.[312]

Unfortunately, the vast majority of the recommendations contained in the report remained unheard. The report was published on 16 March 2001. Despite its findings on grave violations of IHL and IHRL and on the urgent need to tackle promptly the root causes of the conflict, the international community proved clearly unable to stop the increasing level of violence that inflamed the Second Intifada from September 2002 until the end of 2004. Notwithstanding the publication of the report, the gravity and scale of violations and brutalities further increased and led to tragic events such as the siege of Jenin by the IDF in April 2002 and the spread of Palestinian suicide bombing attacks into Israel.

Looking at the report of the UN Fact-finding Mission to Beit Hanoun, it is interesting to note how many of its conclusions and recommendations targeted issues that had already been dealt by the 2000 Commission. Such analogy well explains the difficulties in improving the respect for human rights and the rule of law in a context such as Palestine. A peculiarity of the Beit Hanoun Mission's final report concerns the fact that its recommendations were mainly targeting the parties to the conflict, while leaving little space for possible actions by the international community. Again, it was highlighted how the occupation remained the root cause of the bleak situation that the Mission had to investigate.[313] The fact-finding team also drew attention on the general climate of lack of accountability where violations of international law continued to increase. In this regard, the Mission implicitly raised the attention of the international community on the fact that "one of the most effective and immediate means of protecting Palestinian

310 *Ibid* [para 113].

311 *Ibid* [paras 114-115].

312 *Ibid* [para 133].

313 Report of the high-level fact-finding mission to Beit Hanoun (n 5) para 74.

civilians against any further Israeli assaults is to insist on respect for the rule of law and accountability […] The knowledge that their actions will be scrutinized by an independent authority would be a powerful deterrent to members of the Israeli military against taking risks with civilian lives".[314]

However, one of the most interesting examples on the follow-up provided to the findings and recommendations of international commissions by the international community is represented by the report of the UN Fact-Finding Mission on the Gaza Conflict. The report contained a detailed set of conclusions and recommendations addressing different actors including Israel, the PNA and the Gaza authorities, the UN Human Rights Council, the UN Security Council, the UN General Assembly, the UN Secretary General, the UN Office for the High-Commissioner for human rights, the ICC Prosecutor and the international community as a whole. The recommendations tackled a number of issues including accountability for serious violations of international humanitarian law and human rights law, reparations, the blockade and reconstruction efforts.

In this framework, the Mission called for a more effective intervention by the international community through a number of different channels. Firstly, given the widespread violations of IHL documented in the report, the Mission reminded the ICJ call for High Contracting Parties of the Geneva Conventions to ensure compliance by Israel with international humanitarian law.[315] It then referred to the 2005 World Summit Outcome document and the R2P framework to reiterate the obligation of the international community to intervene in case of perpetration of war crimes and crimes against humanity. In this regard, the report noted how "after decades of sustained conflict, the level of threat to which both Palestinians and Israelis are subjected has […] increased with continued escalations of violence, death and suffering for the civilian population, of which the December-January military operations in Gaza are only the most recent occurrence. The State of Israel is therefore also failing to protect its own citizens by refusing to acknowledge the futility of resorting to violent means and military power".[316] In this context, according to the Mission, "the international community has been largely silent and has to-date failed to act to ensure the protection of the civilian population in the Gaza Strip and generally the

314 *Ibid* [para 80].

315 Report UN Fact-Finding Mission on Gaza (n 1) para 1709.

316 *Ibid* [para 1711].

Occupied Palestinian Territory. Immediate action […] needs to be accompanied by a firmer and principled stance by the international community on violations of international humanitarian and human rights law and long delayed action to end them. Protection of civilian populations requires respect for international law and accountability for violations. When the international community does not live up to its own legal standards, the threat to the international rule of law is obvious and potentially far-reaching in its consequences".[317]

With regard to specific recommendations, the team led by Justice Goldstone called the Security Council to require the parties involved, under art. 40 UN Charter, to start appropriate investigations and to establish an independent committee of experts charged to monitor the investigative efforts undertaken. In the absence of progress at domestic level, the Mission requested the Council to refer the situation in Gaza to the ICC using its power of referral under article 13(b) of the ICC Statute.[318]

Aware of the deadlock within the Council on issues concerning the OPT, the report addressed also specific recommendations to the UN General Assembly. In particular, it was highlighted the need to request the Security Council to report to the Assembly measures to counteract serious violations of IHL and IHRL. In case of inaction of the Council on the matter, the Assembly was urged to consider whether additional action within its powers could be required in the interests of justice, including under the 'Uniting for Peace' resolution.[319] According to certain literature, such reference to the 'Uniting for Peace' resolution "was one of the highest profile references […] and the problem which it had sought to address, in many years".[320]

Other recommendations were targeting the international community and concerned the need to ensure universal jurisdiction for grave breaches of the Geneva Conventions, to put respect for international law, IHL and IHRL in the peace negotiations and to provide effective and prompt support for recovery and reconstruction in Gaza.

Notwithstanding the fact that the report's findings attracted a certain amount

317 *Ibid* [para 1713].

318 *Ibid* [para 1766].

319 *Ibid* [para 1768].

320 M. 4(n 37) 5.

of criticism,[321] the international community did react to the conclusions and recommendations included therein. In this regard, certain authors expressed the view that the report had 'significant impact' on the accountability efforts in the OPT, while fairly contributing to illuminating the facts of what happened in Gaza.[322] In addition, according to one opinion, "despite the controversies over the fairness of some methods used and some of the impediments recorded, the *Gaza Report* was generally comprehensive and attempted to be inclusive of all parties to the conflict and others".[323]

The report was, in fact, endorsed by both the Human Rights Council and the General Assembly, but not by the Security Council. In particular, the blessing of the General Assembly was considered a success.[324] While the track undertaken by the PNA with the declaration ex article 12(3) of the Rome Statute accepting the jurisdiction of the ICC did not end successfully due to the controversial status of Palestine as a State,[325] a first important follow-up to the Mission's recommendations concerned the establishment by the UN Human Rights Council of a Committee of Independent Experts (chaired by Ms. McGowan Davis) tasked with monitoring and assessing legal actions undertaken by Israeli and Palestinian authorities to investigate alleged violations. Such move, which followed the General Assembly's blessing of the report, triggered somehow a reaction by the affected parties. In particular, it was noted that Israel conducted 400 command investigations in relation to Operation Cast Lead, and 52 criminal investigations of which three have led to prosecutions, in this way "suggesting that many of the

321 For a critical view on the report see L.R. Blank, 'Finding Facts But Missing the Law: The Goldstone Report, Gaza and Lawfare' 43 Cas. W. Res. J. Int'L. L. (2011); A. Bell, (n 151).

322 Z. Yihdego (n 134) 49; Wilkinson (n 110) 33.

323 Z. Yihdego (n 134) 19.

324 *Ibid* 53. In particular, according to the author, "the empowerment (and readiness) of the UNGA to endorse or oversee a fact-finding mission with the purpose of probing serious breaches of civilian immunity during armed conflict, particularly when the hands of the UNSC are tied as a result of political division among its members, is of great importance".

325 After the PNA Minister of Justice, on 22 January 2009, lodged a declaration under article 12(3) of the Rome Statute accepting the jurisdiction of the ICC in Palestine starting from 2002, the ICC Prosecutor decided to open a preliminary examination into the situation. Such examination ended in April 2012 with the publication of an 'update' by the Office of the Prosecutor (OTP) in which it was argued that the OTP could not proceed to open an investigation due to controversies around the definition of Palestine as a 'State' under international law. According to the OTP, such controversies fell outside the competence of the ICC Prosecutor and should have been resolved by competent bodies within the United Nations. Office of the Prosecutor, 'Situation in Palestine' (4 April 2012) http://www.icc-cpi.int/NR/rdonlyres/C6162BBF-FEB9-4FAF-AFA9-836106D2694A/284387/SituationinPalestine030412ENG.pdf accessed 28 February 2015.

concerns the Mission rose did indeed deserve judicial scrutiny".[326] The Committee released two reports in which, although acknowledging Israel's significant efforts and allocation of resources for furthering the investigation process, it highlighted how there was no indication that Israel had opened investigations into the actions of those who designed, planned, ordered and oversaw Operation Cast Lead, while the Gaza de facto authorities had not conducted relevant legal actions into the launching of rockets and mortar attacks against Israel.[327] On the contrary, the Committee expressed serious concerns over the transparency, promptness and level of participation of victims in the legal proceedings undertaken by Israel.[328]

On a separate development, on 1 April 2011, in an editorial written for the Washington Post entitled 'Reconsidering the Goldstone Report on Israel and War Crimes', Richard Goldstone reconsidered the work and findings of the UN Fact-finding Mission in light of Israel's subsequent disclosure of certain evidence, concluding that " If I had known then what I know now, the Goldstone Report would have been a different document".[329] In particular, he adopted the following view: "although the Israeli evidence that has emerged since publication of our report doesn't negate the tragic loss of civilian life, I regret that our fact-finding mission did not have such evidence explaining the circumstances in which we said civilians in Gaza were targeted, because it probably would have influenced our findings about intentionality and war crimes".[330]

Such statement, despite extrapolated from the context of an editorial that otherwise commended the efforts and the results achieved by the Fact-finding Mission, was used by certain States to undermine the credibility and fairness of the report's findings.[331] This development induced the other members of the Team to release a statement in which they made clear that "there is no justification for any demand or expectation for reconsideration of the report as nothing of substance has appeared that would in any way change the context, findings or conclusions

326 Wilkinson (n 110) 33.

327 Human Rights Council, 'Report of the Committee of independent experts in international humanitarian and human rights law established pursuant to Council resolution 13/9', A/HRC/16/24 (18 March 2011) para 79.

328 *Ibid* [paras 42 § 45].

329 R. Goldstone, 'Reconsidering the Goldstone Report on Israel and war crimes', *The Washington Post* (1 April 2011) http://www.washingtonpost.com/opinions/reconsidering-the-goldstone-report-on-israel-and-war-crimes/2011/04/01/AFg111JC_story.html accessed on 28 February 2015.

330 *Ibid*.

331 *Supra* note 131.

of that report with respect to any of the parties to the Gaza conflict. […] The report of the fact-finding mission contains the conclusions made after diligent, independent and objective consideration of the information related to the events within our mandate, and careful assessment of its reliability and credibility. We firmly stand by these conclusions".[332]

In this regard, certain literature has emphasized how "such an unfortunate but intriguing 'rift' among Mission members raises not only the issue of ensuring the impartiality and objectivity of a fact-finding mission before, during and after publishing their report, but also the need for a clear UN procedure by which subsequent concerns of members and those who are directly impacted by a fact-finding report can be accommodated. The problem here is how to protect the integrity of a UN fact-finding report when there are revelations of new evidence at a later stage, leading to pressure to modify assertions made in it".[333]

Finally, moving to the investigation on the flotilla events, the HRC Fact-Finding Mission determined, in its final conclusions, that the deplorable situation existing in Gaza was "intolerable and unacceptable in the twenty-first century", in this way implicitly calling for relevant international actors to take urgent actions in order to put an end to such humanitarian crisis.[334] The Mission also expressed the hope that the Israeli authorities would cooperate to assist in the identification of the perpetrators of the most serious crimes committed during the seizure, with a view to prosecuting the culpable and bringing closure to the situation.[335]

The Mission also urged the relevant authorities to provide prompt and adequate compensation to those who suffered loss as a result of the unlawful actions of the Israeli military. In this regard, the report advocated for a swift action by the Government of Israel in order to reverse "the regrettable reputation which that country has for impunity and intransigence in international affairs".[336]

As already mentioned in previous paragraphs, the UN Fact-finding Mission was

332 H. Jilani – C. Chinkin – D. Travers, 'Goldstone Report: Statement issued by members of UN mission on Gaza war', The Guardian (11 April 2011) http://www.theguardian.com/commentisfree/2011/apr/14/goldstone-report-statement-un-gaza accessed on 28 February 2015.

333 Z. Yihdego (n 134) 48.

334 Report of the international fact-finding mission to investigate violations of international law resulting from the Israeli attacks on the flotilla (n 72) para 275.

335 *Ibid* [para 267].

336 *Ibid* [para 278].

not the only independent inquiry set up in relation to the events concerning the seizure of the flotilla. Both Israel and Turkey appointed their national independent investigations and the UN Secretary General established a Panel of Inquiry with the aim of positively affecting the relationship between Turkey and Israel by filling the gaps existing between the respective positions. It should be noted in fact how the flotilla incident produced a harsh diplomatic row between Turkey and Israel. Turkey recalled its ambassador to Israel, while also opting for a freeze of the joint military exercises. In the following months, the Turkish National Assembly approved a statement harshly criticizing the Israeli raid, while also demanding Israel a formal apology and the payment of compensation to those Turkish citizens wounded in the attacks and to the deceased's families. After three years of tense diplomatic relations, following to an apology expressed by Prime Minister Netanyahu to President Erdogan, bilateral discussions started in order to restore diplomatic relations between the countries and agree on compensation. On February 2014, after an initial stalemate on the amount of compensation to be paid,[337] media sources (not expressly denied by Israeli officials) reported that Israel offered 20 million USD to Turkey as compensation for the damage suffered by the families of those deceased and wounded during the seizure.[338] According to the same source, Israel seemed expecting in exchange a reconciliation agreement between the countries, including the normalization of diplomatic relations and the cancellation of lawsuits pending against IDF soldiers and high-level officials before Turkish courts.

With regard to initiatives aimed at ensuring accountability following the publication of the HRC Mission report, on May 2012 the Istanbul Attorney General issued an indictment containing four arrest warrants for former IDF Chief of Staff Gabi Ashkenazi, former Military Intelligence chief Amos Yadlin, former commander of the navy Eliezer Marom, and former head of air force intelligence Avishai Levi, for their role in planning and ordering the raid into the Mavi Marmara.[339] After their trial started in absentia before the Istanbul Seventh Court of Serious Crimes, in May 2014 the Court formally issued four arrest warrants, while also requesting

337 The Jerusalem Post, 'Turkey refuses to accept Israel's ex gratia compensation payment' (25 July 2013) http://www.jpost.com/Diplomacy-and-Politics/Turkey-refuses-to-accept-Israels-ex-gratia-compensation-payment-320992 accessed 28 February 2015.

338 Haaretz, 'Israel offers Turkey $20m in compensation over Gaza flotilla raid' (3 February 2014) http://www.haaretz.com/news/diplomacy-defense/1.572069 accessed 28 February 2015.

339 Haartez, 'Turkey issues arrest warrants for ex-IDF officers', (24 May 2012) http://www.haaretz.com/news/diplomacy-defense/turkey-issues-arrest-warrants-for-ex-idf-officers-1.432246 accessed 28 February 2015.

Interpol to deliver a 'Red Notice' for their arrest.[340] To date, all the four individuals indicted remain at large in Israel.

On a separate development, on 14 May 2013 the ICC Prosecutor received a referral from the Union of the Comoros, the registered State of the Mavi Marmara vessel as well as State Party to the Rome Statute, with respect to the Israeli raid on the flotilla, requesting the Prosecutor 'pursuant to Articles 12, 13 and 14 of the Rome Statute to initiate an investigation into the crimes committed within the Court's jurisdiction, arising from this raid'.[341]

On 6 November 2014, the ICC Prosecutor issued a statement on the conclusion of its preliminary examination, in which it determined that the legal requirements under the Rome Statute to open an investigation had not been met. In particular, Prosecutor Bensouda, although concluding how there was a reasonable basis to believe that war crimes within the jurisdiction of the ICC had been committed on board of the Mavi Marmara, noted that "the potential case(s) likely arising from an investigation into this incident would not be of sufficient gravity to justify further action by the ICC", given that gravity is an explicit criteria set by the Rome Statute for the opening of an investigation.[342] After an Application for Review of the Prosecutor's decision was filed by the Republic of Comoros on 29 January 2015,[343] on 16 July 2015 the ICC Pre-Trial Chamber requested the Prosecutor to reconsider the decision not to investigate the situation due to a number of material errors in her determination of the gravity of the potential case(s).[344]

340 The Jerusalem Post, 'Turkish courts ask Interpol to arrest former IDF chief Ashkenazi, 3 others for flotilla raid' (26 May 2014) http://www.jpost.com/Diplomacy-and-Politics/Turkish-court-asks-Interpol-to-arrest-former-IDF-chief-Ashkenazi-3-others-for-flotilla-raid-354385 accessed 28 February 2015.

341 Referral under Articles 14 and 12(2)(a) of the Rome Statute arising from the 31 May 2010, Gaza Freedom Flotilla situation (14 May 2013) http://www.icc-cpi.int/iccdocs/otp/Referral-from-Comoros.pdf accessed 28 February 2015.

342 Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on concluding the preliminary examination of the situation referred by the Union of Comoros: "Rome Statute legal requirements have not been met (6 November 2014) http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/reports%20and%20statements/statement/Pages/otp-statement-06-11-2014.aspx accessed 28 February 2015.

343 Application for Review pursuant to Article 53(3)(a) of the Prosecutor's Decision of 6 November 2014 not to initiate an investigation in the Situation on Registered Vessels of the Union of the Comoros, the Ellenic Republic of Greece and the Kingdom of Cambodia, ICC 01/13 (29 January 2015).

344 ICC Pre-Trial Chamber I requests Prosecutor to reconsider decision not to investigate situation referred by Union of Comoros, ICC-CPI-20150716-PR1133 (16 July 2015) http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/PR1133.aspx accessed 04 October 2015; ICC, Pre-Trial Chamber I, 'Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation', ICC 01/13 (16 July 2015).

In this regard, it is extremely relevant to note how both the Comoros referral and the Prosecutor's decision relied extensively upon the findings of the HRC Fact-Finding Mission. In particular, the group of Turkish lawyers submitting the request on behalf of the Comoros underlined how they had based their request mainly on significant primary evidence in their possession and on the report of the HRC Fact-Finding Mission.[345] Consequently, the Mission findings were used extensively in the referral as the principal source in order to provide an account of the events prior, during and after the seizure of the Mavi Maramara by the IDF.[346] Especially, the referral upheld the Mission's findings on the use of live ammunition and lethal force by Israeli soldiers. [347]It also endorsed the Mission's view that the treatment of those passengers detained after the seizure amounted to torture and inhuman treatment according to international human rights standards.[348] Furthermore, the Mission's report was quoted to support the argument that the actions carried out by the IDF were undertaken as part of a deliberate plan and policy to resort to violence in order to dissuade the flotilla to reach Gaza, in this way justifying the 'gravity' requirement.[349]

With regard to the legal analysis, the HRC Mission conclusions on the characterization of the flotilla passengers as civilians according to IHL, on the blockade of Gaza amounting to collective punishment and on the illegal character of the interception of the flotilla were used to support the findings reached in the referral.[350] Moreover, in relation to those findings concerning individual criminal responsibility, the HRC Mission determinations on the characterization of certain acts as war crimes were also duly taken into consideration, although the referral included a broader list of criminal offences including both war crimes and crimes against humanity.[351]

Also in relation to the 'Article 53(1) Report' submitted by the ICC Prosecutor in response to the referral, the HRC Mission's findings played an outstanding contribution in those sections dedicated to Prosecutor's factual determinations

345 Referral on Gaza Freedom Flotilla situation (n 336) para 5.

346 *Ibid* [paras 38-40 § 42].

347 *Ibid* [paras 42-45].

348 *Ibid* [para 48].

349 *Ibid* [para 25].

350 *Ibid* [paras 53 § 55-56].

351 *Ibid* [paras 58-59 § 60-65].

and legal analysis. In particular, such findings have been relied upon extensively in the assessment concerning the legality of the blockade in order to oppose the view expressed by the Turkel Commission and the UN Secretary General Panel of Inquiry that the blockade should have been considered legal. Furthermore, the HRC Mission report provided a precious contribution in the Prosecutor's legal analysis of whether war crimes such as 'wilful killing', 'inhuman treatment', 'wilfully causing great suffering', 'intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians' and 'intentionally directing attacks against personnel or objects involved in a humanitarian assistance mission' had been perpetrated during the seizure of the flotilla.[352]

Notwithstanding the decision by the Prosecutor not to proceed with an investigation, its 'Article 53(1) Report' constitutes an interesting example on how the findings of fact-finding missions and commissions of inquiry can positively affect the course of action undertaken by relevant actors within the international community over situations of human rights crisis. It should be reminded how the Prosecutor, despite determining that the gravity requirement was lacking in relation to the events in question, did endorse the UN Mission's position on the fact that war crimes had probably been committed during the seizure of the flotilla.

Moreover, it should be noted the extensive reference to the HRC Mission's findings in the Application for Review to the Prosecutor's decision filed by the Union of the Comoros.[353] It is significant how the Application stresses that the Prosecutor's conclusions on gravity "are contrary to both UN reports - the Palmer Report and the Report of the UN Human Rights Council fact-finding mission - which at a minimum would provide a reasonable basis for her to proceed to investigate the alleged acts".[354] As an example, the Application refers to the fact that the Prosecutor did not take adequately into account the importance of the issue concerning the legality of the Gaza blockade, notwithstanding previous determinations made by the ICRC and the HRC Mission.[355] Also, on her decision not to address the firing from helicopters, the Application notes how "she places no weight at all on the information set out [in the HRC Mission's report], and ignores it, when considering whether there was a planned and deliberate attack on civilians".[356]

In sum, while, for reasons that have been explained above,[357] such 'indirect cooperation' between international human rights inquiries and criminal prosecutors should be assessed with great care, its effects should not be underestimated particularly in a context of long-standing lack of accountability such as Palestine and given certain important recent developments. These developments concern from one side the establishment, in July 2014, by the UN Human Rights Council of a new international commission of inquiry charged to investigate the events concerning the latest Gaza war and "to establish the facts and circumstances of the crimes perpetrated and to identify those responsible, to make recommendations, in particular on accountability measures, all with a view to avoiding and ending impunity and ensuring that those responsible are held accountable".[358] From the other side, an important game changer has been introduced with the decision taken by the State of Palestine on 2 January 2015 to accede to the Statute of the ICC, accepting the jurisdiction of the Court starting from 13 June 2104.[359] Such move, while increasing the chances of a proper accountability process for violations occurring in Palestine, may also entail the possibility of a more effective follow-up to the findings and recommendations produced by the newly established international commission of inquiry.

352 Statement of the Prosecutor of the International Criminal Court (n 337) para 42, 66, 75, 108, 121.

353 Application for Review (n 343) paras 16, 90, 95, 103, 116, 122, 124, 130.

354 *Ibid* [para 95].

355 *Ibid* [para 130].

356 *Ibid* [para 104].

357 See *supra* (n 257).

358 Human Rights Council, A/HRC/RES/S-21/1 (23 July 2014) para13.

359 ICC Press Release, 'The State of Palestine accedes to the Rome Statute' (07 January 2015) http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1082_2.aspx accessed 28 February 2015; ICC Press Release, 'Palestine declares acceptance of the ICC jurisdiction since 13 June 2014' (05 January 2015) http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1080.aspx accessed 28 February 2015.

3. CONCLUDING REMARKS: IMPACT OF THE WORK OF COMMISSIONS OF INQUIRY AND THE WAY AHEAD

It is now time to provide a general overview of the impact of the work conducted by the international commissions of inquiry analysed above.

A first general remark concerns the fact that today, in 2015, the situation of human rights in Palestine remains bleak. Human rights violations continue unabated in the whole OPT. In the West Bank, Israeli settlements are expanding while the set of combined restrictions on Palestinians' rights and freedoms remains in place. This has exacerbated tension and terror attacks coming from both sides. Israeli demographic and housing policies are negatively affecting the status of Jerusalem with the concrete risk to produce irreversible changes on the ground, while Israeli plans are aimed at further severing and fragmenting Palestinian communities in a way that would render a contiguous West Bank impossible. On the other hand, the Gaza Strip is living under a strict blockade regime since 2007. The dire humanitarian situation generated by the closure has been exacerbated by the eruption of three conflicts between 2008 and 2014, which have further traumatised the civilian population from both sides and exacerbated their vulnerability.

While the prospects of a just and durable peace have vanished after the collapse of the latest round of talks in 2014, the international community remains unwilling to take effective actions to tackle the situation in Palestine from an international law and human rights perspective. In this regard, main international actors remain committed to an approach to the conflict that constantly prioritizes the resumption of negotiations over the respect of international law and basic human rights. In this context, any prospect of accountability for all parties to the conflict at both state and individual level remains remote.

However, these remarks should not underestimate the impact of the work conducted so far by international commissions of inquiry. First of all, international commissions and fact-finding missions had the merit of ascertaining facts in relation to a number of events that have been harshly disputed. The 'truth-seeking' function is by no mean secondary in a context, such as the Israeli-Palestinian conflict, characterized by an extremely polarizing rhetoric as well as by opposed views on the events that occurred. An account of the events provided by an impartial body of eminent experts according to international standards of independence, impartiality, objectivity, transparency, integrity, confidentiality, and the principle of "do no harm" can prove extremely precious in isolating neutral facts and responsibilities according to the law and detaching them from any political and moral debate. Indeed, this has been the case for the work of the great majority of the commissions examined. What has been missing so far has been the support received from the parties involved and the international community as a whole. Israel's persistent lack of cooperation has inevitability hampered the work of the commissions and, in certain circumstances, has negatively affected the accuracy of their findings. On the other hand, the international community has often failed to provide adequate follow-up to the recommendations put forward by the commissions, exposing once again its inadequacy to tackle effectively the human rights situation in the OPT.

Notwithstanding such obstacles, commissions of inquiry have, in certain circumstances, triggered relevant reactions. For example, in response to the recommendations included in the report of the Fact-finding Mission on the Gaza Conflict, the establishment by the Human Rights Council of a Committee of independent experts to monitor proceedings undertaken at domestic level in relation to violations occurring during 'Operation Cast Lead' had indeed an impact on the initial efforts put in place by the parties to the conflict to investigate those violations, pending possible further decisions by relevant international bodies. The fact that these efforts translated into no accountability whatsoever for the violations perpetrated proves once again the failure by the international community to act consistently and put adequate pressure on the relevant domestic authorities for the respect of their international obligations.

Another merit of the UN Mission to Gaza has been its role in strengthening the debate around international criminal responsibility in relation to the OPT. The consistent reference, for the first time in a UN report, to the commission of war crimes and crimes against humanity has triggered a number of reactions whose latest effects can be visible today with the accession of Palestine to the ICC.

At the same time, the extensive reference to the findings of the UN Mission to the flotilla events by the ICC Prosecutor in its decision on the Comoros referral may indicate the potential role that commissions' reports can play in case the response mechanisms of the international community involve bodies mandated to ensure accountability.

Indeed, assessing the follow-up provided by the international community, the record of commissions of inquiry in Palestine remains poor. At the same time,

looking at a number of obstacles that have obstructed the work of these bodies, the responsibility for such a failure cannot be ascribed to commissions of inquiry themselves.

On the contrary, from the examples examined, it emerged a scrupulous attitude towards fact-finding matched with utmost attention in clarifying the credibility of sources and evidence used. In relation to the use of international law, while certain commissions have been more progressive than others, in general their findings in law have always been substantiated by extensive references to the opinions of authoritative international bodies and scholars.

While some criticism over certain stances adopted by these commissions has been already highlighted in the course of the study, the fact that commissions' reports contain certain gaps cannot be considered the result of a biased approach directed systematically against one party to the conflict or of a politically motivated distortion of the truth.

However, this does not mean that the quality of the work of commissions of inquiry in Palestine and the conditions in which they operate cannot be improved. First of all, the practice of the Human Rights Council to frame one-sided mandate for the commissions is certainly unfortunate and noxious to the search of the truth commissions are called to pursue. While it is true that past commissions have often healed the damages provoked by their founding resolutions through a formal or informal amendment of their mandate, the biased approach of the Human Rights Council has represented one of the most detrimental factors for the commissions' own credibility and legitimacy. While according to some opinion the anti-Israeli approach endorsed by the Human Rights Council should be seen as a reaction to the anti-Palestinian attitude of the UN Security Council, one cannot deny the fact that it has been used as a mantra by the Israeli authorities to cover their unwillingness to allow international investigations into the OPT.

Other issues that future commissions will be called to clarify concern the cooperation by the parties and access to the territory. Among the examples analysed above, only the 2000 Human rights inquiry commission has been granted access to the territory by Israel. Against this background, looking also at the reference contained in the UNGA Declaration on Fact-Finding on the need of state consent, international stakeholders involved in the establishment of commissions of inquiry are called to take a firm and clear approach in this regard. While, as explained above, it is the opinion of this author that commissions should ago ahead in discharging their mandate even in cases where the consent of the affected states is missing, it is clear how in these circumstances the fact-finding exercise becomes an extremely arduous task. It is precisely for this reason that the support from relevant actors of the international community needs to be considerable and consistent throughout the whole life-cycle of commissions of inquiry. Unfortunately, the most recent international practice seems to go in an opposite direction. As already mentioned, in July 2014, the UN Human Rights Council established a international commission of inquiry with the mandate to investigate the events concerning the latest Gaza war. While Israel immediately dismissed the Commission and denied any sort of cooperation, it soon became apparent how also the international community has proven little supportive for the new investigation. The Commission was not able to enter neither the West Bank nor the Gaza Strip due to Egypt security concerns. The lack of political and logistic support to the investigative team was denounced by a number of local NGOs in a statement[360] and somehow reflected in the decision of the commissioners to postpone the publication of the report in order to seek access into the affected territory.

Notwithstanding such obstacles, the upcoming publication of the Commission of Inquiry's report together with the ICC involvement in the conflict may represent, in the coming months, an extraordinary and unprecedented opportunity of improving the chances of accountability in Palestine from one side, and assessing the role of commissions of inquiry in such accountability process from the other.

360 'Human Rights Groups Denounce Israel's Refusal To Allow Independent Commission of Inquiry Into Gaza' (13 November 2014) http://www.imemc.org/article/69699 accessed 28 February 2015.

4. LIST OF ACRONYMS

OPT = Occupied Palestinian Territory

HRC = UN Human Rights Council

UNSC = UN Security Council

R2P= Responsibility to Protect

IHL = International humanitarian law

IHRL = International human rights law

ICL = International criminal law

NGOs = Non-governmental organisations

PLO = Palestine Liberation Organisation

PNA = Palestinian National Authority

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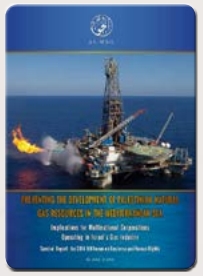

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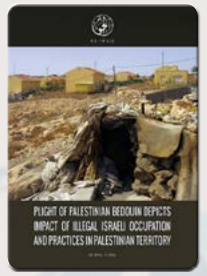

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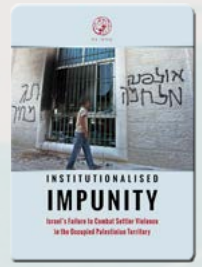

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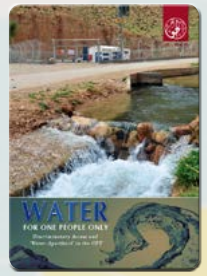

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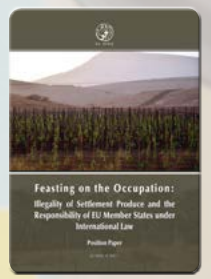

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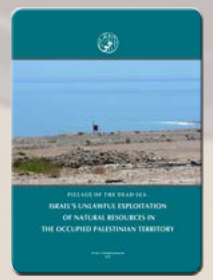

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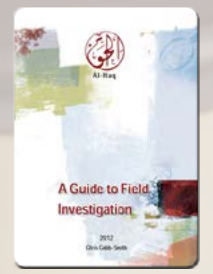

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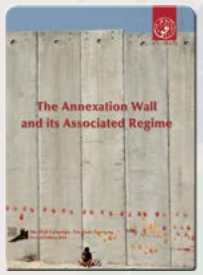

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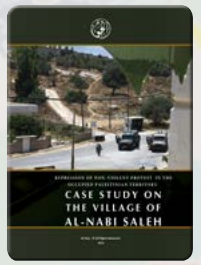

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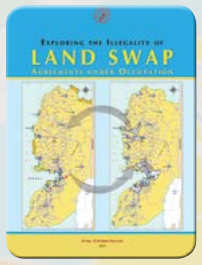
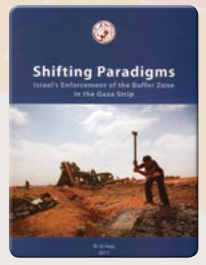
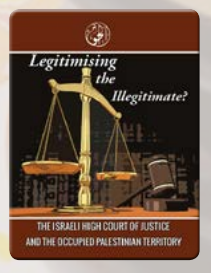


Exploring the Illegality of "Land Swap" Agreements under Occupation

Al-Haq's Questions and Answers
Palestine's UN Initiatives and the Representation of the Palestinian People's Rights



Shifting Paradigms
Israel's Enforcement of the Buffer Zone in the Gaza Strip



Legitimising the Illegitimate
The Israeli High Court of Justice and the Occupied Palestinian Territory

Collective Punishment in Awarta

Unmasking the Freeze

AL-HAQ

About AL-HAQ

Al-Haq is an independent Palestinian non-governmental human rights organisation based in Ramallah, West Bank. Established in 1979 to protect and promote human rights and the rule of law in the Occupied Palestinian Territory (OPT), the organisation has special consultative status with the UN Economic and Social Council.

Al-Haq documents violations of the individual and collective rights of Palestinians in the OPT, regardless of the identity of the perpetrator, and seeks to end such breaches by way of advocacy before national and international mechanisms and by holding the violators accountable. The organisation conducts research; prepares reports, studies and interventions on the breaches of international human rights and humanitarian law in the OPT; and undertakes advocacy before local, regional and international bodies. Al-Haq also cooperates with Palestinian civil society organisations and governmental institutions in order to ensure that international human rights standards are reflected in Palestinian law and policies. The organisation has a specialised international law library for the use of its staff and the local community.

Al-Haq is also committed to facilitating the transfer and exchange of knowledge and experience in IHL and human rights on the local, regional and international levels through its Al-Haq Center for Applied International Law. The Center conducts training courses, workshops, seminars and conferences on international humanitarian law and human rights for students, lawyers, journalists and NGO staff. The Center also hosts regional and international researchers to conduct field research and analysis of aspects of human rights and IHL as they apply in the OPT. The Center focuses on building sustainable, professional relationships with local, regional and international institutions associated with international humanitarian law and human rights law in order to exchange experiences and develop mutual capacity.

Al-Haq is the West Bank affiliate of the International Commission of Jurists - Geneva, and is a member of the Euro-Mediterranean Human Rights Network (EMHRN), the World Organisation Against Torture (OMCT), the International Federation for Human Rights (FIDH), Habitat International Coalition (HIC), and the Palestinian NGO Network (PNGO).

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