

**COMPARATIVE ANALYSIS OF PRELIMINARY INVESTIGATION SYSTEMS IN
RESPECT OF ALLEGED VIOLATIONS OF INTERNATIONAL HUMAN RIGHTS
AND/OR HUMANITARIAN LAW**

1. The Open Society Justice Initiative uses law to protect and empower people around the world. Through litigation, advocacy, research, and technical assistance, the Justice Initiative promotes human rights and builds legal capacity for open societies. We foster accountability for international crimes, combat racial discrimination and statelessness, support criminal justice reform, address abuses related to national security and counterterrorism, expand freedom of information and expression, and stem corruption linked to the exploitation of natural resources. Our staff are based in Abuja, Almaty, Amsterdam, Brussels, Budapest, Freetown, The Hague, London, Mexico City, New York, Paris, Phnom Penh, and Washington, D.C.
2. In March 2010, the Justice Initiative was asked by Adalah: the Legal Centre for Arab Minority Rights in Israel, to assist with a review of comparative standards for military investigations where there is an allegation of a violation of human rights standards and/or international humanitarian law. The Justice Initiative engaged experts in military law to provide information on the relevant provisions of military justice in their respective jurisdictions, and has drafted this memorandum based on their reports.

Overview

3. In response to the Report of the Fact-Finding Mission on the Gaza Conflict of September 2009, (“the Goldstone Report”) the Israeli Defence Force (IDF) issued a report (“the IDF report”)¹ in January 2010 which claims that preliminary investigation systems similar to the IDF “Command Investigation” exist in other legal systems around the world, such as the USA, the UK, Canada and Australia.
4. The IDF Report maintains that it is necessary to conduct an immediate independent criminal investigation only where there is an allegation of *per se* criminal behaviour, which includes the ill-treatment of detainees, the use of civilians as human shields, looting, and the intentional killing of a civilian (at para. 50). In cases of negligent or reckless killings, or of any other type of conduct that may amount to either a violation of law of armed conflict or a serious violation of human rights law, it is for the unit concerned in the incident to conduct its own “Command Investigation”, at the conclusion of which the unit must submit a report to the commanding officers and the Military Advocate General who will then consider whether an independent criminal investigation is required. The IDF states that any such complaint will be brought to the attention of the Military Advocate General who also has the power to refer an investigation to the Military Police Criminal Investigation Division (MPCID).
5. The Goldstone Report concludes that this system results in a delay in transferring cases for independent investigation that might take up to six months (at para.1830), and suggests that

¹ IDF’s Report, “Gaza Operation Investigations: An Update”, January 2010. Available at: <http://www.mfa.gov.il/NR/rdonlyres/8E841A98-1755-413D-A1D2-8B30F64022BE/0/GazaOperationInvestigationsUpdate.pdf>

the narrow definition of *per se* criminal conduct means that very few cases have been transferred (at paras 1826-1828). On 6 July 2010, the IDF announced that it had opened one criminal prosecution arising from Operation Cast Lead.

6. This memorandum examines international standards and comparative procedures on the duty to investigate, in the four jurisdictions – the US, UK, Canada, and Australia – highlighted in the IDF report, that apply where there has been an alleged violation of the law of armed conflict or a gross violation of human rights law. The burden is on the state to foster a culture of compliance with international humanitarian law and to demonstrate that it has satisfied its positive obligation to ensure human rights standards are protected. Unfortunately, the IDF Report of January 2010 does not satisfy that burden. To the contrary, with respect to the individual cases raised in the Goldstone Report, the IDF report fails to provide specific details of the timing and the nature of the investigations undertaken so as to allow for definitive conclusions with regard to its compliance with international standards.
7. The memorandum concludes that where there is an operation that leads to the death or serious injury of civilians, including but not limited to those where there is an explicit allegation of intentional killing, then in the four comparative jurisdictions under question the investigation would immediately be reported to superior officers outside the immediate chain of command, and transferred to an independent investigative unit to undertake the criminal inquiries that are necessary. Only in Israel is it possible for the unit involved in the incident in question to conduct a preliminary inquiry – of up to six months – and collect evidence before the investigation is transferred. Such a delay violates international law and taints the independence and effectiveness of any subsequent inquiry.²

I. Duty to Prosecute and Investigate in International Law

8. The duty to prosecute exists in both international humanitarian law and in human rights law, both of which apply during an armed conflict.

A. Application of International Law to Gaza

9. International standards apply to both Israel and the Occupied Territories, and continue to do so during armed conflict. Additional Protocol I to the Geneva Conventions, which reflects customary international law, contains in Article 75 a series of fundamental guarantees and protections which are also recognized under human rights law, including the prohibition against torture, murder and inhuman conditions of detention. The International Court of Justice has stated that “the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation...”³ The preamble to Additional Protocol II to the Geneva Conventions recalls that “international instruments relating to human rights offer a basic protection to the human person.” Specifically, Article 2 of the International Covenant on Civil and Political Rights (ICCPR)

² Although this memorandum addresses the particular question raised in the IDF report of the comparison between the investigative systems in Israel and the four jurisdictions at issue, the Justice Initiative recognizes that a similar duty to investigate applies to the Palestinian Authority, as recognized in the Goldstone Report (see para. 306-307) but which appears not to have been undertaken (see paragraphs 1836 – 1848). See also the resolution of the UN General Assembly of 5 November 2009 calling for independent investigations by both Israel and the Palestinian Authority, UN GA Resolution A/RES/64/10, available at: <http://unispal.un.org/UNISPAL.NSF/0/C00AAE566F6F9D7485257664004CFF12>

³ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, International Court of Justice, Advisory Opinion of 9 July 2004, I.C.J. Reports 2004, para.106.

obliges each State party to respect and to ensure human rights, which the Human Rights Committee has interpreted to mean that “a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State, even if not situated within the territory of the State party.”⁴ In a recent judgment, the International Court of Justice has further stated that Uganda, as the occupying power of the Ituri region of the Democratic Republic of the Congo, was under an obligation to “secure respect for the applicable rules of international human rights law and international humanitarian law.”⁵

B. International Humanitarian Law⁶

10. The duty to prosecute and investigate exists in international humanitarian law. Article 49 of the First Geneva Convention, Article 50 of the Second Geneva Convention, Article 129 of the Third Geneva Convention, and Article 146 of the Fourth Geneva Convention all require that there is an effective investigation into grave breaches of the Conventions, stating that “Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts.”

C. Customary International Law

11. The obligation to investigate and prosecute war crimes has become an obligation under customary international law. Rule 158 of the ICRC “Rules of Customary International Humanitarian Law” makes clear that:

“[S]tates must investigate war crimes allegedly committed by their nationals or armed forces, or on their territory, and, if appropriate, prosecute the suspects. They must also investigate other war crimes over which they have jurisdiction and, if appropriate, prosecute the suspects.”⁷
12. The second volume of the ICRC Rules provides supporting evidence for this rule.⁸ The sources cited generally refer to the obligation to prosecute grave breaches of international humanitarian law and secondarily relate to the corresponding duty to investigate, derived from the provisions of international humanitarian law outlined above, as well as other provisions of international humanitarian law, international criminal law and international human rights law.⁹ The duty to investigate has been specifically affirmed in the context of

⁴ UN Human Rights Committee, General Comment No. 31 (2004), para.10.

⁵ *Case Concerning the Armed Activities on the Territory of the Congo*, ICJ, Judgment of 19 December 2005, I.C.J. Reports 2005, para.172.

⁶ Israel is a party to the four Geneva Conventions of 12 August 1949 (para.271) and has accepted that the provisions of Hague law are part of customary international law (para.272).

⁷ Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law Volume I: Rules*, ICRC 2005, at p. 607, Rule 158 (“ICRC Volume I”).

⁸ Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law Volume II: Rules*, ICRC 2005, at p. 3,941, para. 315 to p. 4013, para. 632 (“ICRC Volume II”).

⁹ See: ICRC Volume II, p. 3941-4013, para. 315-354. Article 6 of the 1945 IMT Charter (Nuremberg)(“power to try and punish”); Article VI of the 1948 Genocide Convention (person charged with Genocide shall be tried by a competent tribunal); Article 28 of the 1954 Hague Convention (“all necessary steps to prosecute and impose penal or disciplinary sanctions upon those persons, of whatever nationality, who commit or order to be committed a breach of the present Convention”); Article 85(1) AP (provisions relating to the suppression of grave breaches should apply to this protocol); Article 8(1) of the International Convention against the Taking of Hostages (“obliged ... without exception ... to submit the case to the competent authorities for the purpose of prosecution”); Articles 5 & 7 of the 1984 Convention

an armed conflict.¹⁰ Numerous United Nations Security Council Resolutions, statements of the Security Council President, and Resolutions of the U.N. General Assembly, the U.N. Commission on Human Rights, and other U.N. bodies are cited as evidence of the duty as they explicitly call for investigations of alleged violations of international humanitarian law.¹¹

13. Both state practice and *opinio juris* are cited by the ICRC as evidence of the duty to investigate and prosecute war crimes. National military codes of conduct are cited as evidence of the national practice of informing soldiers of the investigation and, eventually, prosecution to which they will be subject in the event that they are suspected of breaching international humanitarian law.¹² Several military codes explicitly provide for the duty to

against Torture; Article 7(1) of the 1993 CWC (“enact penal legislation under sub-paragraph (a) to any activity prohibited by the State Party under this Convention . . .”); Article 14 of the 1996 Amended Protocol II to the CCW; Article 9(2) of the 1994 Convention on the Safety of UN Personnel “each State Party shall make the crimes set out in paragraph 1 of the Convention punishable by appropriate penalties . . .”); Article 14 of the Amended Protocol II to the CCW (“[e]ach High Contracting Party shall take all appropriate steps, including legislative and other measures, to prevent and suppress violations of this Protocol by persons or on territory under its jurisdiction and control.”); Article 9 of the 1997 Ottawa Convention (“each state party shall take all appropriate legal, administrative and other measures including the imposition of penal sanctions, to prevent and suppress any activity prohibited to a State Party under this Convention”); Article 12 and 13 of the ICC Statute; Article 51(2) of the 1999 Second Protocol to the 1954 Hague Convention concerning Serious Violations of this Protocol (“...establish as criminal offenses under its domestic law the offenses set forth in this Article . . . and to make such offenses punishable”); Article 16(1) of the 1999 Second Protocol to the 1954 Hague Convention concerning “Jurisdiction”; Article 17(1) of the 1999 Second Protocol to the 1954 Hague Convention concerning “prosecution”; Article 21 of the 1999 Second Protocol to the 1954 Hague Convention concerning “Measures regarding other violations”; Article 22(1) of the 1999 Second Protocol to the 1954 Hague Convention; Article 1 and Article 6(1) of the Optional Protocol on the Involvement of Children in Armed Conflicts (“all feasible measures to ensure that members of the armed forces that have not obtained the age of 18 should not take direct part in hostilities” and “all necessary legal and administrative measures to ensure effective implementation of the provisions . . .”); Article 1 of the 1993 ICTY Statute.

¹⁰ See: ICRC Volume II, p. 3946 & 3947, para. 343 & 345. 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY and Article 5 of the 1992 Agreement of the Application of IHL between the parties to the conflict in Bosnia and Herzegovina.

¹¹ See, for example, ICRC Volume II: para. 559, 564 & 567 (citing a U.N. Security Council Resolution adopted in 1998 on the situation in Afghanistan in which the U.N. Security Council called upon the Taliban to “investigate urgently attacks on United Nations personnel in the Taliban held territories”) and separate statements of the President of the Security Council calling upon Croatia (1995) and the DRC and Rwanda (1998) to investigate reports of human rights violations and violations of international humanitarian law. See also Article 19 of the New Delhi Draft Rules; Paragraph 18 of the Principles on Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, Article 6(1) of the 1991 Draft Code of Crime against the Peace and Security of Mankind; Article III(1) of the 1994 Comprehensive Agreement on Human Rights in Guatemala; Paragraph 20 of the 1994 Guidelines on the Protection of the Environment in Times of Armed Conflict; Article 9 of the 1996 ILC Draft Code; Section 4 of the UN Secretary-General’s Bulletin; Article 4 of the 2000 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law.

¹² See: ICRC Volume II: Argentina’s Law of War Manual (para. 355), Belgium’s Law of War Manual (para. 357), Canada’s LOAC Manual (para. 361), Canada’s Code of Conduct (para. 362), Colombia’s Basic Military Manual, the Military Manual of the Dominican Republic, Ecuador’s Naval Manual, France’s LOAC Summary Note and LOAC Teaching Note (para. 366 & 367), Germany’s Military Manual (para. 368), Italy’s IHL Manual, South Korea’s Operational Law (para. 371), the Military Manual of the Netherlands (para. 372), New Zealand’s Military Manual (para. 374), Nigeria’s Military Manual (para.

investigate: these include the Belgian code of conduct,¹³ Canada's Unit Guidelines, LOAC Manual, and Code of Conduct,¹⁴ New Zealand's Military Manual,¹⁵ the Joint Circular on Adherence to IHL and Human Rights of the Philippines,¹⁶ South Africa,¹⁷ Spain's LOAC Manual,¹⁸ the UK Military Manual,¹⁹ and the US Field Manual.²⁰ National laws implementing the Geneva Conventions also provide evidence of state practice, several of which provide an indication that the state has an obligation to investigate grave breaches of international humanitarian law.²¹

14. The ICRC Report also cites national case law in support of the duty to investigate grave breaches of international humanitarian law. Many of the cases are cited for the proposition that there is a duty to prosecute grave breaches of the Geneva Conventions²² and other crimes.²³

375), the Joint Circular on Adherence to IHL and Human Rights of the Philippines (para. 377), South Africa's LOAC Manual, Sweden's IHL Manual, Switzerland's Basic Military Manual (para. 381), the UK Military Manual (para. 382), the US Field Manual (para. 383), the US Air Force Pamphlet (para. 384), and the YPA Military Manual of the SFRY (para. 388).

¹³ See: ICRC Volume II, para. 357 ("search for, identification of and prosecution by the national courts of authors of grave breaches . . .").

¹⁴ See: ICRC Volume II: Unit Guide, para. 360 ("to search for and try all persons who committed or ordered to be committed grave breaches . . ."); LOAC Manual, para. 361 ("to take measures necessary to suppress"); Code of Conduct, para. 362 ("[i]t is essential that any alleged breaches of these rules [of the Code of Conduct] and the Law of Armed Conflict be investigated rapidly in as impartial a manner as possible. An impartial investigation will not only assist in bringing violators to justice, thereby maintaining discipline, but will also provide the best opportunity to clear anyone who has not acted improperly. In most cases, that investigation will be carried out by the military police of National Intelligence Service.").

¹⁵ See: ICRC Volume II, para. 374 ("in the event of 'any alleged violations' of the 1949 [Geneva] Conventions an enquiry must be instituted at the request of a Party to the conflict.").

¹⁶ See: ICRC Volume II, para. 377 ("[a]ll human rights-related incidents allegedly committed by members of the AFP and PNOP in the course of security/police operations shall be immediately investigated and if evidence warrants, charges shall be filed in the proper courts.").

¹⁷ See: ICRC Volume II, para. 378 ("obliged to search out and prosecute").

¹⁸ See: ICRC Volume II, para. 379 ("search for persons accused of having committed or having ordered to be committed, grave breaches . . .").

¹⁹ See: ICRC Volume II, para. 382 ("[in] the case of 'any alleged violations' of the 1949 [Geneva] Conventions an inquiry must be instituted at the request of a part to the conflict.").

²⁰ See: ICRC Volume II, para. 383 ("an enquiry shall be instituted in a manner to be decided between the interested Parties, concerning any alleged violation of the [Geneva] Convention[s] . . .").

²¹ See: ICRC Volume II, Burundi's Draft Law on Genocide, Crimes against Humanity, and Genocide (para. 404); Ethiopia's Special Prosecutor's Proclamation provides that ("it is necessary to provide for the establishment of a Special Public Prosecutor's Office that shall conduct a prompt investigation and bring to trial detainees and those who committed offenses.").

²² See, e.g.: ICRC Volume II, para. 523, *Sokolovic* case before Germany's Higher Regional Court at Düsseldorf (1999, decided 2001) (noting that "a duty to prosecute arises from (GC IV) at least when an international armed conflict takes place and the criminal offense fulfill the requirements of a 'grave breach' in the meaning of Article 147 of this Convention); para. 528, the *Quirin* case before the United States Supreme Court (1942) in which the Court noted ("from the very beginning of its history this Court has applied the law of war, including that part of the law of nations which prescribes for the conduct of war, the status rights and duties of enemy nations as well as enemy individuals.").

²³ In post-war Germany, the General Central Office for the Investigation of National-Socialist Atrocities at Ludwigsburg (*Zentrale Stelle zur Aufklärung nationalsozialistischer Gewaltverbrechen*) investigated over 100,000 accused and suspected persons for crimes committed during the Nazi regime. Of the 100,000 cases

D. UN Basic Principles on the Right to a Remedy

15. The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law,²⁴ adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005, apply a duty to investigate arising out of both branches of law. Paragraph 3 states:

“The obligation to respect, ensure respect for and implement international human rights law and international humanitarian law as provided for under the respective bodies of law, includes, inter alia, the duty to:

- (a) Take appropriate legislative and administrative and other appropriate measures to prevent violations;
- (b) Investigate violations effectively, promptly, thoroughly and impartially and, where appropriate, take action against those allegedly responsible in accordance with domestic and international law;
- (c) Provide those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice, as described below, irrespective of who may ultimately be the bearer of responsibility for the violation; and
- (d) Provide effective remedies to victims, including reparation, as described below.”

E. Human Rights Law

16. The Goldston Report has succinctly summarized the duty under human rights law to investigate human rights violations. Article 2 of the ICCPR requires a State party to ensure the rights within the Covenant to all individuals within its territory and under its jurisdiction, and to ensure an effective remedy for any violation of those rights. General Comment 31 establishes that “a failure by a State party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant”²⁵ (Goldstone Report, para.1806). The European Court of Human Rights has found that the obligation to investigate exists in an armed conflict. In a case involving allegations of the killing of civilians in Chechnya by indiscriminate shelling by Russian forces, the Court concluded that the duty to secure rights to all people within the State party’s jurisdiction required “by implication that there should be some form of effective judicial investigation when individuals have been killed as a result of the use of force.”²⁶
17. The duty to investigate grave and serious violations of human rights law imposes specific requirements for the investigation to meet the standards set by the International Covenant on Civil and Political Rights (ICCPR). Contrary to the assertion in the IDF report that “International law does not indicate the precise manner or pace at which a state should investigate alleged violations of the Law of Armed Conflict,” and that “states do seem to enjoy broad discretion (subject to good faith requirements) in conducting *ex post facto* investigations in situations where human rights or IHL had allegedly been breached,” case law from international courts defines the acceptable standards for such an investigation and

investigated, 7,225 of the proceedings were handed over to the public prosecution and about 6,500 individuals were convicted. See: ICRC Volume II, para. 540.

²⁴ 21 March 2006, UN Doc A/RES/60/147.

²⁵ Human Rights Committee, General Comment 31 (2004), para. 15.

²⁶ *Isayeva v. Russia*, ECtHR, judgment of 24 February 2005, at para.209.

makes clear that where there is an allegation of a violation of a non-derogable right such as the right to life or the prohibition against torture, human rights standards must be strictly construed.²⁷

18. Minimum investigative requirements established in international jurisprudence mean that any investigation must be independent and impartial, must be commenced promptly and pursued with expedition, must be effective and thorough, obtaining appropriate medical evidence, and must lead to the identification and punishment of the perpetrators through the criminal justice system.

1. Independent and Impartial

19. Any investigation into a serious human rights violation must be independent and impartial. The European Court of Human Rights (ECtHR) has found this requirement to include hierarchical, institutional and practical independence: “[f]or an investigation into torture or ill-treatment by agents of the State to be regarded as effective, the general rule is that the persons responsible for the inquiries and those conducting the investigation should be independent of anyone implicated in the events This means not only that there should be no hierarchical or institutional connection but also that the investigators should be independent in practice.”²⁸ The European Court has found that a non-impartial investigation is not cured by having independent oversight in circumstances where the actual investigation was conducted by police officers indirectly connected with the operation under investigation,²⁹ and that investigations “lacked independence where members of the same division or detachment as those implicated in the alleged ill-treatment were undertaking the investigation.”³⁰ The Inter-American Court has also held that the right to an effective remedy requires an impartial and effective investigation of the alleged facts.³¹ The Inter-American Commission of Human Rights has specifically criticized a system whereby the military investigates itself as impeding access to justice, and making any subsequent conviction impossible.³²

²⁷ See *McCann v UK*, ECtHR (GC), Judgment of 27 September 1995, at para. 147.

²⁸ *Bati and Others v. Turkey*, ECtHR Judgment of 3 September 2005, at para. 135. The same requirements apply to allegations of a violation of the right to life protected in Article 2 ECHR: see *McCann v UK*, note 27 above. See also U.N. Human Rights Committee, *General Comment No. 20 (Article 7)*, at para. 14 (1992) and Article 13 of the Convention against Torture.

²⁹ *Kelly and Others v. the United Kingdom*, ECtHR, Judgment of 4 May 2001, at para. 95 & 114.

³⁰ *Mikheyev v. Russia*, ECtHR, Judgment of 26 January 2006, at para. 110 (citing *Güleç v. Turkey*, ECtHR, Judgment of 27 July 1998, paras. 80-82).

³¹ *Juan Humberto Sánchez v. Honduras*, Inter-Am. Ct. H.R. (Ser. C) No. 99, 7 June 2003, at para. 127. Available at: <http://www.wfrrt.net/humanrts/iachr/C/99-ing.html>.

³² Inter-American Commission of Human Rights, “Third Report on the Human Rights Situation in Colombia,” 26 February 1999, OEA/Ser.L/V/II.102, Doc.9 rev.1, available at <http://www.cidh.oas.org/countryrep/Colom99en/table%20of%20contents.htm>. Chapter V on “Administration of Justice and Rule of Law” contains a section on “the Military Justice System” which states at para.19: “The problem of impunity in the military justice system is not tied only to the acquittal of defendants. Even before the final decision stage, the criminal investigations carried out in the military justice system impede access to an effective and impartial judicial remedy. When the military justice system conducts the investigation of a case, the possibility of an objective and independent investigation by judicial authorities which do not form part of the military hierarchy is precluded. Investigations into the conduct of members of the State's security forces carried out by other members of those same security forces generally serve to conceal the truth rather than to reveal it. Thus, when an investigation is initiated in the military justice system, a conviction will probably be impossible even if the case is later transferred to

2. Prompt and Expeditious

20. Any investigation must be both commenced promptly and then conducted with expedition. The UN Human Rights Committee states that “Complaints [of ill-treatment] must be investigated promptly and impartially by competent authorities so as to make the remedy effective.”³³ The European Court of Human Rights has found that “[i]t is beyond doubt that a requirement of promptness and reasonable expedition is implicit” in the context of allegations of torture.³⁴ In assessing whether the investigation has been prompt, the ECtHR considers the timing of the start of the investigation,³⁵ any delays in taking statements,³⁶ and the length of time taken during initial investigations.³⁷ The Court has concluded that an investigation should be undertaken promptly in order to recover and preserve evidence, including medical evidence and witness statements while memories are still fresh, to aid in any potential prosecution of those responsible.³⁸
21. The Committee against Torture has also found that promptness relates not only to the time within which an investigation is commenced, but also to the expediency with which an investigation is conducted. In *Encarnación Blanco Abad v. Spain*, the complainant alleged during her first arraignment on terrorism-related charges that she had been tortured. It then took 15 days before the complaint was taken up by a judge and another four days before an inquiry was launched. The investigation took ten months, with gaps of one to three months between investigative actions during the process. The Committee found this to be an unacceptable delay.³⁹

3. Effective and Thorough

22. Any investigation must be effective and thorough. The United Nations Human Rights Committee has consistently held that States have a duty to investigate cases of serious violations of human rights thoroughly.⁴⁰ Furthermore, State authorities must make a serious

the civil justice system. The military authorities will probably not have gathered the necessary evidence in an effective and timely manner. In those cases which remain in the military justice system, the investigation will frequently be conducted in such a manner as to prevent the case from reaching the final decision stage.” The Commission has consistently found that such investigations do not consist of an effective remedy where there has been a violation of human rights law and humanitarian law. See, for example, Report N° 34/01, Case 12.250, Massacre at Mapiripan, 2001 Annual Report, paragraph 24.

³³ See UNHRC *General Comment No.20 (Article 7)* at para.14.

³⁴ *Bati and Others v. Turkey*, see note 28 above, at para. 136. See also *Aksoy v. Turkey*, ECtHR Judgment of 18 December 1996, at para. 98 (while it is “true that no express provision exists in the Convention as such as can be found in Article 12 of the 1984 United Nations Convention against Torture ... which imposes a duty to proceed to a ‘prompt and impartial’ investigation whenever there is a reasonable ground to believe that an act of torture has been committed . . . such a requirement is implicit in the notion of an ‘effective remedy’ under Article 13.”).

³⁵ *Çiçek v. Turkey*, ECtHR Judgment of 27 February 2001, at para. 149; *Timurtaş v. Turkey*, ECtHR, Judgment of 13 June 2000, at para. 89. See also: *Tekin v. Turkey*, ECtHR Judgment of 9 June 1998, at para. 67; *Labita v. Italy*, ECtHR, Judgment of 6 April 2000, at para. 133; *Taş v. Turkey*, ECtHR, Judgment of 14 November 2000, at para. 70-72 (finding that the investigation was not prompt where the public prosecutor did not begin until two years after the incident).

³⁶ *Assenov & Others v. Bulgaria*, ECtHR, Judgment of 28 Oct. 1998, at para. 103.

³⁷ *Labita v. Italy*, see note 35 above, at para. 133-236.

³⁸ See, e.g. *Assenov & Others v. Bulgaria*, see note 36 above.

³⁹ *Encarnación Blanco Abad v. Spain*, UNCAT, Decision of 14 May 1998, at para. 8.7.

⁴⁰ *José Vicente et. al. v. Colombia*, UNHRC, Views of 29 July 1997, at para. 8.8. Available at: <http://www1.umn.edu/humanrts/undocs/612-1995.html>; *Stephens v. Jamaica*, UNHRC, Views of 18

attempt to learn what happened and “should not rely on hasty or ill-founded conclusions to close their investigation or as the basis of their decisions.”⁴¹ The ECtHR has identified the steps that State authorities should take in conducting an investigation, including the need for prompt questioning of witnesses and searches for evidence at the scene of the incident, and the execution of objective medical examinations by qualified doctors.⁴² The ECtHR has stated in a number of cases that the right to an effective remedy is denied when there is a failure to take certain specific steps in an investigation. Some of these key steps include: (i) taking fingerprints; (ii) performing a medical examination that fully examines the injuries on a victim’s body, and results in “a complete and accurate record of possible signs of ill-treatment and injury and an objective analysis of clinical findings”;⁴³ (iii) taking initiative in investigating all the circumstances of the abuse; and (iv) taking reasonable steps available to “secure the evidence concerning the incident, including, *inter alia*, eyewitness testimony, forensic evidence ...”⁴⁴ In general, the responsible authorities must, “where appropriate, [carry out] a visit to the scene of the crime.”⁴⁵ The ECtHR has also indicated that a medical examination must also provide “a complete and accurate record of injury and an objective analysis of clinical findings.”⁴⁶

4. Medical Evidence and Autopsies

23. International standards set forth specific requirements to ensure proper medical evidence is obtained for investigations of incidents involving either killings or torture. The Manual on Effective Investigation and Documentation of Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (the “Istanbul Protocol”) outlines the standards for an effective investigation for allegations of torture.⁴⁷ The Istanbul Principles are annexed to the Protocol and provide a more succinct statement of many of the recommendations contained in the Protocol.⁴⁸ The Istanbul Principles require that a full medical report is obtained in cases of torture. Experts must act “in conformity with the highest ethical standards” and must produce a prompt written report that includes details regarding the circumstances of the examination, including a record of the history of the alleged torture, a record of the physical and psychological examination, an opinion as to the probable

October 1995, at para. 9.2. Available at: <http://www1.umn.edu/humanrts/undocs/session55/vws37355.htm> (noting that the applicant’s complaint . . . “was acknowledged but neither investigated thoroughly nor expeditiously.”). See also *Arhuacos v. Colombia*, UNHRC, Views of 19 August 1997, at para. 8.8, CCPR/C/60/D/612/1995; and *Bautista v. Colombia*, UNHRC, Views of 13 November 1995, at para. 8.6, CCPR/C/55/D/563/1993.

⁴¹ *Corsacov v. Moldova*, ECtHR, Judgment of 4 April 2006, at para. 69 (citing *Assenov and Others v. Bulgaria*, see note 36 above, at para. 103).

⁴² *Salman v. Turkey*, ECtHR Judgment of 27 June 2000, at para. 106 (in the context of a right to life investigation); *Tanrikulu v. Turkey*, ECtHR, Judgment of 8 July 1999, at para. 109; *Gül v. Turkey*, ECtHR, Judgment of 2002, at para. 89.

⁴³ *Gül v. Turkey*, *ibid.*

⁴⁴ *Paul and Audrey Edwards v. the United Kingdom*, ECtHR, Judgment of 14 March 2002, at para. 71.

⁴⁵ *Cennet Ayhan and Mehmet Salih Ayhan v. Turkey*, ECtHR, Judgment of 27 June 2006, at para. 88.

⁴⁶ *Paul and Audrey Edwards v. the United Kingdom*, see note 44 above, at para. 71.

⁴⁷ United Nations Office of the High Commissioner for Human Rights, *Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. Professional Training Series No. 8/Rev.1, at para. 214 (2004) (“Istanbul Protocol”). Available at: <http://www.ohchr.org/Documents/Publications/training8Rev1en.pdf>.

⁴⁸ *Ibid.* at Annex 1, p. 59-60.

relationship of the physical and psychological findings to the alleged torture, and a clear statement on the authorship of the report.⁴⁹

24. The same standards apply to suspicious deaths. In 1986 the UN General Assembly called for the development of “international standards designed to ensure that investigations were conducted in all cases of suspicious death, including provisions for an adequate autopsy.”⁵⁰ This led to the Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary or Summary Executions (“Principles”)⁵¹ which were endorsed by the General Assembly in 1989, and which call for a prompt, thorough and impartial investigation of all suspicious deaths to be undertaken by offices, or—where necessary—-independent bodies set up to make such inquiries.⁵² The purpose of the investigation “shall be to determine the cause, manner and time of death...and any pattern or practice which may have brought about that death.”⁵³ The results of investigations should be made public, those who participate in extra-judicial executions brought to justice, and the families of victims entitled to fair compensation.⁵⁴
25. The Principles were elaborated for practical application in the Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions (“Manual”).⁵⁵ The Manual contains specific guidelines and procedures for the conduct of investigations, including a Model Protocol (the “Minnesota Protocol”) for medical-legal investigation of suspicious cases. The Minnesota Protocol reiterates the need for a prompt investigation for the purpose of conducting autopsies, stating that medical personnel should be notified immediately and provided with access to the scene where the body was found.⁵⁶

5. Identification and Punishment of Perpetrators

26. Investigations into human rights violations should seek to ascertain the facts and identify the perpetrators.⁵⁷ The U.N. Human Rights Committee has found that amnesties which protect persons from prosecution are incompatible with the duties under the ICCPR to investigate violations of the right to life, observing that “Amnesties are generally

⁴⁹ *Ibid.* at para. 6(a-b).

⁵⁰ A/Res/ 41/144 (December 4, 1986).

⁵¹ E.S.C. res. 1989/65, annex, 1989 U.N. ESCOR Supp. (No. 1) at 52, U.N. Doc. E/1989/89 (1989) [hereinafter “Principles on the Effective Prevention and Investigation of Executions”]. In paragraph 1, the Economic and Social Council recommends that the Principles should be taken into account and respected by Governments within the framework of their national legislation and practices; the General Assembly endorsed the Principles, *see* A/Res/44/162 (December 15, 1989).

⁵² Principles on the Effective Prevention and Investigation of Executions, *supra* n. 2, at para. 9

⁵³ *Ibid.* In ascertaining the cause of death, the investigation shall distinguish between natural death, accidental death, suicide and homicide.

⁵⁴ *Ibid.*, at paras. 17, 18 & 20

⁵⁵ U.N. Doc. E/ST/CSDHA/12 (1991), Section I (A)(1) (citing E/CN/4/1986/21).

⁵⁶ *Ibid.*, at Section IV (B)(1).

⁵⁷ Article 12 of the Convention against Torture states: “Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.” See also *Encarnación Blanco Abad v. Spain*, CAT Decision of 14 November 1994, at para. 8.8. Available at: <http://www1.umn.edu/humanrts/cat/decisions/59-1996.html>; *Dzemajl v Yugoslavia*, CAT Decision of 2 December 2002, at para. 9.4. Available at: <http://www.unhcr.org/refworld/country,,CAT,,SRB,,3f264e774,0.html> (stating that a “criminal investigation must seek both to determine the nature and circumstances of the alleged acts and to establish the identity of any person who might have been involved therein.”)

incompatible with the duty of States to investigate such [breaches]; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future. States may not deprive individuals of the right to an effective remedy, including compensation and such full rehabilitation as may be possible.”⁵⁸ In *Rodriguez v. Uruguay*, the UN Human Rights Committee rejected the application of an amnesty law that prevented the applicant from pursuing his claim of torture against the previous military regime, finding that such a law may help to generate an “atmosphere of impunity” which might lead to further human rights violations.⁵⁹ The Inter-American Court of Human Rights has frequently found that amnesties for violations of human rights law and humanitarian law violate human rights guarantees.⁶⁰

27. The ECtHR has held that, in order to satisfy the investigative requirement of the prohibition of killings and torture, an investigation should be capable of leading to the identification and punishment of those responsible for the behavior.⁶¹ Such an investigation “must be ‘effective’ in practice as well as in law, in particular in the sense that its exercise must not be unjustifiably hindered by the acts or omissions of the authorities ...”⁶² The Inter-American Court has found that the State is under a legal duty “to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victims adequate compensation.”⁶³ The Inter-American Commission has held that this duty “requires punishment not only of material authors, but also of the intellectual authors of those acts.”⁶⁴ Article 8 of the Inter-American Torture Convention requires that where there is a well-grounded reason to believe that torture has occurred in its jurisdiction, the State must immediately investigate the allegations and initiate criminal proceedings against the perpetrators, if appropriate.
28. Disciplinary proceedings are insufficient to satisfy this requirement. The U.N. Human Rights Committee has found that “if the violation that is the subject of the complaint is particularly serious ... remedies of a purely disciplinary and administrative nature cannot be considered sufficient or effective.”⁶⁵ Where there are criminal proceedings, the sentence imposed must reflect the gravity of the conduct, as “the imposition of lighter penalties and the granting of pardons ... are incompatible with the duty to impose appropriate

⁵⁸ UN HRC, General Comment 20, at paragraph 15.

⁵⁹ *Rodriguez v. Uruguay*, UNHRC, Views of 9 August 1994, Communication 322/1998, at para. 12.4.

⁶⁰ See, for example, *Barrios Altos v. Peru*, IACtHR, judgment of 14 March 2001.

⁶¹ *Assenov and Others v Bulgaria*, ECtHR, Judgment of 28 October 1998, at para. 102: “... where an individual raises an arguable claim that he has been seriously ill-treated by the police or other such agents of the State unlawfully and in breach of Article 3, that provision, read in conjunction with the State’s general duty under Article 1 of the Convention to ‘secure to everyone within their jurisdiction the rights and freedoms in [the] Convention’, requires by implication that there should be an effective official investigation. This obligation, as with that under Article 2, should be capable of leading to the identification and punishment of those responsible.”

⁶² *Aksoy v. Turkey*, ECtHR, Judgment of 18 December 1996, at para. 95.

⁶³ *Velásquez-Rodríguez v. Honduras*, IACtHR, Judgment of 29 July 1988, at para. 187.

⁶⁴ *Corumbiara Massacre v. Brazil*, IACommHR, Decision of 11 March 2004, Case 11.556, Report No. 32/04, at para. 256.

⁶⁵ *Coronel et al. v. Colombia*, UNHRC, Views of 29 September 1996, at para. 6.2. Available at: <http://www.wfirt.net/humanrts/undocs/778-1997.html>.

punishment.”⁶⁶ The European Court found a violation of human rights standards where judges had “exercised their discretion more in order to minimize the sentence of an extremely serious unlawful act than to show that such acts can not be tolerated” and held that the criminal system was not sufficiently dissuasive and the “outcome of the disputed proceedings did not provide appropriate redress.”⁶⁷

II. The Respective Positions of the Goldstone Report and the IDF Report on the Requirements for an Effective Investigation

The Goldstone Report

29. In the Goldstone Report, the Fact-Finding Mission made a number of conclusions with regard to the independence and impartiality of the military investigations that were undertaken or underway by the Military Advocate General’s Corps of the IDF.
30. The Goldstone Report argues that as Israel has ratified the most important international human rights treaties, international human rights law applies to the conflict (paragraphs 294 to 310) and that Israel is responsible under human rights law for violations of international law by its forces in the occupied territories (at paragraph 302-303), and that the Palestinian Authority also has obligations under human rights law through its public commitment to uphold international standards and the inclusion of them in the Palestinian Basic Law (at paragraphs 304-307). The Fact-Finding Mission heard evidence from numerous sources with regard to incidents where it is alleged that violations of the law of armed conflict occurred, and concluded that there had been grave breaches of the Geneva Conventions giving rise to individual criminal responsibility for the offences of willful killing, torture or inhuman treatment, willfully causing great suffering to body or health, and extensive destruction of property (para.1935), the use of human shields, a war crime under the Rome Statute of the ICC (para.1935) and the crime against humanity of persecution (para.1936). In addition, the Goldston Report concluded that there had been numerous other violations of the law of war.⁶⁸

⁶⁶ *Guridi v. Spain*, UNCAT, Decision of 8 February 2002, at para. 6.7, where Civil Guards convicted of torture had their sentenced of four years reduced to one year, and were then given a pardon. Available at: <http://www1.umn.edu/humanrts/cat/decisions/212-2002.html>.

⁶⁷ *Okkali v. Turkey*, ECtHR, Judgment of 12 February 2007, at para. 78, where police officers convicted of offences amounting to torture received a sentence of one year imprisonment and suspension from duty for three months.

⁶⁸ The attack on Al-Quds and al-Wafa hospitals, using white phosphorus shells, which violated the duty to avoid incidental loss of life in Art.57(2)(a)(II) API (para.1919); Deliberate attacks on civilians and civilian targets, in violation of Article 51(2) and 75 of API, Art.27 of GCIV, and in breach of Art.6 ICCPR (para.1921); Failing to permit humanitarian access to the sick and wounded, in violation of Art.10(2) API (para.1921); Launching an attack expecting to cause disproportionate loss of civilian life, in violation of Art.57(2)(a)(i) and (ii) of API, and in breach of Art.6 ICCPR (para.1922); Deliberately attacking police stations, causing disproportionate loss of civilian life, in violation of customary international law and in breach of Art.6 ICCPR (para.1923); Disproportionate use of certain weapons such as flechettes and white phosphorous (para.1924.); Use of civilians as human shields, in violation of international humanitarian law (para.1925); Questioning civilians under threat of death or injury, in violation of Art.31 GCIV (para.1926); Detaining protected persons in violation of Art.27 GCIV (para. 1927); Collective penalties, in violation of Art.33 GCIV, amounting to measures of intimidation or terror in violation of Art.33 GCIV (para.1927); Deliberate attacks on civilian objects including the Palestinian Legislative Council building and the prison, in violation of customary international law (para.1928); Unlawful and wanton attacks on food production,

31. In part four of the Goldstone Report the Mission considers the proceedings and responses by Israel to allegations of violations of international law by its armed forces against Palestinians (at section XXVI) and proceedings by Palestinian authorities (at section XXVII).
32. With regard to investigations by the IDF, the Goldstone Report is particularly critical of the use of “operational debriefings” by the IDF as the main vehicle for investigations. The report describes these debriefings as “reviews of incidents and operations conducted by soldiers from the same unit or line of command together with the superior officer. They are meant to serve operational purposes” (at paragraph 1795). The Mission observes that following a change in policy in 2000, operational debriefings became a regular tool to address incidents arising out of military operations.
33. The Goldstone Report states, “Both international humanitarian law and international human rights law establish an obligation to investigate and, if appropriate, prosecute allegations of serious violations by military personnel whether during military operations or not” (at para. 1804). The report finds that “international humanitarian law contains an obligation to investigate grave breaches of the Geneva Conventions (at para.1805) and that there is a parallel obligation to investigate under international human rights law (at para.1806). A review of human rights jurisprudence of the regional tribunals suggests that this duty “extends equally to allegations about acts committed in the context of armed conflict” (at paras 1808-1811).
34. The Goldstone Report concludes that the use of Operational Debriefings does not satisfy the requirement for an independent and impartial tribunal. Rather, such debriefings often serve to prevent authentic criminal investigations, as they generally are not prompt, they often result in destruction of the crime scene (for example, ballistic evidence is not preserved as weapons used in the incident are not confiscated), and they delay the prompt commencement of an independent and impartial investigation (at paragraphs 1815 to 1818). The report also concludes that a delay of **six months** caused by the Operational Debriefing to a full investigation by the Military Police Criminal Investigation Division (MPCID) is excessive, and consequently “a violation of its obligation to genuinely investigate allegations of war crimes and other crimes, and other serious violations of international law” (at para. 1823). The Goldstone Report concludes:

“The Mission holds the view that a tool designed for the review of performance and to learn lessons can hardly be an effective and impartial investigation mechanism that should be instituted after every military operation where allegations of serious violations have been made. It does not comply with internationally recognized principles of independence, impartiality, effectiveness and promptness in investigations. The fact that proper criminal investigations can start only after the “operational debriefing” is over is a major flaw in the Israeli system of investigation ” (para. 1831.).
35. The Goldstone Report also finds that the authorities in Gaza also failed in their duties to conduct an independent investigation, concluding that “the Mission is unable to consider the measures taken by the Palestinian Authority as meaningful for holding to account

water installations, farms and animals, with the purpose of denying sustenance to the civilian population, in violation of customary international law reflected in Art.54(2) GCIV (para.1929); Subjection of the population to extreme hardship and deprivation, in violation of obligations under GCIV (para.1931); and preventing free passage of medical and hospital supplies, in violation of Art.23 GCIV (para.1932).

perpetrators of serious violations of international law and believes 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” (at para. 1848).

Response of the IDF

36. In a report of January 2010 the IDF responds to the allegation that the use of operational debriefings does not satisfy the requirements of international law by providing a description of the investigative process under Israeli Military Law. The IDF report argues that the system for investigations of violations of the Law of Armed Conflict is the same as those used by other countries and does not violate international standards (at para. 11).
37. Part II of the response outlines the structure for the formal criminal investigations undertaken by the MPCID within the structure of the Military Advocate General’s Corps, and for subsequent trials before the Military Courts. It also outlines the civilian oversight of the military court structures.
38. The IDF response states that operational debriefings, also known as “military command investigations” are not always undertaken prior to a full criminal investigation, and that this “central premise” of the Goldstone report “is wrong” (at para. 53).
39. The IDF report states that any complaint is first screened by the Military Advocate General and that where there is an allegation involving reasonable suspicion of “*per se*” criminal behaviour, then the case will automatically be referred to the MPCID for direct criminal investigation, without the need for a prior Command Investigation. The IDF defines the “*per se*” criminal behaviour in this category as including “allegations of maltreatment of detainees, the use of civilians as human shields, intentional targeting of civilians and looting” (at para. 50).
40. Where the complaint involves an allegation which does *not* involve “*per se* criminal behaviour,” the Military Advocate General will refer the case for a command investigation “to compile an evidentiary record and make a preliminary assessment of the complaint” (at para. 55). On receiving the report at the conclusion of the Command Investigation, the Military Advocate General will initiate a criminal investigation if he finds a reasonable suspicion of criminal activity (at para. 63).
41. Significantly, the IDF report does not regard activities as being *per se* criminal – and thus meriting a formal criminal investigation by the MPCID – absent a clear *mens rea*. The report states, “criminal responsibility for violation of the Law of Armed Conflict requires evidence that military personnel *intended* to harm civilians or clearly foresaw that excessive harm to civilians would result, when balanced against the anticipated military advantage” (at para. 51) (emphasis added). This reasoning reflects previous statements that war crimes – and thus, independent investigations – are restricted to cases of intentional attacks against civilians.⁶⁹
42. An operational debriefing or command investigation is always required whenever a civilian has been killed or seriously injured (see IDF Supreme Command Order 2.0702). The IDF report states that “the IDF’s Chief of General Staff has the authority to initiate special (sometimes called “expert”) command investigations for exceptional or complex cases. This type of investigation is conducted by a commanding officer who is outside the

⁶⁹ See The State of Israel, “The Operation in Gaza, 27 December 2008-18 January 2009: Factual and Legal Aspects,” July 2009.

relevant chain of command. As with other command investigations, the results of a special command investigation must be transmitted to the Military Advocate Generals' Corps in appropriate circumstances – for example, whenever a civilian has been killed or seriously injured” (at para 57). The order requires that exhibits are preserved.

43. The response explains that the purpose of the Command Investigation is to collect the evidence, emphasizing that the operational debriefings do not replace a criminal investigation, but “serve as a means of compiling an evidentiary record for the Military Advocate General, and enabling him, from his central vantage point, to determine whether there is a factual basis to open a criminal investigation. The Military Advocate General’s review, not the command investigation, lies at the heart of the system. Many military systems rely on preliminary reviews, similar to command investigations, to assess complaints of soldier misconduct and to identify those that actually raise suspicions of criminal behaviour” (para.60).⁷⁰ The report justifies the reliance on command investigations by reference to a 1996 decision of the Israel Supreme Court which concluded that command investigations are “usually the most appropriate way to investigate an event that occurred during the course of an operational activity”⁷¹ (at para.61).
44. The IDF response does not appear to deal with any of the specific criticisms of the process that were raised in the Goldstone Report (paragraphs 1815-1818) such as:
 - When commanders conduct an operational debriefing they destroy the evidence on the ground.
 - Weapons are not seized, but continue to be used after the incident, meaning that ballistic evidence cannot be used.
 - Operational debriefings are exploited by commanders in order to prevent MPCID investigations.
 - Various reports have noted that few cases go to a criminal investigation, even fewer end in indictments, and that where there were convictions, penalties were noticeably more lenient than those imposed on Palestinian offenders.
 - Established methods for visits to the crime scene and interviews with witnesses and victims have not been adopted.
 - Investigations appear to have relied exclusively on interviews with Israeli officers and soldiers.
 - The 13 criminal investigations that have been started were delayed by six months.

⁷⁰ However, Article 539(A)(b)(4) of the Law on Military Justice makes clear that the materials from an operational debriefing will not serve in a subsequent criminal investigation and will remain confidential from the investigative authorities.

⁷¹ *Mor Haim v. Israeli Defence Forces*, H CJ 6208/96 (16 September 1996). This case concerned the appropriate manner for investigating the circumstances of the death of a soldier during an IDF operation.

Announcement of Criminal Investigations

45. On 6 July 2010 the IDF announced (the “6 July 2010 IDF Announcement”) that the chief military prosecutor had decided to take disciplinary and legal action in four cases which are highlighted by the Goldstone report.⁷²
46. The statement issued by the IDF indicates that more than 150 incidents that occurred during Operation Cast Lead were examined by the IDF and nearly 50 investigations have been launched by the MPCID. The IDF states that of the 30 incidents referred to in the Goldstone Report, most were already familiar to the IDF and were in various stages of examination prior to the report’s publication. The IDF report states that the examinations of the majority of the incidents have concluded, and their findings transferred to the Military Advocate General for his examination and decision. Having concluded his examination the Military Advocate General has decided to take action in four cases, ordering one criminal indictment and one criminal investigation, referring one case for disciplinary action, and dismissing the complaint in the remaining case. According to the Israel Defense Force, “It was also decided that legal measures would not be taken in additional incidents examined by the Military Advocate General because according to the rules of warfare, no faults were found in the forces’ actions. In other cases, there was not enough evidence proving that legal measures needed to be taken.”⁷³
47. The four cases discussed in the 6 July 2010 IDF announcement are:
- *Complaint by the Hajaj Family.* This incident is included in the Goldstone Report, where it is alleged that two women were killed as part of a group of civilians carrying white flags (at paras. 764-769). According to the 6 July 2010 IDF Announcement, an IDF Staff Sergeant has been indicted with manslaughter for deliberately targeting a man walking with a group of individuals while carrying a white flag at that site without being ordered or authorized to do so.
 - *The Al-Samouni Residence Incident.* This incident is included in the Goldstone Report at paras. 706-735. This case involved an air strike on a house with 100 family members. According to the 6 July 2010 IDF Announcement, after an expert investigation, a criminal investigation has been ordered into the incident.
 - *Complaint by Majdi Abed-Rabo.* This incident is included in the Goldstone Report at paras. 1033-1063. It involved the use of the complainant as a “human shield,” being required to enter a neighbour’s house ahead of IDF forces. According to the 6 July 2010 IDF Announcement, the Battalion Commander was disciplined and given a warning. The IDF found that the man voluntarily entered into his neighbor’s house in order to convince the IDF not to destroy his property.
 - *Ibrahim Al-Makadma Mosque.* This incident is included in the Goldstone Report at paras. 822-843, which suggests that this mosque was subjected to an aerial attack, and that civilians were injured by shrapnel. According to the 6 July 2010 IDF Announcement, the officer in charge of the incident was given a rebuke following disciplinary proceedings. The case was considered by the Military Advocate General (MAG) who concluded that the attack was targeting a terror operative who was firing

⁷² IDF Press Release, “IDF Military Advocate General Takes Disciplinary Action, Indicts Soldiers Following Investigations into Incidents during Operation Cast Lead”, 6 July 2010. Available at: <http://dover.idf.il/IDF/English/Press+Releases/10/07/0601.htm>

⁷³ *Ibid.*

missiles in the vicinity, and did not target the mosque. Therefore, the MAG found that no offence was committed.

III. Military Investigations in Practice – Comparative Experience

48. The IDF response of January 2010 argues that the system for investigations used in Israel is the same as that used in the United Kingdom, the United States, Canada and Australia, and is thus in accordance with international standards. The response claims that states enjoy a broad discretion as to the conduct of such investigations (at para. 72). Specifically, the IDF response argues that the comparator countries also use a preliminary military review similar to an operational debriefing in order to decide whether to move forward to a full criminal investigation. A short analysis is given of the systems of military justice in each country, all of which have been subject to procedural changes within the past few years.
49. The characterization by the IDF of the four comparator systems of military justice is inaccurate and out of date. The Goldstone Report lists some 30 specific cases arising out of Operation Cast Lead, only two of which appear to have been referred for an independent criminal investigation by the MPCID.⁷⁴ In each of the four countries at issue, the serious incidents within the Goldstone Report, such as the grave breaches and crimes against humanity outlined in paragraph 30 above and the specific incidents described paragraph 47 above, would have triggered an immediate independent investigation.

United States⁷⁵

50. The IDF report of January 2010 provides a précis of US military law at paragraphs 79 to 82. The report suggests that under US law, where there has been an incident that was a violation of the Law of Armed Conflict, then the Commander receiving such a report must order a formal or informal investigation to collect evidence and assess the credibility of the allegations to determine whether a crime has been committed. The IDF report suggests that this initial report is then passed up the chain of command to determine whether there should be a criminal investigation (at para. 77).
51. The IDF report is apparently referring to a Commander's Inquiry, pursuant to Rule 303 of the Rules for courts-martial, which requires the commander to make preliminary inquiries where a member of the command is suspected of having committed an offense under the Uniform Code of Military Justice. However, where the allegation includes a violation of the law of war, and there is credible information in support, it is defined as a "reportable incident" under a Department of Defense Directive, and must be promptly reported through the chain of command.⁷⁶
52. A reportable incident is broadly defined as "[a] possible, suspected, or alleged violation of the law of war for which there is credible information, or conduct during military

⁷⁴ The Goldstone Report considered a number of specific incidents with regard to the duty to investigate alleged violations of international criminal law, where it appears that there had not been an independent criminal investigation. Paragraph 47 above notes the four cases that were referred to in the 6 July 2010 IDF Announcement that were also mentioned in the Goldston Report. It appears that in only one of them has there already been a criminal investigation and in another such an investigation has been recently ordered.

⁷⁵ The section on US law is based on information provided in an expert report by Professor Victor Hansen, New England School of Law, Boston, Massachusetts, USA.

⁷⁶ Chairman of the Joint Chiefs of Staff Instruction, "Implementation of the DOD Law of War Program," CJCSI 5810.01D, 30 April 2010, at paragraph 4(d).

operations other than war that would constitute a violation of the law of war if it occurred during an armed conflict.”⁷⁷ Complex responsibilities and reporting lines have been established for a variety of military situations in order to ensure that incidents are promptly reported.⁷⁸ Serious crimes and incidents are reported to, and investigated by, US Army Criminal Investigation Division (CID) personnel.⁷⁹ “The commander of the appropriate USACIDC will direct the initiation of an investigation immediately upon receipt of information that a criminal incident falling within the investigative purview of USACIDC has occurred or is suspected. Once initiated, a criminal investigation will continue until completion.”⁸⁰

53. The Directive establishes that upon obtaining information about a reportable incident alleged to have been committed by its command personnel, the commander of the unit shall conduct a command investigation, which runs in parallel to an Army CID investigation: “If it is determined that U.S. personnel may be involved in or responsible for a reportable incident, the commander shall initiate a formal command investigation in accordance with Service regulations, and shall at the same time notify the cognizant military criminal investigative organization [which] will be responsible for subsequent criminal incident reporting, as appropriate....”⁸¹
54. Disciplinary action may follow where there is a failure to promptly report an incident or to initiate an investigation where credible information about war crimes emerges. One such example involved allegations of unlawful killings by U.S. Marines in Haditha, Iraq. Once the incident was brought to light, members of the chain of command, including the unit legal advisor were investigated for dereliction of duty for failing to take initial action on the allegations.
55. There are drawbacks to the informal investigative procedure of a Commander’s Inquiry, in that the investigation is often conducted by officers without any formal training in evidence collection, witness interviewing, evidence preservation and other investigation techniques. In contrast, Army CID has specific responsibility to initiate and carry out criminal investigations of serious crimes including war crimes and serious maltreatment or abuse of detainees.⁸² Since 15 May 2009 Army CID has “sole responsibility” for the investigation of

⁷⁷ *Ibid.*, at paragraph 5(b).

⁷⁸ *Ibid.*, at paragraph 6, including the requirement to establish priority intelligence requirements for allegations of law of war violations, specific reporting lines to principals of the Joint Staff and Office of the Secretary of Defense, inclusion of reporting procedures in military exercises, and a requirement for combatant commanders to issue directives to ensure prompt reporting of such incidents to all personnel under their command.

⁷⁹ Also known as U.S. Army Criminal Investigation Division Command (USACIDC).

⁸⁰ Department of the Army, Army Regulation 195-2 “Criminal Investigation Activities,” 15 May 2009, at paragraph 1-6(b). This edition of the regulation is described in the summary as a “major revision” which “establishes policies on criminal investigation activities, including the utilization, control, and investigative responsibilities of all personnel assigned to the U.S. Army Criminal Investigation Command elements. It also delineates responsibility and authority between Military Police and the U.S. Army Criminal Investigation Command.”

⁸¹ *Ibid.*, at paragraph 6(f)(4)(e)(2).

⁸² Army Regulation 195-2, note 80 above, at paragraph 3-3(a)(6): “The USACIDC is responsible for investigating suspected war crimes when a violation of 18 USC, the USMJ, as listed in appendix B of this regulation, when a violation of the law of land warfare is indicated, or when otherwise directed by HQDA. This includes maltreatment or abuse of prisoners of war (POWs) or detainees when the alleged crime meets

serious felonies, including war crimes, and the unit commander specifically does not have responsibility for a criminal investigation.⁸³ CID investigations can be initiated at the request of a commander, or independently by CID, or at the request of senior military or civilian officials within the Department of Defense. The Army CID's obligation to investigate crimes continues in deployed environments and active theaters of combat. The Army CID is a separate military organization with its own chain of command that is independent of other military chains of command. CID investigations are conducted by special agents trained in law enforcement, witness questioning, evidence development, evidence collection, and evidence preservation. CID agents have the authority to secure crime scenes and exclude access to those crime scenes in order to preserve evidence. CID also maintains a crime lab which conducts various types of forensic testing on evidence, including ballistic testing. CID agents have the authority to collect evidence and submit it for testing.⁸⁴

56. The IDF report refers to an incident in Afghanistan on 4 May 2009 where a U.S. military engagement with Taliban insurgents resulted in civilian casualties, and a "preliminary inquiry" was undertaken which found no violation of the Law of Armed Conflict.⁸⁵ The preliminary investigation into the incident at Gerani village concentrated on the use of B-1B bombers to strike buildings where it was believed that Taliban were hiding, and where there were also civilians,⁸⁶ and appears to have concluded the strike was a legitimate military objective, but that the consequential civilian deaths were inconsistent with U.S. policy to provide for the security and safety of the Afghan people.⁸⁷ The preliminary investigation made recommendations for the need to establish an independent investigative team within 2 hours of such an incident.⁸⁸ Following the preliminary investigation, on 8 May 2009 the Commander of U.S. Central Command "directed a U.S. Army General from outside Afghanistan to conduct a full investigation." This final report was presented on 5 June 2009 and concluded that there had been no violation of international humanitarian law. It is worth noting that this incident occurred shortly before the introduction of substantial changes to the investigation process that are detailed in Army Regulation 195-2 published on 15 May 2009 (see footnote 80 above), and prior to the changes to the reporting process outlined in the Department of Defence Directive "Implementation of the DOD Law of War Program," introduced on 30 April 2010 (see footnote 76 above).
57. Once an investigation is complete, CID agents will prepare a written report and provide it to the relevant commanders who have court-martial authority over the accused soldiers. The commander is required to report back to the CID informing the CID of what actions, if any were taken in response to the report.⁸⁹ In many cases the commander may begin

the USACIDC threshold as identified in appendix B." Appendix B includes the offences of cruelty, oppression or maltreatment.

⁸³ *Ibid.* at para 3-3(a): "The USACIDC is solely responsible for investigating the criminal aspects of those Army related felonies ... that are listed in Appendix B". Appendix B includes war crimes.

⁸⁴ The investigative powers and responsibilities of Army CID are outlined in detail in Army Regulation 195-2, note 80 above.

⁸⁵ The State of Israel, Gaza Operation Investigation: An Update (January 2010), para. 80.

⁸⁶ UNCENCOM's Unclassified Executive Summary, *U.S. Central Command Investigation into Civilian Casualties in Farah Afghanistan on 4 May 2009* (18 June 2009). Available at: <http://www.centcom.mil/images/pdf/uscentcom%20farah%20unclass%20exsum%2018%20jun%2009.pdf>.

⁸⁷ *Ibid.* p. 11.

⁸⁸ *Ibid.* p. 12.

⁸⁹ See Army Regulation 195-2, note 82 above, at paragraph 1-4e(1).

initiating criminal proceedings against an accused soldier before a CID investigation is completed. This is particularly true in serious cases. In such cases the unit's military prosecutor will work closely with the CID agents in preparing the case for possible court-martial.

58. While Army CID has the independent authority to initiate and conduct criminal investigations, the CID does not have the authority to initiate criminal charges or court-martial proceedings against an accused soldier. Only the soldier's military commander has the authority to initiate court-martial proceedings. Usually the commander's decision to initiate criminal proceedings for serious offenses will be based in part on information contained in the CID report. But unlike in the Israeli system, in the U.S., the commander may not decline prosecution of a soldier without first consulting with his JAG legal advisor and, in serious cases, after receiving the recommendation of an independent investigating officer.⁹⁰ The CID report may also give a commander reason to initiate a commander's inquiry into aspects of the case that were not part of the criminal investigation. Reports of criminal investigations are in writing and the reports are filed and maintained centrally by the Army CID.
59. In conclusion, it is clear that Army CID has the specific responsibility and the sole power to undertake a criminal investigation into serious offences including alleged war crimes, and that they could assert this power at the earliest opportunity. The serious incidents within the Goldstone Report, such as the grave breaches and crimes against humanity outlined in paragraph 30 above and the specific incidents described in paragraph 47 above, would be considered "reportable incidents." Thus, they would trigger an immediate investigation by the CID once the incident was mandatorily reported. Any failure to immediately report the incident may result in charges of dereliction of duty. The specialist investigators of the Army CID would then undertake an independent criminal investigation.

United Kingdom⁹¹

60. The IDF report deals with the United Kingdom in paragraphs 76 to 78. The report refers to the power of the Army Prosecuting Authority (APA) to deal with allegations of violations of the law of armed conflict, and suggests that cases which are not referred to the APA are dealt with inside the military justice system. However, the IDF report does not take into account recent legal reforms. Since the Armed Forces Act 2006 came into force, the APA has been replaced by a tri-service Service Prosecuting Authority (SPA) that covers the Army, the Royal Navy, and the Royal Air Force. The SPA has more sweeping authority than the APA did to carry out independent investigations in cases of alleged war crimes.
61. In the United Kingdom there is a clear legal duty upon the Commanding Officer of a unit to report any allegation of a violation of the law of armed conflict as soon as is reasonably practicable to the Service Police⁹² so that they can make a decision as to whether an independent criminal investigation is necessary.

⁹⁰ See article 32, Uniform Code of Military Justice.

⁹¹ The section on UK law is based on an expert report provided by Brigadier (ret'd) Anthony Paphiti, previously Brigadier Prosecutions (2002-2005).

⁹² "Service Police" includes the police of the three services, namely the Royal Military Police (for the British Army, known as "redcaps"), the Royal Navy Police (for both the Royal Navy and the Royal Marines) and the Royal Air Force Police (known as "snowdrops"). The phrase "military police" includes both service police and also regimental police within the army who are responsible for their units alone.

62. The Armed Forces Act 2006 deals with criminal offences by members of the armed forces, and Sections 113-118 outline the investigative process. Where there is the possibility that a Schedule 2 offence has been committed then the Commanding Officer (CO) of the unit concerned is obliged pursuant to section 113 to make the Service Police aware of that fact as soon as reasonably practicable. The trigger for the reporting requirement is defined in Section 113(2) as arising where the allegation or circumstances would indicate to a reasonable person that a Schedule 2 offence has or may have been committed by a relevant person. Offences in Schedule 2 include murder, manslaughter, torture, and offences contrary to the Geneva Conventions Act 1957 and the International Criminal Court Act 2001, i.e. international crimes. Only if the incident is *not* a reportable one pursuant to Section 113, such as a lesser “service offence,” is the CO permitted to carry out a preliminary investigation himself, although he is likely to seek legal advice before doing so. By virtue of the number of shooting incidents occurring daily, the incident reports are scrutinised by a military policeman who may take advice from a military lawyer in theatre. The internal policies of the Royal Military Police (RMP) make clear that reports must be made within 48 hours, and that unit investigations should not be conducted into serious incidents such as war crimes.⁹³
63. An investigation into a Schedule 2 offence is carried out by the Special Investigations Branch (SIB) of the RMP. Prosecutions are supervised by the Service Prosecution Authority (SPA) which is headed by the Director of Service Prosecutions who is a senior lawyer who is not a member of the armed forces, and who in turn reports to the Attorney General.
64. Where a Service Policeman is of the opinion that an individual should be charged with a Schedule 2 offence, then the policeman must: (i) report the case to the Director of Service Prosecutions (section 116(2)) with a statement as to why they believe an offence has been committed, (ii) transfer the papers to the SPA, and (iii) notify the relevant CO of that decision (section 118). If the individual should be charged with a lesser service offence then the policeman must inform the individual’s CO (section 116(3)). Where following an investigation for a Schedule 2 offence the Service Policeman decides *not* to charge the individual, then he is required by section 116(4)(a) to consult with the Director of the SPA as soon as is reasonably practicable, and before referring the case to the CO for the investigation of any service offences. Any decision not to prosecute is subject to judicial review in the civilian courts.⁹⁴ The adequacy of any investigation into alleged war crimes is also subject to judicial review in the ordinary civil courts.⁹⁵
65. The RMP is required to maintain independence in any investigation. Regulation 6.4 of the Queen’s Regulations, the manual for military discipline and regulation within the UK Armed Forces, provide that when the RMP conducts investigations it must:

⁹³ The Royal Military Police has drafted a “shooting incident review policy” which provides operational guidance for commanders with regard to the process for commencing a review, which includes guidance on situations involving possible war crimes. This document is not publicly available, but has been reviewed by the expert.

⁹⁴ *R v. Director of Public Prosecutions, ex parte Kebeline and others*, House of Lords, 28 October 1999.

⁹⁵ See the decision of the Administrative Court in *R v. Secretary of State for Defence, ex parte Al-Sweady*, [2009] EWHC 2387 (Admin) in which the court severely criticized an investigation by the RMP into allegations of killings of Iraqis by British soldiers.

“act independently of the chain of command and are not subject to any undue interference or influence prior to concluding their investigation and reporting to a Commanding Officer.”

66. The Queen’s Regulations impose a duty on all members of the British Army to report any breaches of the law of armed conflict to the commanding officer, who has a duty to ensure the allegation is investigated by the RMP. Regulation J7.121 states:
- “a. It is the duty of all ranks to:
- (1) Abide by the law of armed conflict.
 - (2) Do all in their power to prevent any breaches taking place.
 - (3) Upon becoming aware of an allegation of any breach of the law of armed conflict, report the circumstances to their commanding officer
- b. The commanding officer, upon receipt of any allegation of a breach of the law of armed conflict, is to report it to his higher authority and ensure that it is thoroughly investigated without delay. Normally the Royal Military Police are to be tasked to conduct the investigation.”
67. The SIB will conduct investigations in accordance with the provisions of the Police and Criminal Evidence Act (PACE) 1984, i.e. the same procedure that applies to civilian police investigations. The SIB determines which witnesses to interview, and which evidence to secure, and makes any decisions on case management.
68. Once an investigation has commenced, then it must comply with the investigative duties imposed by the European Convention of Human Rights.⁹⁶
69. The IDF report suggests that the UK system essentially allows for preliminary investigations to be undertaken by the unit involved in the incident at issue, and that the system is no different to that in Israel. The IDF report refers to the Aitken Report for an explanation of the system of military justice in the United Kingdom. However, the Aitken report was dealing with events in 2004, prior to the introduction of the Armed Forces Act 2006.
70. In conclusion, it is inconceivable that an allegation of the commission of a war crime would result in anything other than an independent investigation by the SIB from the outset, and there would be no preliminary investigation by the unit concerned. The serious incidents within the Goldstone Report, such as the grave breaches and crimes against humanity outlined in paragraph 30 above and the specific incidents described in paragraph 47 above, would be subject to an independent investigation by the SIB.

Canada⁹⁷

71. The IDF Report of January 2010 provides a summary of Canadian procedure at paragraphs 86 and 87. The report correctly observes that complaints alleging a *prima facie* violation of the Law of Armed Conflict during an operational activity are generally referred to the

⁹⁶ Section 7(1) of the Human Rights Act 1998 requires any public authority to act in accordance with the European Convention of Human Rights. The application of the investigative duties under the ECHR to military police investigations was confirmed in *R v. Secretary of State for Defence, ex parte Al-Sweady*, [2009] EWHC 2387 (Admin)

⁹⁷ The section on Canadian law was prepared with assistance from the Office of the Canadian Forces Provost Marshal, Ottawa, Ontario.

National Investigation Service (NIS), which has a mandate to investigate “serious and sensitive matters” including war crimes. If the NIS becomes aware of such allegations it reviews them to decide whether to investigate, and if the matter is not sufficiently serious it is able to refer the case for investigation by the command unit. Serious offences will be prosecuted by the Canadian Military Prosecution Service (CMPS).

72. In general terms, the Canadian Forces Military Police (MP) are responsible for the investigation of any allegation of a violation of international humanitarian law committed by members of the Canadian Armed Forces. Any incident that results in death or injury must be reported to the Military Police, and a failure to do so in a reasonable time may result in charges being filed against the Commander concerned. Serious offences are investigated by the Canadian Forces National Investigation Service (NIS) which is independent of the chain of command and which has the full authority to examine crime scenes, collect evidence, seize weapons, conduct interviews and conduct searches.
73. If it is alleged that an investigation is inadequate then there is a preliminary appeal to the Military Police Professional Standards organization for an internal review. Following that, a complaint can be made to the Military Police Complaints Commission (MPCC) which is a quasi-judicial oversight body.
74. The Canadian Charter of Rights and Freedoms applies to all involved in the process.
75. Although the IDF report’s characterization of the Canadian investigative legal procedures is essentially accurate, it wrongly suggests that in practice the Israeli and Canadian systems yield similar outcomes. In practice, the system for the investigation of serious allegations of violations of the law of armed conflict in Canada is significantly different to that employed by the IDF. Any preliminary investigation into a serious allegation is undertaken by a professional investigation service which is independent from the unit concerned with the incident. The NIS has the power to refer the investigation back to the unit concerned, only once it has considered the seriousness of the allegation.
76. In conclusion, under the system of military investigation that applies in Canada, the serious incidents within the Goldstone Report, such as the grave breaches and crimes against humanity outlined in paragraph 30 above and the specific incidents described in paragraph 47 above, would immediately be referred to the National Investigation Service of the Military Police. It would not be permitted for the unit involved in the incident to undertake the investigation.

Australia⁹⁸

77. In its report of January 2010, the IDF suggests at paragraphs 83 to 85 that under the Australian legal system, where any complaint is received involving soldier misconduct the commander would conduct a “quick assessment” (QA) of the incident. The IDF report claims that the QA is the same as the command investigation (or operational de-briefing) utilized by the IDF, in that it involves conducting interviews and collecting evidence, and then making a recommendation for either a military inquiry or prosecution, or to the Australian Defence Force Inquiry Services (ADFIS). The IDF’s assessment of the Australian system is out of date, and does not take account of recent changes to the system of military justice in Australia. The Quick Assessment (QA) is different from a command investigation (or operational de-briefing) in a number of significant respects.

⁹⁸ The section on Australian law is based on an expert report provided by Dr Vasko Nasteovski of the Asian Pacific Centre for Military Law, University of Melbourne, Australia.

Notwithstanding the evolving nature of the Australian system,⁹⁹ the provisions described below, which remain in force, make clear that, unlike in Israel, in Australia, any serious incident involving non-combatants is regarded as a “notifiable incident” which must be immediately reported to the relevant Defence Investigative Authority outside the unit of command.

Quick Assessments

78. Administrative Instruction B/6/2007 issued on 7 August 2007 by the Chief of the Defence Force and the Secretary of Defence gives instructions as to the way in which a “Quick Assessment” may be used. Paragraph 2 states:

“A QA is not an investigation. The purpose of a QA is to quickly assess the known facts, and to identify what is not known about an occurrence, so that a decision can be made about the most appropriate course of action to be taken in response to it. A QA is not a precursor to a service or civilian police investigation.”¹⁰⁰

79. The instruction makes clear that a QA may not replace an investigation. A QA must be independent, and may be conducted by someone from the same unit only “provided that they have no involvement or personal interests in the matters of people involved in the QA, which is likely to compromise their objectivity or impartiality” (para.10). The assessment must be concluded within 24 hours of the incident (para.11). If a police investigation has been commenced, then the Quick Assessment Officer “must ensure that their QA does not interfere with any other inquiries or investigative processes” (para.13). The QA is intended to record basic facts such as the time, date and place of the occurrence. The Officer in charge may not take formal statements, but may retain any records of conversations (para.16). Significantly, where it becomes evident that a “notifiable incident” *may* have occurred, then the officer must *immediately* notify the commander who ordered the QA (para.17).

Notifiable Incidents

80. Defence Instruction Admin 45-2 issued on 26 March 2010 by the Chief of the Defence Force and the Secretary of Defence gives instructions on “The reporting and management

⁹⁹ It is worth noting that Military justice in Australia is currently in flux. The Geneva Conventions Act 1957 provided for the domestication of international offences. In 2002, it was replaced by amendments to the Criminal Code introduced pursuant to the Rome Statute of the International Criminal Court, which applied in Australia from 1 July 2002. In 2005 the Australian Senate published a report entitled, “The Effectiveness of Australia’s Military Justice System,” following a lengthy inquiry which led to fundamental changes to almost every element of the military justice system. On 29 August 2009 the High Court of Australia ruled that the newly created Australian Military Court was unconstitutional: *Lane v. Morrison* [2009] HCA 29 (26 August 2009), available at <http://www.austlii.edu.au/au/cases/cth/HCA/2009/29.html> On 24 May 2010 the Australian Attorney-General announced the decision of the Government to establish a new federal court, the Military Court of Australia, the Upper Division of which will have jurisdiction to try very serious service offences, to be defined in the Military Court of Australia Regulations. See news report at http://australia.to/2010/index.php?option=com_content&view=article&id=2938:military-court-of-australia&catid=122:security&Itemid=169.

¹⁰⁰ Australian Government Department of Defence, Defence Instructions (General) DI(G) ADMIN 67-2, 7 August 2007, available at http://www.defence.gov.au/fr/Policy/ga67_02.pdf.

of notifiable incidents.”¹⁰¹ Paragraph 6 defines a notifiable incident as including *inter alia* any incident that:

- Raises a reasonable suspicion that a disciplinary offence has been committed;
- Raises a reasonable suspicion that a criminal offence may have been committed; or
- Includes the death, serious injury or disappearance of non-Defence personnel (excluding enemy combatants), involving any Defence activity, property or premises, even where there may be no reasonable suspicion of an offence having been committed.

81. Commanders must determine whether an incident is a notifiable incident “as soon as possible after becoming aware of the incident” and if they conclude it is, must report it immediately (para.7). Paragraph 11 allows a commander to report directly to a Defence Investigative Authority where the individual does not wish to report through their chain of command.
82. Disciplinary and criminal matters are reported to the Australian Defence Force Investigative Service. Incidents involving the death or serious injury of civilians must also be reported to the chain of command (para.14) and must be sent “by the quickest means such as telephone” (para.15).
83. On receiving a report involving civilians, the ADFIS must respond to provide immediate assistance, contact the civilian police, and “ensure the securing of the incident area and the proper security and preservation of evidence as detailed in DI(G) OPS 13-15 – *Incident scene initial action and preservation*” (para.20).
84. In conclusion, under the currently prevailing Australian military justice system, any of the serious incidents within the Goldstone Report, such as the grave breaches and crimes against humanity outlined in paragraph 30 above and the specific incidents described in paragraph 47 above, would be regarded as a notifiable incident, and the ADFIS and civilian police would be notified immediately, and would be responsible for securing the scene. Any quick assessment would be completed within 24 hours, and would be forbidden from interfering with the police investigation.

IV. Conclusion

85. The foregoing analysis suggests that the system of “operational debriefings” or “command investigations” used by the IDF differs in subtle but significant ways from the four national systems identified as comparators in the IDF report of January 2010. In each of the four comparator systems, the serious incidents within the Goldstone Report, such as the grave breaches and crimes against humanity outlined in paragraph 30 above and the specific incidents described in paragraph 47 above, would have led to an immediate independent investigation undertaken outside the operational unit at issue.

Reportable Incidents

86. As part of its preliminary assessment procedure, the IDF distinguishes between (i) a narrow class of *per se* criminal incidents – the ill-treatment of detainees, the use of civilians as human shields, looting, and the *intentional* killing of a civilian – which are subject to immediate reporting and automatic referral for criminal investigation, and (ii) a broad range

¹⁰¹ Australian Government Department of Defence, Defence Instructions (General) ADMIN 45-2, 26 March 2010, available at http://www.defence.gov.au/ig/pdf/GA45_02.pdf

of other violations of IHL and international human rights law, which are only considered for criminal investigation *after* the Command Investigation (or operational debriefing).

87. In contrast, the four comparator systems err on the side of caution in defining an incident that must be immediately reported and treated as a serious incident where a full criminal investigation is required. Within the United States military a “reportable incident” triggering independent review is defined broadly to include a “possible, suspected or alleged violation of the law of war for which there is credible information.” In the UK, there is a presumption that there will be an independent criminal investigation into any situation where a violation of the law of war “has or may have been committed”; only when an independent criminal review has been ruled out may the unit concerned undertake its own investigation. In Canada, any incident that results in death or injury must be reported to the Military Police. In Australia, any situation involving the death or serious injury of a civilian is a notifiable incident, “even when there is no reasonable suspicion of an offence having been committed,” which is essentially an absolute duty to report incidents involving civilians.

Prompt

88. The Goldstone report identified cases where the decision to *commence* an independent criminal investigation rather than a command investigation had taken up to six months to be made (at para.1830). By contrast, in the comparator countries, such decisions are taken promptly, often “immediately” or within a matter of days. In the US, a failure to promptly report a reportable incident may lead to charges of dereliction of duty. On receiving such information, the US Army CID “will direct the initiation of an investigation immediately.” In the UK, the incident must be reported “as soon as is reasonably practicable” which means within 48 hours, and the military police must report to the Director of Service Prosecutions on their decision to charge or not. In Canada, any incident involving death or serious injury must be referred to the Military Police and charges may be brought if it is not done in a reasonable time. In Australia, a notifiable incident must be “immediately” brought to the attention of senior commanders by the “quickest means,” and the quick assessment / preliminary investigation must report within 24 hours.

Effective

89. The Goldstone report identified specific shortcomings in the IDF’s reliance on command investigations (operational debriefings) for gathering evidence. The law in Israel appears to be unclear as to the use that may be made of evidence obtained through the command investigation. The officers involved in the preliminary investigation do not generally have any expertise in criminal investigations, and the rules for interviewing witnesses, seizing evidence, preserving the crime scene, seizing weapons and assessing the legal implications of the facts lack precision. In addition, the operational debriefings often rely only on the evidence of one side of the story.
90. In the comparator systems the investigation is immediately transferred to specialist criminal investigators who have the enhanced powers necessary to conduct an effective investigation. In the US, the Army CID has sole jurisdiction for the criminal investigation of allegations of war crimes, and their agents have expertise in ballistic testing, other scientific methods, interviewing witnesses, and the authority to secure crime scenes and prevent access to them. In the UK, the scientific and other investigations may not be conducted in the course of any preliminary review, but may only be carried out in the course of the criminal investigation. In Canada, the National Investigation Service has the

authority to examine crime scenes, collect evidence and to seize weapons. In Australia, when a serious incident is reported to the Australian Defence Force Investigative Service, they must respond to provide immediate assistance, contact the civilian police, and “ensure the securing of the incident area and the proper security and preservation of evidence.”

Independent

91. The primary concern of the Goldston Report with the IDF’s heavy reliance on command investigations (operational de-briefings) is that it is the unit involved in the incident that is in charge of its own investigation. For offences that are not *per se* criminal, it is only once the operational debriefing is complete that the case is reported to an independent structure.
92. The comparator systems prevent any such conflict of interest, by establishing a presumption of immediate reporting of any suspect incident, broadly defined, to superior officers outside the chain of command, and by requiring a swift independent criminal investigation often with sole jurisdiction for seizing evidence and speaking to witnesses. While a command investigation in the comparator countries might proceed at the same time, the emphasis on quickly bringing in an outside body to investigate the case prevents any command investigation from tainting the criminal investigation. In the US system any possible allegation of war crimes must immediately be reported to the Army CID which is independent from the unit involved in the investigation. In the UK any serious incident is reported to the Special Investigations Branch of the Royal Military Police as soon as is reasonably practicable and so is completely independent from the unit concerned. Any decision not to prosecute must be referred to the independent Director of the Service Prosecution Agency for consultations. In Canada, it is the independent National Investigation Service, which makes the decision whether to refer the case back down to the unit concerned for a preliminary investigation. In Australia, the Australian Defence Force Investigative Service conducts an independent investigation.

New York

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