THE YEAR IN REVIEW[1]

Susan C. Breau[2]

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2. Dr Susan Breau is a Professor of International Law, School of Law, Flinders University. My gratitude to Chris Gutmann and Faye Biggin for their research assistance on this contribution.

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1. INTRODUCTION – MAJOR DEVELOPMENTS IN IHL IN 2009

This year in review will first discuss the major developments that contributed towards the formation or enforcement of international humanitarian law. Despite the many positive developments in the elucidation of international humanitarian law, 2009 witnessed the continuation of violent armed conflict around the world, not least in Sri Lanka where the long standing armed conflict came to a bloody conclusion amidst allegations of summary executions and other serious violations of international humanitarian law.

Two other conflicts involving Israel/Gaza and Russia/Georgia which took place in 2008 and early 2009, resulted in the release of two influential international investigative reports, each of which alleged serious violations of international humanitarian law and called for the enforcement of criminal accountability. The election of Barack Obama marked a significant shift in the attitude of the United States to terrorism and detention with the new President immediately announcing on taking office, the closure of Guantánamo Bay.

With respect to the elucidation of the customary and treaty rules of international humanitarian law, 2009 saw the release of two major initiatives: the ICRC Guidance on Direct Participation in Hostilities and the HPCR Manual on International Law Applicable to Air and Missile Warfare.

Finally, 2009 saw the final award in the long standing international arbitration between Eritrea and Ethiopia.

Also discussed within this year in review, are the regular resolutions adopted by international organisations on long-standing issues in international humanitarian law with respect to protected persons generally and specifically with regard to continuing conflicts in several states. Regional organisations also passed resolutions on international humanitarian law and the European Court of Human Rights considered issues relating to armed conflict within its judgments.

Finally, there were hopeful developments in the long-standing campaign to regulate small arms and a major development in the control of nuclear weapons.

1.1 **The executive order closing Guantánamo Bay Detention Facility**

2009 marked the first year of the new Presidential administration under Barack Obama and the announcement of significant changes in US policy relating to inter-

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national humanitarian law and the struggle against terrorism. On 22 January 2009, shortly after his inauguration, President Obama signed three executive orders. The first established a task force reviewing detention policy[3]; the second ordered the closure of the Guantánamo Bay detention facilities[4]; and the third dealt with defining the rules of lawful interrogation.[5]

The second executive order ambitiously provided:

> 'The detention facilities at Guantánamo for individuals covered by this order shall be closed as soon as practicable, and no later than 1 year from the date of this order. If any individuals covered by this order remain in detention at Guantánamo at the time of closure of those detention facilities, they shall be returned to their home country, released, transferred to a third country, or transferred to another United States detention facility in a manner consistent with law and the national security and foreign policy interests of the United States.'[6]

In October 2009 Obama signed the Department of Homeland Security Appropriations Act 2010[7] which mandated that prior to the closure of the detention facility, the President was to submit to Congress a report in classified form describing the disposition or legal status of each individual detained at the facility as of the date of the enactment of the Act which was 28 October 2009.[8]

In spite of the projected closure of Guantanamo Bay, the status of Military Commissions remained uncertain. On 28 October 2009 Obama signed the Military Commissions Act 2009 which introduced important reforms to the procedures of the military commissions; nevertheless, the institution for trial of terrorist suspects remains.[9] The Act retains the basic structure of the existing commissions with a military judge presiding over the trials, ruling on issues of law and evidence, and a panel of US service members deciding on issues of fact and guilt or innocence. The panels range from five members in lesser cases to at least twelve in trials involving a possible death sentence. Presidential approval is required before an execution is carried out.

Importantly, this new law excludes statements obtained through torture or through cruel, inhuman, or degrading treatment. But the Act allows the Secretary of Defense to enact rules permitting admission of coerced statements and hearsay evi-

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3. Exec. Order No. 13,493, 74 Fed. Reg. 4901 (22 January 2009): Review of Detention Policy Options, by the end of the year that report had still not been prepared by the President's task force.

4. Exec. Order No. 13,492, 74 Fed. Reg. 4897 (22 January 2009): Review and Disposition of Individuals Detained At the Guantanamo Bay Naval Base and Closure of Detention Facilities.

5. Exec. Order No. 13,491, 74 Fed. Reg. 4893 (22 January 2009): Ensuring Lawful Interrogations, this report from the President's task force had not been prepared by the end of 2009.

6. Exec. Order No. 13,492, 74 Fed. Reg. 4897 (22 January 2009): Review and Disposition of Individuals Detained at the Guantánamo Bay Naval Base and Closure of Detention Facilities.

7. Department of Homeland Security Appropriations Act, H.R. 2892, 111th Congress.

8. Ibid., Section 552 (h).

9. Military Commissions Act 2009, H.R. 2647-385.

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dence; should this exception be invoked, it is likely to result in further legal challenges. With respect to procedural guarantees, defendants have been extended the right to attend their entire trial and to examine all evidence presented against them as well as to cross-examine witnesses and to call their own. Defendants can be excluded from the proceedings for disruptive conduct. Prosecutors are required under this Act to disclose the existence of any exculpatory evidence as well as any evidence that might impeach the credibility of a government witness.

The Military Commissions Act also specifies an appeals process. Initial appeals are to the US Court of Military Commission Review, with the possibility of further appeals to the Federal Appeals Court in Washington and ultimately to the US Supreme Court.

The Military Commissions have jurisdiction over 32 crimes. Many of the offences are standard war crimes such as pillaging, denying quarter, taking hostages, torture, mutilation, and rape. But the new law also authorizes the prosecution of individuals for conspiracy and providing material support for terrorism.

In a separate development, a prosecution was instituted in New York for Khalid Shaikh Mohammed, the alleged planner of the 11 September 2001 bombings.[10] At that time there were still 215 detainees remaining at Guantanamo Bay making the one year deadline for closure highly unlikely.[11]

Finally, on Christmas Day 2009 an attempted suicide bombing on a US civilian airline allegedly planned in Yemen derailed any possibility of returning some of the remaining detainees to Yemen.[12]

The delayed release of the two further reports on detention policy and on interrogation as mandated under the remaining Executive Orders is indicative of the difficulties being faced by the Obama administration in respect of these controversial issues.[13]

1.2 The release of the ICRC Guidance on Direct Participation in Hostilities

After a five year process of expert consultations, in May 2009 the International Committee of the Red Cross released its Interpretive Guidance on the Notion of Direct Participation under the authorship of Nils Melzer. The aim of the project was to clarify some of the legal issues pertaining to civilians who directly participate in hostilities.[14] Although civilian participation has long been a feature of armed

10. C. Savage, 'Accused 9/11 Mastermind to face trial in N.Y.', *New York Times*, 13 November 2009.

11. Ibid.

12. A. O'Connor and E. Schmitt, 'Terror Attempt Seen as Man tries to Ignite Device on Jet', *New York Times*, 25 December 2009. C. Parsons and J. Barnes, 'U.S. to Halt Guantanamo Bay Transfers to Yemen', *Los Angeles Times*, 6 January 2010.

13. P. Finn, 'Report on U.S. Detention Policy will be delayed', *Washington Post*, 21 July 2009.

14. N. Melzer, *Direct Participation in Hostilities Under International Humanitarian Law*, (Geneva, ICRC 2009).

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conflict the increase in civilian contractors and the proliferation of armed groups such as Hamas, Hezbollah and the al Qaeda network that do not fit the traditional view of combatants has resulted in the necessity for such a study.

Despite the lengthy and extensive consultation process, many of the experts refused to have their names attached to the Interpretive Guidance due to serious disagreements on the characterization of the term 'civilian', the temporal aspect of participation, and the application of the principle of military necessity. Consequently, the final document was released with the express proviso that it represented the views of the International Committee of the Red Cross.[15] In particular, the controversy concerned the provision in the Guidance that members of armed groups could only be attacked during the time they participated in hostilities whereas combat members of an armed force, unless they are rendered *hors de combat*, can be attacked at all times.[16]

There have already been academic commentaries critiquing various aspects of the Interpretive Guidance.[17] Nevertheless, it represents an important clarification on the issue of who may be considered a combatant in these days of asymmetrical warfare.

1.3 The Human Rights Council report on Gaza conflict

One of the major conflicts that occupied the international community in late 2008 and early 2009 concerned the military operations carried out by Israel in the Gaza Strip. 'Operation Cast Lead', launched in response to the increasing incidents of rocket fire by Hamas into Israel, lasted from 27 December 2008 until 18 January 2009. The Israeli military operations began with a week-long air attack, (27 December-3 January 2009) followed by a ground offensive (3 January-18 January 2009). The Israeli navy was also deployed in part to shell the Gaza coast during the operations.[18]

During this period, the Security Council met several times to consider the situation in Gaza.[19] In particular, the Israeli strike on three schools run by United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA), each of which had during the hostilities been used as civilian shelters, was heavily criticised by members of the Security Council.[20] . On 8 January 2009, the Security Council adopted Resolution 1860 with the United States abstaining. The Resolution provides:

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15. Ibid., p. 6.
16. Ibid., p. 70.
17. See e.g., this volume pp. 40, 134, 288, 304 and 315.
18. UN Doc. A/HRC/12/48, 25 September 2009, Report of the United Nations Fact-Finding Mission on the Gaza Conflict, para. 29.
19. Security Council Meeting 6072, 21 January 2009.
20. UN Doc. S/PV. 6061, took place on 6 and 7 January 2009.

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> *Expressing* grave concern at the escalation of violence and the deterioration of the situation, in particular the resulting heavy civilian casualties since the refusal to extend the period of calm; and *emphasizing* that the Palestinian and Israeli civilian populations must be protected,
> Amongst the operative paragraphs were statements of legal obligations.
> 1. *Stresses* the urgency of and *calls for* an immediate, durable and fully respected ceasefire, leading to the full withdrawal of Israeli forces from Gaza;
> 2. *Calls for* the unimpeded provision and distribution throughout Gaza of humanitarian assistance, including of food, fuel and medical treatment;
> 3. *Welcomes* the initiatives aimed at creating and opening humanitarian corridors and other mechanisms for the sustained delivery of humanitarian aid;
> 4. *Calls on* Member States to support international efforts to alleviate the humanitarian and economic situation in Gaza, including through urgently needed additional contributions to UNRWA and through the Ad Hoc Liaison Committee;
> 5. *Condemns* all violence and hostilities directed against civilians and all acts of terrorism[21]

On 3 April 2009, following a resolution of the Human Rights Council, the United Nations Fact Finding Mission on the Gaza Conflict was established with the mandate 'to investigate all violations of international human rights law and international humanitarian law that might have been committed at any time in the context of the military operations that were conducted in Gaza during the period from 27 December 2008 and 18 January 2009, whether before, during or after'.[22] Justice Richard Goldstone, former judge of the Constitutional Court of South Africa and former Prosecutor of the International Criminal Tribunals for the former Yugoslavia and Rwanda, headed the Mission. The other three members were Professor Christine Chinkin, Professor of International Law at the London School of Economics and Political Science, Ms. Hina Jilani, Advocate of the Supreme Court of Pakistan and former Special Rapporteur of the Secretary-General on the situation of human rights defenders, and Colonel Desmond Travers, a former Officer in Ireland's Defence Forces and member of the Board of Directors of the Institute for International Criminal Investigations.[23] The Mission investigated 36 incidents and issued recommendations on a variety of matters including accountability for serious violations of international humanitarian law and human rights law; reparations; the blockade and reconstruction; the use of weapons and military procedures; the protection of human rights organizations and defenders; and follow up mechanisms in light of the Mission's recommendations.[24]

The Goldstone Report, released on 15 September 2009, provided a unique opportunity for the international humanitarian law community to review an extensive

21. UN Doc. S/Res/1860 (2009), 8 January 2009.
22. UN Doc. A/HRC/S-9/L.1, 12 January 2009 and Human Rights Council Press Release, 3 April 2009.
23. Human Rights Council Press Release, 3 April 2009.
24. Ibid., para. 1764.

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assessment of compliance (or lack thereof) with the rules and customs governing the conduct of an armed conflict. The method of gathering evidence was comprehensive and robust and included:

> (a) the review of reports from different sources; (b) interviews with victims, witnesses and other persons having relevant information; (c) site visits to specific locations in Gaza where incidents had occurred; (d) the analysis of video and photographic images, including satellite imagery; (e) the review of medical reports about injuries to victims; (f) the forensic analysis of weapons and ammunition remnants collected at incident sites; (g) meetings with a variety of interlocutors; (h) invitations to provide information relating to the Mission's investigation requirements; (i) the wide circulation of a public call for written submissions; (j) public hearings in Gaza and in Geneva.[25]

However, Israel's decision not to cooperation with the Mission was regrettable in that facts that might otherwise have resulted in supplementary and/or different assessments were simply unavailable to it.[26] In spite of this the Report concluded that there had been serious violations of international humanitarian law and acts entailing individual criminal responsibility.[27] Given the constraints the Mission was working under, the report contains a remarkable degree of specificity regarding the 36 incidents.

Prior to consideration of the specific incidents the drafters of the report set out the relevant legal regimes. Firstly, the report stated that the legal framework applicable to situations of occupation included provisions in the Hague Regulations (especially Arts. 42-56), the Fourth Geneva Convention (especially Arts. 47-78) and those provisions of Additional Protocol I that had been incorporated into customary international law. The drafters observed that the development of the legal framework represented attempts by the international community to better protect human beings from the effects of war while giving due account to military necessity.[28] The Mission found that at all times relevant to the mandate of the Mission, Israel exercised effective control over the Gaza Strip and that as a result, the provisions of the Fourth Geneva Conventions applied.[29] The report declared that the ultimate authority over the Occupied Palestinian Territory still rested with Israel even though Israel had transferred to the Palestinian Authority a series of functions within certain designated zones. In so concluding, the Mission cited the Advisory Opinion of the International Court of Justice (ICJ) on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, that the transfer

25. Ibid., paras. 18 and 19, the report indicated that The Mission conducted 188 individual interviews. It reviewed more than 300 reports, submissions and other documentation either researched of its own motion, received in reply to its call for submissions and notes verbales or provided during meetings or otherwise, amounting to more than 10,000 pages, over 30 videos and 1,200 photographs.
26. Ibid., para. 20.
27. Ibid., para. 25
28. Ibid., para. 273.
29. Ibid., para. 276.

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of powers and responsibilities by Israel under various agreements with the Palestine Liberation Organization (PLO) had 'done nothing' to alter the character of Israel as an occupying Power.[30]

The Report discussed the categorization of the armed conflict maintaining that developments in the past two decades, through the jurisprudence of international tribunals had led to the conclusion that the substantive rules applicable to international and non-international armed conflict were converging. However, the Mission recognized that certain differences existed in relation to the regime of enforcement established by treaty law, particularly the regime of 'grave breaches' contained in the Geneva Convention.[31] While the Mission did not render an opinion on the characterization of the Gaza conflict, they indicated that the military hostilities took place between the Israeli armed forces and the military wing of Hamas and other Palestinian factions.[32] Citing the Israeli Supreme Court's opinion that the confrontation between Israeli armed forces and 'terrorist organizations' active in the Occupied Palestinian Territories is an international armed conflict,[33] the Report then recalled the statement made by the Government of Israel, that the classification of the armed conflict in question may not be too important as 'many similar norms govern both types of conflict'. The Report also noted that the rules contained in Common Article 3 represented the 'baseline rules applicable to all conflicts' and that the rules in Article 75 of Additional Protocol I, which reflect customary international law, 'define a series of fundamental guarantees and protections' that are recognized under human rights law.[34] The report cited with approval the ruling of the Appeals Chamber of the International Criminal Tribunal in the *Tadić* case that 'what is inhumane, and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife' and argued that this ruling related not only to the protection of civilians but also to the methods and means of warfare'.[35]

Although the foregoing discussion may indeed be correct in law, a determination on the classification of the conflict is critical for reasons of identifying the applicable treaty law in spite of the convergence of customary law. This is particularly so in respect of the grave breaches regime which is clearly inapplicable to non-international armed conflict.[36] The section of the report on international criminal

30. Ibid., para. 279 and Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion of 9 July 2004, *ICJ Rep*. 2004, paras. 76-78.

31. Ibid., para. 281.

32. Ibid., para. 282.

33. *The Public Committee against Torture in Israel* v. *The Government of Israel* (*Targeted Killings* case), HCJ 796/02.

34. 'The operation in Gaza: Factual and legal aspects', July 2009, published on the website of the Israeli Ministry of Foreign Affairs, at <http://www.mfa.gov.il/MFA/>, and paras. 282 and 283 of the Report on the Gaza Conflict.

35. *Prosecutor* v. *Tadić*, case No. IT-94-1-AR72, Decision on the defence motion for interlocutory appeal on jurisdiction of 2 October 1995, para. 119. See also para. 96 ff.

36. For discussion of this issue see L. Moir, 'Grave Breaches and Internal Armed Conflict', 7 *J Int. Criminal Justice* (2009) p. 763.

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law therefore becomes quite problematic as both the grave breaches provisions in Articles 147 of the Fourth Geneva and war crimes are discussed by reference to Articles 8(2)(a)(grave breaches) and 8(2)(b) (other serious violations of the laws and customs applicable in international armed conflict) of the Statute of the International Criminal Court. It is not definitively set out which regime applies to this conflict and there is no discussion of the separate provisions for non-international armed conflict in the Rome Statute.[37] One difficulty with the lack of clarification is that throughout the Report the findings of violations with respect to the investigated incidents are categorized as 'grave breaches' as defined in Article 147 of the Fourth Geneva Convention.[38]

In another important declaration, the Mission relied on the ICJ's Advisory Opinion in the *Legality of the Threat or Use of Nuclear Weapons* case that in the context of armed conflict, international humanitarian law is *lex specialis* in relation to human rights law.[39] The Report thus concludes that 'human rights law would continue to apply as long as it is not modified or set aside by IHL' and furthermore, that 'the general rule of human rights law does not lose its effectiveness and will remain in the background to inform the application and interpretation of the relevant humanitarian law rule.'[40]

The first extensive consideration of a violation involved a discussion of the Israeli 'blockade' of the Gaza Strip. The finding of the Mission was that:

> '… Israel continues to be duty-bound under the Fourth Geneva Convention and to the full extent of the means available to it to ensure the supply of foodstuff, medical and hospital items and others to meet the humanitarian needs of the population of the Gaza Strip without qualification. Furthermore, the Mission notes the information it received regarding the lack of compliance by the Government of Israel even with the minimum levels set by the Israeli Court, and in this regard observes that the Government retains wide discretion about the timing and manner of delivering fuel and electricity supplies to the Gaza Strip, and that this discretion appears to have been exercised capriciously and arbitrarily.'[41]

The Report also identified the failure to distinguish between civilian objects and military objectives, as exemplified by the attacks on Gaza's government buildings as amounting to a clear violation of IHL given the 'absence of evidence or, indeed, any allegation from the Israeli Government and armed forces that the Legislative Council building, the Ministry of Justice or the Gaza main prison "made an effective contribution to military action".' As a result, the Mission found that '[o]n the

37. Report on the Gaza Conflict, paras. 288-292 and Rome Statute of the International Criminal Court, 17 July 1998, Art. 8(2)(c)-(d) and (e).

38. Report on the Gaza Conflict, see for example para. 390.

39. Report on the Gaza Conflict, para. 296 and Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion of 8 July 1996, *ICJ Rep.* 1996, p. 226, para. 25.

40. Report on the Gaza Conflict, para. 296.

41. Ibid., para. 326.

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information available to it … the attacks on these buildings constituted deliberate attacks on civilian objects in violation of the rule of customary international humanitarian law whereby attacks must be strictly limited to military objectives'. The Mission concluded that, in its view, 'these facts further indicate the commission of the grave breach of extensive destruction of property, not justified by military necessity and carried out unlawfully and wantonly, as defined in article 147 of the Fourth Geneva Convention.'[42]

The Report investigated attacks on Gaza policemen on 27 December 2008 and found that there was insufficient information to conclude that the Gaza police as a whole had been incorporated into the armed forces of the Gaza authorities[43] . The Mission Report found that the policemen killed could not be considered to have been combatants by virtue of their membership in the police nor did they take direct part in hostilities. Therefore, they did not lose their civilian immunity.[44] They also considered whether an allegation of members of Palestinian armed groups among the police could justify the attacks.[45] The consideration of proportionality began with the definition of proportionality in Additional Protocol I which prohibits launching attacks 'which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated'.[46] The Report accepted that there may have been individual members of the Gaza police who were at the same time members of Palestinian armed groups and thus combatants but that did not deprive the whole police force of its status as a civilian law-enforcement agency. The Report found that the deliberate killing of 99 members of the police at police headquarters and three police stations during the first minutes of the military operation constituted an attack which failed to strike an acceptable balance between the direct military advantage anticipated and the loss of civilian life and thus was disproportionate and a violation of customary international humanitarian law.[47]

Another important contribution the Report makes to international humanitarian law is the discussion of the use of white phosphorous in the conflict. The Report found that there were frequent incidents of the use of ordinance containing white phosphorous at or near civilian targets[48] and concluded:

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42. Ibid., paras. 389- 390.

43. Ibid., para. 433.

44. Ibid., paras. 433-434 and Additional Protocol I of 1977 to the Geneva Conventions of 1949, Art. 51(3) which is argued by the ICRC to be part of customary international law see J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law: Volume I, The Rules* (Cambridge, CUP 2005).

45. Report on the Gaza Conflict, para. 435.

46. Additional Protocol I of 1977 to the Geneva Conventions of 1949, Article 57(2)(a)(iii) once again argued to be part of customary international law as accepted by the Israelis.

47. Report on the Gaza Conflict, paras. 434 and 435.

48. See for example the consideration of the use of white phosphorous on attacks on hospitals in paras. 629 648-650.

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> 'While accepting that white phosphorous is not at this stage proscribed under international law, the Mission considers that the repeated misuse of the substance by the Israeli armed forces during this operation calls into question the wisdom of allowing its continued use without some further degree of control. The Mission understands the need to use obscurants and illuminants for various reasons during military operations and especially in screening troops from observation or enemy fire. There are, however, other screening and illuminating means which are free from the toxicities, volatilities and hazards that are inherent in the chemical white phosphorous. The use of white phosphorous in any form in and around areas dedicated to the health and safety of civilians has been shown to carry very substantial risks. The Mission therefore believes that serious consideration should be given to banning the use of white phosphorous in built-up areas.'[49]

The Report concluded with a series of recommendations to different parties, some of which have already been acted upon. The recommendations are set out below followed by the action taken by the relevant parties up to the end of 2009.[50]

> **1765. To the Human Rights Council**
> The Mission recommends that the United Nations Human Rights Council endorse the recommendations contained in this report, takes appropriate action to implement them as recommended by the Mission and through other means as it may deem appropriate, and continues to review their implementation in future sessions.
> In view of the gravity of the violations of international human rights and humanitarian law and possible war crimes and crimes against humanity that it has reported, the Mission recommends that the United Nations Human Rights Council request the United Nations Secretary-General to bring this report to the attention of the United Nations Security Council[51] under Art. 99 of the Charter of the United Nations so that the Security Council may consider action according to the relevant Mission's recommendations below.
> The Mission further recommends that the United Nations Human Rights Council formally submit this report to the Prosecutor of the International Criminal Court.
> The Mission recommends that the Human Rights Council submits this report to the General Assembly with a request that it should be considered.
> The Mission recommends that the Human Rights Council brings the Mission's recommendations to the attention of the relevant United Nations human rights treaty bodies so that they may include review of progress in their implementation, as may be relevant to their mandate and procedures, in their periodic review of compliance by Israel with its human rights obliga-

49. Ibid., para. 897.
50. There will be further developments no doubt in the years to follow.
51. Ibid., pp. 545-554.

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tions. The Mission further recommends that the Human Rights Council consider review of progress as part of its Universal Periodic Review process.

Response:
On the 16th of October 2009 the Human Rights Council concluding its 12th special session adopted a resolution that focused on the Goldstone Report. The Human Rights Council adopted a resolution that endorsed the recommendations set out in the Report and called for their implementation. The resolution was adopted by a vote of 25 in favour, 6 against, and 11 abstentions. Significantly the Council condemned Israel's non-cooperation with the Independent Fact-Finding Mission. It called on all parties to ensure the implementation of the recommendations in the Report. It recommended that the General Assembly consider the Report of the Fact-Finding Mission during its sixty-fourth session.[52]

1766. To the United Nations Security Council
The Mission recommends:
1. That the Security Council require the Government of Israel, under Article 40 of the Charter of the United Nations:
(a) To take all appropriate steps, within a period of three months, to launch appropriate investigations that are independent and in conformity with international standards, into the serious violations of International Humanitarian and International Human Rights Law reported by the Mission and any other serious allegations that might come to its attention;
(b) To inform the Security Council, within a further period of three months, of actions taken, or in process of being taken, by the Government of Israel to inquire into, investigate and prosecute such serious violations;
The Mission further recommends that the Security Council at the same time establish an independent committee of experts in International Humanitarian and Human Rights Law to monitor and report on any domestic legal or other proceedings undertaken by the Government of Israel in relation to the aforesaid investigations. Such committee of experts should report at the end of the six-months period to the Security Council on its assessment of relevant domestic proceedings initiated by the Government of Israel, including their progress, effectiveness and genuineness, so that the Security Council may assess whether appropriate action to ensure justice for victims and accountability for perpetrators has been or is being taken at the domestic level. The Security Council should request the committee to report to it at determined intervals, as may be necessary. The committee should be appropriately supported by the Office of the United Nations High Commissioner for Human Rights.

52. UN Doc. A/HRC/RES/S-12/1, 16 October 2009.

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3. The Mission recommends that upon receipt of the committee's report the Security Council consider the situation and, in the absence of good faith investigations that are independent and in conformity with international standards having been undertaken or being under way within six months of the date of its resolution under Article 40 by the appropriate authorities of the State of Israel, again acting under Chapter VII of the Charter of the United Nations, refer the situation in Gaza to the Prosecutor of the International Criminal Court pursuant to Article 13(b) of the Statute of the International Criminal Court.

The Mission recommends:

1. That the Security Council require the independent committee of experts referred to in paragraph 3 to monitor and report on any domestic legal or other proceedings undertaken by the relevant authorities in the Gaza Strip in relation to the aforesaid investigations. The committee should report at the end of the six-months period to the Security Council on its assessment of relevant domestic proceedings initiated by the relevant authorities in Gaza, including their progress, effectiveness and genuineness, so that the Security Council may assess whether appropriate action to ensure justice for victims and accountability for perpetrators has been taken or is being taken at the domestic level. The Security Council should request the committee to report to it at determined intervals, as may be necessary.

2. The Mission recommends that upon receipt of the committee's report the Security Council consider the situation and, in the absence of good faith investigations that are independent and in conformity with international standards having been undertaken or being under way within six months of the date of its resolution under Article 40 by the appropriate authorities in Gaza, acting under Chapter VII of the Charter of the United Nations, refer the situation in Gaza to the Prosecutor of the International Criminal Court pursuant to Article 13(b) of the Statute of the International Criminal Court.

The Mission recommends that lack of cooperation by the Government of Israel or the Gaza authorities with the work of the Committee should be regarded by the Security Council to be obstruction of the work of the Committee.

Response:

The Security Council met on 14 October shortly after receipt of the Report and engaged in an extensive debate on the recommendations but did not reach consensus and a resolution was not drafted.[53] The matter has been left to the Human Rights Council and the General Assembly.

53. UN Doc. S.PV/6201 and S.PV/6201 (Resumption 1) 14 October 2009.

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1767. To the Prosecutor of the International Criminal Court
With reference to the declaration under Article 12(3) received by the Office of the Prosecutor of the ICC from the Government of Palestine, the Mission considers that accountability for victims and the interests of peace and justice in the region require that the legal determination should be made by the Prosecutor as expeditiously as possible.

Response:
The Prosecutor's Office is considering whether the Palestinian Authority is 'enough like a state' for it to bring a case alleging that Israeli troops committed war crimes in the recent assault on Gaza.[54] On 22 January 2009 Dr Ali Khashan, Minister of Justice of the Palestinian National Authority, lodged a declaration recognizing the jurisdiction of the International Criminal Court pursuant to Article 12(3) of the Rome Statute.[55] The Office of the Prosecutor announced that it would 'carefully examine all relevant issues relating to the jurisdiction of the Court'.[56] Nevertheless, this is an unlikely outcome and neither the Prosecutor nor the pre-trial chamber is likely to confirm jurisdiction. The Rome Statute is specifically drafted to ensure that jurisdiction is based on the consent of the state of the nationality of the suspect or the state where the crime has taken place. Israel is not a party to the Statute and will not likely give consent in an ad hoc declaration. Article 12 is addressed to 'states'; the Prosecutor would therefore have to take the unprecedented and politically controversial decision of recognizing Palestine as a state to take jurisdiction. This is clearly problematic; moreover the situation is compounded by the fact that the Palestinian National Authority does not exercise territorial or political control over Gaza where Hamas remains in power. Hamas and the Palestinian National Authority might join in the declaration. However, this is not likely given that Hamas also risks prosecution for violations of international humanitarian law.[57] The only way to avoid all these jurisdictional obstacles would be for the United Nations Security Council (UNSC) to refer the situation to the ICC as it did so in the case of Darfur.

1768. To the General Assembly
The Mission recommends that the General Assembly request the Security Council to report to it on measures taken with regard to ensuring accountability for serious violations of international humanitarian law and human rights in relation to the facts in this report and any other relevant facts in the context

54. Radio Nederland, 'ICC Starts Analysis of Gaza War Crimes Allegations', 3 February 2009.
55. International Criminal Court Press Release from the Prosecutor, 6 February 2009, at <www.icc-cpi.int/NR/rdonlyres/4CC08515-D0BA.../PNAMFA130209.pdf>.
56. Ibid.
57. For further academic discussion of this issue see Y. Ronen, 'ICC Jurisdiction over Acts Committed on the Gaza Strip', 8 *J Int. Criminal Justice* (2010) p. 3.

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of the military operations in Gaza, including the implementation of the Mission's recommendations. The General Assembly may remain appraised of the matter until it is satisfied that appropriate action is taken at the domestic or international level in order to ensure justice for victims and accountability for perpetrators. The GA may consider whether additional action within its powers is required in the interests of justice, including under resolution 377 (V) Uniting for Peace.

The Mission recommends that the General Assembly establish an escrow fund to be used to pay adequate compensation to Palestinians who have suffered loss and damage as a result of unlawful acts attributable to the State of Israel during the December-January military operations and actions in connection with it, and that the Government of Israel pay the required amounts into such fund. The Mission further recommends that the General Assembly ask the Office of the High Commissioner for Human Rights to provide expert advice on the appropriate modalities to establish the escrow fund.

The Mission recommends that the General Assembly ask the Government of Switzerland to convene a conference of the High Contracting Parties to the Fourth Geneva Convention of 1949 on measures to enforce the Convention in the OPT and to ensure its respect in accordance with Article 1.

The Mission recommends that the General Assembly promote an urgent discussion on the future legality of the use of certain munitions referred to in this report, and in particular white phosphorous, flechettes and heavy metal such as tungsten. In such discussion the General Assembly should draw *inter alia* on the expertise of the International Committee of the Red Cross (ICRC). The Mission further recommends that the Government of Israel undertake a moratorium in the use of such weapons in light of the human suffering and damage they have caused in the Gaza Strip.

Response:

The General Assembly met to consider the Report on 5 November 2009 and passed a resolution endorsing it on 1 December.[58] The vote was not unanimous with 114 in favor, 18 against and 44 abstentions. The resolution gave Israel and the Palestinians three months to undertake 'independent, credible investigations' into serious violations of international humanitarian and human rights law committed during the conflict.[59] The resolution also requested that Secretary-General Ban Ki-moon transmit the Report to the Security Council.[60] The Assembly also recommended to the Swiss Government that they take steps to convene as soon as possible a Conference of the High Contracting Parties to the Fourth Geneva Convention on measures to enforce that

58. UN Doc. A/Res/64/10, 1 December 2009.
59. Ibid., paras. 3 and 4.
60. Ibid., para. 2.

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Convention in the Occupied Palestinian Territory.[61] Finally, the Secretary-General was to report to the General Assembly in three months on the implementation of this resolution.[62]

The Gaza report also contained recommendations to the parties in the conflict and the international community in general. There were specific recommendations concerning the general peace process but there were also specific recommendations pertaining to the enforcement of international humanitarian law.

1769. To Israel

The Mission recommends that Israel immediately cease the border closures and restrictions of passage through border crossings with the Gaza Strip and allow passage of goods necessary and sufficient to meet the needs of the population, for the recovery and reconstruction of housing and essential services and for the resumption of meaningful economic activity in the Gaza Strip.

The Mission recommends that Israel cease the restrictions on access to the sea for fishing purposes imposed on the Gaza Strip and allow such fishing activities within the 20 nautical miles as provided for in the Oslo accords. It further recommends that Israel allow the resumption of agricultural activity within the Gaza Strip, including within areas in the vicinity of the borders with Israel.

Israel should initiate a review of the rules of engagement, standard operating procedures, open fire regulations and other guidance for military and security personnel. The Mission recommends that Israel avail itself of the expertise of the ICRC, the United Nations Office of the High Commissioner for Human Rights and other relevant bodies, and Israeli experts, civil society organizations with the relevant expertise and specialization, in order to ensure compliance in this respect with international humanitarian law and international human rights law. In particular such rules of engagement should ensure that the principles of proportionality, distinction, precaution and non-discrimination are effectively integrated in all such guidance and in any oral briefings provided to officers, soldiers and security forces, so as to avoid the recurrence of Palestinian civilian deaths, destruction and affronts on human dignity in violation of international law.

…

The Mission recommends that Israel reiterates its commitment to respect the inviolability of UN premises and personnel and that it undertakes all appropriate measures to ensure that there is no repetition of violations in the future (ref Convention on Privileges and Immunities of the UN). It further recom-

61. Ibid., para. 5.
62. Ibid., para. 6.

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mends that reparation to the United Nations be provided fully and without further delay by the State of Israel, and that the General Assembly consider this matter.

Response:
In July, Israel released a report on the conflict entitled 'The Operation in Gaza: Factual and Legal Aspects' in which many of the allegations later contained in the Mission Report were denied.[63] Nonetheless, the Government of Israel also issued a caveat stating:

On a number of issues the Paper offers only a provisional analysis as the IDF is still conducting comprehensive field and criminal investigations into allegations regarding the conduct of its forces during the Operation. Such investigations will be reviewed by the Military Advocate General and are subject to further review by the Attorney General. In addition, petitions may be filed for judicial review by the Supreme Court of Israel (sitting as the High Court of Justice).[64]

1770. To Palestinian armed groups
The Mission recommends that Palestinian armed groups undertake forthwith to respect international humanitarian law, in particular by renouncing attacks on Israeli civilians and civilian objects, and take all feasible precautionary measures to avoid harm to Palestinian civilians during hostilities.
The Mission recommends that Palestinian armed groups who hold Israeli soldier Gilad Shalit in detention release him on humanitarian grounds. Pending such release they should recognize his status as prisoner of war, treat him as such, and allow him ICRC visits.

Response:
By the end of 2009 Gilad Shalit was still in incarceration and no Palestinian armed groups had renounced attacks on civilians.

1772. To the international community
Among the recommendations to the international community was:
The Mission recommends that States Parties to the Geneva Conventions of 1949 start criminal investigations in national courts, using universal jurisdiction, where there is sufficient evidence of the commission of grave breaches of the Geneva Conventions of 1949. Where so warranted following investigation, alleged perpetrators should be arrested and prosecuted in accordance with internationally recognised standards of justice.

63. The State of Israel, 'The Operation in Gaza: Factual and Legal Aspects', July 2009.
64. Ibid., para. 2.

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Response:
As of the end of 2009 there were no reports of national prosecutions in third states.

Notwithstanding the lack of response by the Security Council there has been a significant reaction to the Report within the General Assembly that remains seized of this issue and the Israeli government that has launched investigations into the violations of international humanitarian law. However, for the international humanitarian lawyer discussions of the principles of distinction, military necessity and the rule of proportionality within both the report and the Israeli response will result in further elaboration of these cardinal rules.

1.4 The European Council Report on Georgia/Russia Conflict

The legal community also had to digest another significant report in 2009 on the conflict in South Ossetia which had taken place in August 2008. The European Union commissioned a fact finding mission which also released its report in September 2009. Although the vast majority of the report was concerned with jus ad bellum issues, the drafters also commented on compliance with IHL.[65] The structure of this section of the report is very similar to the approach adopted in the contemporaneous Gaza Report. Firstly, the Report outlined the relevant international law, particularly the applicable rules of international humanitarian law. It then examined these rules on a thematic basis with respect to the armed conflict between Russia and Georgia and for each of the thematic issues the main substantive rules applicable were discussed followed by an establishment of the facts and a conclusion as to whether or not there had been a violation.[66] As with the Goldstone Report, the boundary between international and non-international armed conflict was uncertain but the drafters of the Report also argued that there was an increasing convergence between the rules of IHL applicable for both types of conflict.

In this case the two national parties Russia and Georgia were also parties to the two Additional Protocols to the four Geneva Conventions of 1949.[67] The hostilities between Russian and Georgia constituted an international armed conflict whereas the hostilities between Georgia and the two regions, South Ossetia and Abkhazia, were defined as a non-international armed conflict since both regions were recognized internationally as being part of Georgia and at the time of the conflicts, this was not disputed.[68] The discussion in this report with respect to classification of armed conflict should assist those in studying the complex issue of the distinction

65. European Union, *Independent International Fact-Finding Mission on The Conflict in Georgia: Report*, (Brussels, European Union 2009) Vol. II, pp. 295-438 for discussion of IHL.
66. Ibid., p. 297.
67. Ibid., p. 298.
68. Ibid., p. 300.

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between international and non-international armed conflict. In the case of the Russia/Georgia conflict another interesting humanitarian law issue explored concerned the duration of the conflict. The question was whether when the cease-fire was agreed on 12 August 2008, IHL ceased to apply. Geneva Convention IV in Article 6(2) specifies the 'general close of military operations' whereas Article 2(2) of Additional Protocol II uses the phrase 'end of the armed conflict'. The Report refers to the ICTY decision in the *Tadić* case which states:

> 'International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved.'[69]

Relying on the Tadić statement, the Report concluded that some rules of international humanitarian law continued to apply beyond the cease-fire, including protection in respect of those interned as a result of conflict.

After considering in detail allegations of violations of the laws and customs of armed conflict, the main findings with respect to International Humanitarian Law were as follows:

> 'While the August 2008 conflict lasted only five days, numerous violations of IHL were committed during this period by Georgia, Russia and South Ossetia.
> Very serious violations of IHL and HRL were committed by South Ossetian forces, armed groups and individuals after the cease-fire.
> Violations mainly concern IHL on the conduct of hostilities, treatment of persons and property and forced displacement.
> More specifically, violations include indiscriminate attacks and a lack of precautions by Georgia and Russia; a widespread campaign of looting and burning of ethnic Georgian villages by South Ossetia, as well as ill treatment, beating, hostage-taking and arbitrary arrests; and the failure by Russia to prevent or stop violations by South Ossetian forces and armed groups and individuals, after the cease-fire, in the buffer zone and in South Ossetia.'[70]

The report also outlined lessons that could be learned from this conflict one of which pertained to the use of certain weaponry in such conflicts. The report suggested:

> 'The conduct of hostilities in populated areas requires particular precautions in order to minimise civilian losses and damage to civilian property. The use of artillery or cluster bombs does not allow IHL to be respected in such areas. Georgia and Russia should sign the Convention on Cluster Munitions of 30 May 2008.'[71]

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69. *Prosecutor* v. *Tadić*, case No. IT-94-1-AR72, Decision on the defence motion for interlocutory appeal on jurisdiction of 2 October 1995, para. 118.
70. Ibid., pp. 430-431.
71. Ibid., p. 432.

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The Fact-Finding Mission lent its support to a number of recommendations made by UN agencies and regional and nongovernmental organisations, as essential elements conducive to securing a lasting peace in the region. In particular, the Report recalled that:

> 'The Human Rights Assessment Mission of the Office for Democratic Institutions and Human Rights of the OSCE has recommended that all parties to the conflict "undertake a thorough and genuine investigation of allegations of, and prosecute, human rights violations and other unlawful acts committed during the conflict by persons under their jurisdiction or control. Any individuals believed to have been involved in human rights violations or other serious crimes should be held to account and prosecuted in accordance with the law. The parties should co-operate in exchanging information and evidence for such prosecutions. In addition to holding individuals accountable, there should be full public disclosure of the facts surrounding human rights violations during the conflict".'[72]

The Mission also supported the statement made by the International Crisis Group that both investigation and prosecution 'serve multiple purposes, not the least of which is to correct misinformation on the scale and nature of atrocities, when appropriate, so as to reduce the likelihood of revenge violence and to promote longer-term reconciliation'.[73]

The conflict has resulted in thousands of individual applications to the European Court of Human Rights by persons affected on all sides of the conflict. The Court may well have to consider the international humanitarian law issues as they have done in previous cases.[74] While there are currently no cases pending before the International Criminal Court, on 20 August 2008 the ICC Prosecutor confirmed that the situation in Georgia is under analysis by his Office.[75] In addition, Georgia has instituted proceedings against the Russian Federation before the International Court of Justice under the International Convention for the Elimination of all forms of Racial Discrimination.[76]

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72. Human Rights Assessment Mission of the Office for Democratic Institutions and Human Rights, OSCE,Human Rights in the War-Affected Areas following the Conflict in Georgia, 27 November 2008, p. 76.

73. International Crisis Group, Russia vs. Georgia: the Fallout, Europe Report No.195, 22 August 2008, p. 29.

74. On 14 January 2009, for example, the Court announced that it had examined seven applications against Georgia, and that it had received a total of more than 3300 cases from South Ossetians and Russians 'with a similar factual background'.

75. ICC Press Release, 'ICC Prosecutor confirms situation in Georgia under analysis', ICC-OTP-20080820-PR346, 20 August 2008, at <http://www.icc-cpi.int>.

76. Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (*Georgia* v. *Russian Federation*), International Court of Justice, General List 140, Request for the Indication of Provisional Measures, 15 October 2008.

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1.5 Allegations of serious violations of humanitarian law and the Sri Lanka conflict

2009 marked the end of the civil war in Sri Lanka amid allegations of serious violations of international humanitarian law. For more than 25 years the Government of Sri Lanka was involved in a non-international armed conflict with the separatist Liberation Tigers of Tamil Eelam (LTTE). A ceasefire that began in February 2002 ended with the resumption of major military operations in mid-2006.[77] International Crisis Group estimated that between 250,000 and 300,000 civilians were trapped in areas of fighting with limited access to food, water or medical assistance.[78]

In February, with thousands of civilians trapped in the conflict zone, international concern began to be expressed over possible serious violations of international humanitarian law following mounting reports alleging the targeting of civilian installations.[79] In a Human Rights Watch report entitled 'War on the Displaced: Sri Lankan Army and LTTE Abuses Against Civilians in the Vanni' it was alleged that Sri Lankan forces were shelling hospitals and so-called safe zones and killing civilians.[80] The International Crisis Group claimed that the LTTE was forcibly conscripting civilians and preventing many from leaving the combat zone. The organisation reported that according to UN Agency estimates more than 7,500 civilians had been killed and over 15,000 wounded between mid-January and early May. On 13 March the UN High Commissioner for Human Rights released a statement expressing grave concern over credible evidence of war crimes by both sides.[81] It was reported that UN and government leaders called on the LTTE to allow civilians freedom of movement and urged both sides to halt their fighting to allow access for additional humanitarian relief and humanitarian personnel. The Government rejected any pause in the fighting.[82]

Human Rights Watch called for a United Nations Commission of Inquiry to investigate violations of international humanitarian law by both sides in the conflict.[83] In May the Government announced that the LTTE had been defeated after government forces had assumed control over the last portion of rebel held territory in the Northeast of the country. They also announced the death of the leader of the rebel forces Velupillai Prabhakaran. In August 2009 the new Tamil Tiger leader

77. Human Rights Watch, 'Q & A on Accountability for Violations of International Humanitarian Law in Sri Lanka', (New York, 27 April 2009).

78. International Crisis Group, 'Conflict History: Sri Lanka', (Brussels, May 2009).

79. Human Rights Watch, 'War on the Displaced: Sri Lankan Army and LTTE Abuses Against Civilians in the Vanni', (New York, 19 February 2009).

80. Ibid.

81. UNHCRH Press Release, 'Serious Violations of international law committed in Sri Lanka Conflict: UN Human Rights Chief', 13 March 2009.

82. International Crisis Group, 'Conflict History: Sri Lanka', (Brussels, May 2009).

83. Human Rights Watch, 'War on the Displaced: Sri Lankan Army and LTTE Abuses Against Civilians in the Vanni', (New York, 19 February 2009).

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was detained and local elections were held in the north.[84] However, there were continuing concerns about the plight of the civilian population even after the end of full scale hostilities. In late August Philip Alston UN Special Rapporteur on extrajudicial, summary or arbitrary executions, called for the urgent establishment of an independent investigation into the authenticity of a video allegedly depicting the extrajudicial execution of two men by Sri Lankan army personnel.[85] The investigation remains ongoing.

1.6 HPCR Manual on International Law Applicable to Air and Missile Warfare

On 15 May Harvard University's Program on Humanitarian Policy and Conflict Research finalized its Manual on International Law Applicable to Air and Missile Warfare. This manual contains 175 black letter rules on air and missile warfare. The Manual's rules were developed by a Group of International Experts over the course of a five year project. The rules are accompanied by a Commentary, released in March 2010, drafted by six members of the Group. They provide an important clarification of a relatively uncodified area of international humanitarian law, which had previously only addressed the subject through the 1923 Rules of Air Warfare. In approach, the manual resembles the San Remo Manual on International Law Applicable to Armed Conflicts at Sea, which has had substantial influence on naval operations.

The objective of the project was to develop a methodological restatement of existing international law applicable to air or missile warfare, based on the general practice of States accepted as law (*opinio juris*) and treaties in force. The resulting Manual is intended to serve as a resource for armed forces in developing rules of engagement, writing of domestic military manuals, preparing training courses and providing guidance for armed forces engaged in combat operations. Although the black letter rules are confined to international armed conflict, the manual contains a specific statement that this is 'without prejudice to the possible application of some of the Rules in this Manual to non-international armed conflicts'.[86] The accompanying commentary addresses the applicability of the individual rules in such conflicts.

Topically, the Manual is broad in scope. Specific rules address such topics as weapons, attacks, protection of certain types of aircraft, protection of the environment, humanitarian aid, zones, blockade, perfidy, espionage, surrender, contraband, combined operations and neutrality. Of particular note is the Manual's confirmation of the cardinal principles of humanitarian law recognized by the International

84. K. Francis, 'Tamil Tigers' New Leader Arrested', *The Scotsman*, 8 August 2009.

85. UNHCHR Press Release, 'An Independent Investigation into Sri Lankan Executions is Urgent, says UN Expert', 31 August 2009.

86. Harvard Program on Humanitarian Policy and Humanitarian Research, 'Manual on International Law Applicable to Air and Missile Warfare', Bern May 2009.

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Court of Justice in the *Nuclear Weapons* Advisory Opinion – distinction, necessity and proportionality.

1.7 Eritrea-Ethiopia Claims Commission final award

On the 17th of August 2009, the Eritrea-Ethiopia Claims Commission released its final award for damages. The Commission was established to 'decide through binding arbitration all claims for loss, damage or injury by one Government against the other' related to the 1998-2000 conflict between the two states that 'result from violations of international humanitarian law, including the 1949 Geneva Conventions, or other violations of international law'.[87] The Final Awards awarded compensation in respect of claims by both Eritrea and Ethiopia for violations of international law previously found by the Commission in its fifteen Partial and Final Awards on liability, rendered between 1 July 2003 and 19 December 2005.[88]

There were two awards in fact, one addressed to the claims of Eritrea and one addressed to the claims of Ethiopia. The damages were primarily related to two areas: the unlawful destruction by soldiers of civilian buildings and infrastructure and the injury to civilians. These arbitral awards are the rare instances where parties to an armed conflict agree to provide financial compensation for their violations of international humanitarian law.

2. INTERNATIONAL ORGANISATIONS

2.1 Protected persons

2.1.1 *Civilians generally*

Once again a major focus of debate within the Security Council was on the continuing issue of civilians involved in armed conflict. On 14 January a meeting was convened specifically on civilians in armed conflict.[89] As a result of their deliberations the Security Council adopted an updated version of its landmark 2002 aide-memoire, by Presidential Statement[90] which set out core objectives for providing protection and assistance to conflict-affected civilians. The aide-memoire is to serve as a practical tool to improve the Council's analysis and diagnosis of key protection issues, particularly during its deliberations on peacekeeping mandates.[91] The meeting was briefed by the Under-Secretary-General for Humanitarian Affairs and Emergency Relief Coordinator, John Holmes, who raised a number of issues in-

87. Final Award Eritrea, para. 5.
88. Ibid.
89. Security Council Meeting 6066, 14 January 2009.
90. Presidential Statement S/PRST/2009/1, 14 January 2009.
91. S/PV. 6066, 14 January 2009.

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cluding the humanitarian law violations against civilians in the Gaza conflict, the use of human shields in Somalia, and the increase by 40 percent of civilians killed in Afghanistan in the previous year totalling 2000. The Under-Secretary-General drew attention to the 'catastrophic situation' that had unfolded in August in and around Goma in the Democratic Republic of Congo where Congolese civilians had been subject to attacks, displacement, sexual violence and forced recruitment by advancing rebel force, a situation that had been compounded by the acts of violence, rape and looting carried out by members of the Congolese armed forces.[92] Some of the delegations called for a speedy implementation of the Responsibility to Protect to deal with issues of civilians in conflict.[93]

The Presidential Statement resulting from the meeting expressed the Council's deep concern at the violence committed against civilian populations as a result of 'deliberate targeting, indiscriminate and excessive use of force, and sexual or gender-based violence'.[94] The statement also condemned all violations of international humanitarian, human rights and refugee law, committed against civilians in armed conflict and demanded that 'all relevant parties put an end to such practices'. In addition, the statement reaffirmed 'the needs of civilians under foreign occupation' and the particular responsibilities of occupying powers in such situations.[95]

The updated aide-memoire highlighted objectives for Security Council action including:

- access to vulnerable populations
- safe, voluntary and dignified return of refugees and internally displaced persons
- respect for the safety and security of humanitarian workers
- accountability for persons suspected of genocide, crimes against humanity, war crimes and serious violations of human rights law

The aide-memoire included a range of additional measures that could be taken by the Council, such as imposing targeted sanctions against the perpetrators of serious violations against civilians and the referral of situations to the International Criminal Court[96] Two further meetings specifically dealing with civilians in armed conflict were held later in the year. The first took place on 26 June and although once again there was an extensive briefing by the under-Secretary-General on the same issues, no action was taken. However, on 11 November there was an extensive meeting resulting in the unanimous adoption of Resolution 1894. The 35 operative paragraphs repeated the calls for compliance with international humanitarian law by both state actors and those on United Nations peacekeeping operations.

92. Ibid.
93. Ibid.
94. Presidential Statement S/PRST/2009/1, 14 January 2009.
95. Ibid.
96. Ibid.

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2.1.2 *Women*

Several meetings of the Security Council during 2009 were dedicated to the topic of women in armed conflict resulting in the adoption of Resolutions 1888[97] and 1889[98]. The first resolution specifically focused on sexual violence in armed conflict and demanded that:

> '… all parties to armed conflict immediately take appropriate measures to protect civilians, including women and children, from all forms of sexual violence, including measures such as, inter alia, enforcing appropriate military disciplinary measures and upholding the principle of command responsibility, training troops on the categorical prohibition of all forms of sexual violence against civilians, debunking myths that fuel sexual violence and vetting candidates for national armies and security forces to ensure the exclusion of those associated with serious violations of international humanitarian and human rights law, including sexual violence;'[99]

This resolution also called for the appointment of a Special Representative tasked with addressing the issue of sexual violence in armed conflict.[100]

The second resolution called for the involvement of women in the post-conflict peacebuilding process by means of 'gender mainstreaming.'[101]

2.1.3 *Children*

The topic of children and armed conflict prompted an extensive discussion in a Security Council meeting on 29 April.[102] The Secretary-General presented his annual report on the implementation of resolution 1612 and listed 56 parties, including 19 persistent violators who have recruited child soldiers or committed other grave violations against children, In particular, the Secretary-General referred to the recruitment of children as young as 14 years by the LTTE in Sri Lanka and urged the Council to expand the trigger of the Monitoring and Reporting Mechanism (set up under SCR 1612) to include sexual violence and, if possible, intentional killing and maiming of children.[103] This meeting resulted in a Presidential Statement on children and armed conflict which stated that the Security Council reaffirmed its commitment to address the widespread impact of armed conflict on children and expressed its intention to consider bolstering its measures to protect

97. UN Doc. S/Res. 1888 (2009), 30 September 2009.
98. UN Doc. S/Res. 1889 (2009), 5 October 2009.
99. Un Doc. S/Res. 1888 (2009), 30 September 2009, para. 3.
100. Ibid., para. 4.
101. Ibid., para. 19(b).
102. UN Doc. S/PV.6144, Security Council Meeting 6114, 29 April 2009.
103. Ibid., and Report of the Secretary-General of 26 March 2009, UN Doc. S/2009/158, 26 March 2009.

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war-affected children. There was strong condemnation of all such acts and violations of international law regarding the protection of children.[104]

On 4 August, the Security Council passed a unanimous resolution concerning children and armed conflict which included a strong condemnation of all violations of applicable international law involving the recruitment and use of children by parties to armed conflict as well as their recruitment, killing and maiming, rape and other sexual violence, abductions, attacks against schools or hospitals and denial of humanitarian access by parties to armed conflict.[105] Resolution 1882 called on those countries mentioned in the Secretary-General's report to develop concrete time- bound action plans to halt violations and abuses.[106] The Resolution also welcomed the efforts by the Department of Peacekeeping Operations to mainstream child protection into peacekeeping missions.[107]

2.2 **The Security Council**[108]

2.2.1 *Afghanistan*

The Security Council passed two resolutions on Afghanistan in 2009. Resolution 1868 unanimously extended the mandate of the United Nations Assistance Mission in Afghanistan for one year until 23 March 2010.[109] The resolution further condemned all attacks on civilians and on Afghan and international forces, as well as the use by Taliban and other extremist groups of civilians as human shields and children as soldiers. It called for compliance with international humanitarian and human rights law as applicable in the context of the ongoing attacks by rebel groups (mainly Taliban). The Security Council expressed its concern with the serious threat that anti-personnel mines and improvised explosive devices pose to the civilian population. The resolution stressed the need to refrain from the use of weapons and devices prohibited by international law.[110]

The second meeting on Afghanistan resulted in the adoption of Resolution 1890 on 8 October extending the mandate of the ISAF force for one year until October 2010. Expressing in its preamble serious concern with the high number of civilian casualties, the Resolution called for compliance with international humanitarian and human rights law and for all appropriate measures to be taken to ensure the protection civilians.

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104. UN Doc. S/PRST/2009/9, 29 April 2009.
105. UN Doc. S/Res. 1882 (2009), 4 August 2009.
106. Ibid., para. 5.
107. Ibid., para. 11.
108. This year in review only discusses those situations where the Security Council refers to international humanitarian law.
109. UN Doc. S/Res. 1868 (2009), 23 March 2009.
110. Ibid.

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2.2.2 *Central African Republic and Chad*

On the 14th of January the Security Council considered the situation in Chad, the Central African Republic and the subregion more broadly. Adopting SCR 1861, the Security Council reiterated its concern at the humanitarian and security repercussions in eastern Chad, the north-eastern Central African Republic and western Sudan including Darfur. It also expressed its deep concern regarding the armed activities and banditry in the sub-region which threatened the security of the civilian population and the conduct of humanitarian operations that had resulted in serious violations of human rights and international humanitarian law. In its operative paragraphs the Council agreed to extend for a period of 12 months (until 15 March 2010) the mandate of the UN Mission in the Central African Republic and Chad (MINURCAT).[111] MINURCAT had been established in 2007 to support elements of the Chadian police and liaise with other regional actors to create conditions conducive to a voluntary, secure and stable return of refugees and displaced persons; to contribute to the protection of refugees, displaced persons and civilians in danger; and to facilitate the provision of humanitarian assistance in the region. Under the Resolution, the Security Council authorized the deployment of a military component of MINURCAT to replace EUFOR (the European Union Force) whose mandate was due to expire on 15 March 2009. The new force includes 300 police officers, 25 military liaison officers and 5,200 military personnel. Mandated under Chapter VII, MINURCAT's primary responsibilities include protecting civilians in danger particularly refugees and internally displaced persons; facilitating delivery of humanitarian aid and the free movement of humanitarian personnel; and protecting United Nations personnel and facilities in both Chad and the Central African Republic.[112] The resolution also reaffirmed the obligation of all parties to implement fully the rules and principles of international humanitarian law, particularly those regarding the protection of humanitarian personnel.[113] It also encouraged efforts by MINURCAT and the United Nations country team through the appointment of child protection advisers, to prevent the recruitment of refugees and children into armed groups and welcomed the effort of Chad to prevent recruitment of child soldiers.[114]

This situation was again deliberated in the Security Council in May 2009. A Presidential Statement released on 8 May condemned the renewed military incursions in eastern Chad of Chadian armed groups, coming from outside, and demanded that rebel armed groups cease the violence immediately. The President also expressed deep concern at the direct threat the activity of armed groups posed for the safety of the civilian population and the conduct of humanitarian opera-

111. UN Doc. S/Res. 1861 (2009), 14 January 2009.
112. Ibid., para. 7.
113. Ibid., para. 22.
114. Ibid., para. 23.

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tions; Council called on all parties to abide by their obligations under international humanitarian law, in particular to respect the security of civilians, humanitarian workers and United Nations personnel.[115]

2.2.3 *Côte d'Ivoire*

The Security Council met on several occasions to discuss the situation in Côte d'Ivoire. Although in March 2007, the Ouagadougou Political Agreement supposedly ended the civil war in the country, the agreed elections had not been held and there were pockets of armed conflict. There were three Security Council Resolutions during 2009 expressing concern about continued violations of international humanitarian law. On 27 January, after taking note of the report of the Secretary-General dated 8 January 2009, the Security Council noted with concern that in spite of the improvements in the overall human rights situation, the persistence of human rights violations against civilians in different parts of the country, including numerous acts of sexual violence, necessitated that the perpetrators be brought to justice.[116] In its operative paragraph, SCR 1865 called on all Ivorian parties to take appropriate measures to refrain from, prevent and protect civilians from all forms of sexual violence, enforce appropriate military disciplinary measures, uphold the principle of command responsibility, and train troops on the prohibition of all forms of sexual violence.[117]

In its subsequent resolution, adopted on 30 July, the Security Council repeated its concerns over the continued human rights violations against civilians and in particular acts of sexual violence perpetrated against civilians. SCR 1880 called on all parties to ensure the protection of women and children as provided in the Ouagadougou Political Agreement and to investigate all reported abuses and to bring to justice all those responsible for such abuse.[118] In renewing the mandate of the United Nations Operation in Cote d'Ivoire (UNOCI) until 31 January 2010, the Security Council requested the Secretary-General continue to take the necessary measures to ensure full compliance by UNOCI with the United Nations zero tolerance policy on sexual exploitation and abuses; to keep the Council informed; and to urge troop-contributing countries to take appropriate preventive action including pre-deployment awareness training, and other action to ensure full accountability in cases of such conduct involving their personnel.[119]

While noting the improvement in the overall human rights situation in the Cote d'Ivoire, in Resolution 1893 of 29 October, the Security Council once more raised concerns over the persistence of reported human rights and humanitarian law violations in different parts of the country. Emphasising the need to bring perpetrators

115. UN Doc. S/PRST/2009/13, 8 May 2009.
116. UN Doc. S/Res. 1865 (2009), 27 January 2009.
117. Ibid., para. 12.
118. UN Doc. S/Res/1880 (2009), 30 July 2009, para. 14.
119. Ibid., para. 29.

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to justice, the Security Council reiterated its firm condemnation of all violations.[120] The Resolution makes unambiguous, the Security Council's determination that it is fully prepared to impose targeted measures against persons designated as responsible for serious violations of human rights and international humanitarian law.[121]

2.2.4 *Democratic Republic of the Congo*

Although the long-standing armed conflict taking place in the Democratic Republic of Congo was the subject of much discussion, there was only one resolution passed in 2009. On 17 February a meeting of the Security Council noted that in the previous six months there had been renewed fighting leaving many hundreds dead and an estimated 500,000 people displaced. Extreme sexual violence remains prevalent the eastern Democratic Republic of Congo.[122] In April, Special Representative for the DRC and head of MONUC, Alan Doss, briefed the Council and reported an improvement in the situation in North Kivu when, following a joint operation between Rwanda and the DRC, General Nkunda, leader of the CNDP was captured by Rwandan forces. The declaration by the CNDP and other Congolese armed groups to end the conflict with the DRC and to be integrated into the Armed Forces of the Democratic Republic of the Congo (FARDC) came as a welcome surprise to many. The accelerated integration process, overseen by MONUC, resulted in the separation of almost 1,100 children associated with these armed groups. Regrettably in other areas of the country there was continued fighting with reports of appalling levels of violence perpetrated against women and children. For example, the Lord's Resistance Army had taken revenge by looting, raping, maiming, abducting and killing civilians in a vast area stretching from northern Ituri to eastern Central African Republic.[123]

In his briefing in December 2009, Alan Doss informed the Security Council of significant numbers of surrenders and voluntary repatriation by members of the FDLR and LRA. While significant progress had been made in dismantling the FDLR armed forces, the military operation had also resulted in reprisal attacks by the FDLR against the civilian population. The concurrent initiative to integrate and demobilize the armed Congolese groups had compounded existing disciplinary problems within FARDC and resulted in wide scale human rights violations – particularly sexual violence – against the civilian population in the Kivus.[124]

In December the Security Council adopted Resolution 1896 which renewed existing sanctions on armed groups and called on MONUC share all relevant information with the Group of Experts, especially information on the recruitment and

120. UN Doc. S/Res/1893 (2009), 29 October 2009, preamble.
121. Ibid., para. 20.
122. UN Doc. S/PV.6083, 17 February 2009.
123. UN Doc. S/PV.6104, 9 April 2009.
124. UN Docs. S/PV.6159, 10 July 2009 and S/PV.6244, 16 December 2009.

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use of children, and on the targeting of women and children in situations of armed conflicts.[125]

2.2.5 *Iraq*

Given the improvement in the security situation there was only one resolution with respect to Iraq that referred to international humanitarian law.[126] In the resolution extending the mandate of the United Nations Assistance Mission for Iraq (UNAMI) for another twelve months, the Security Council urged all those concerned, as set forth in international humanitarian law, including the Geneva Conventions and the Hague Regulations, to allow full unimpeded access by humanitarian personnel to all people in need of assistance, and to make available, as far as possible, all necessary facilities for their operations, and to promote the safety, security, and freedom of movement of humanitarian personnel and United Nations and its associated personnel and their assets.[127]

2.2.6 *Somalia*

The continuing instability in Somalia resulted in significant activity in the Security Council. The first of three resolutions (SCR 1863) was adopted on 16 January which, in its preamble, welcomed the contribution of the African Union Mission to Somalia (AMISOM) to lasting peace and stability in Somalia.[128] In one of its operative paragraphs the Council called on all parties to cooperate fully in the deployment and operations of AMISOM, in particular by guaranteeing the safety, security, and freedom of movement of African Union and United Nations personnel as well as associated personnel throughout Somalia and to comply fully with their obligations under international law, including international humanitarian, human rights and refugee law.[129]

On 18 May the President of the Security Council issued a statement in light of the renewal of fighting in Somalia which had been led by Al-Shabaab and other extremists in what was viewed as an attempt to remove the Transitional Federal Government (TFG).[130] . His statement expressed the concern of the Security Council at the loss of life and the worsening humanitarian situation arising out of the hostilities and called on all parties to abide by their obligations under international humanitarian law, in particular to respect the security of civilians, humanitarian works and AMISOM personnel.[131] On 26 May 2009 a resolution of the Security

125. UN Doc. S/Res/1896 (2009), 7 December 2009, para. 11.
126. UN Doc. S/Res/1883 (2009), 7 August 2009.
127. Ibid., Preamble and para. 1.
128. UN Doc. S/Res/1863 (2009), 16 January 2009.
129. Ibid., para. 15.
130. UN Doc. S/PV.6125, 15 May 2009 and UN Doc. S/PRST/2009/15, 18 May 2009.
131. Ibid.

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Council condemned the resurgence in fighting and called for an end to all hostilities.[132]

In November 2009 the Security Council convened to consider the report of the Secretary-General pursuant to Resolution 1846 (2008) which provided an assessment of the piracy situation off the Somali coast.[133] Later that month, Resolution 1897 was adopted extending the authorization for states and regional organizations cooperating with the Somali TFG to enter Somalia's territorial waters and use all necessary means to fight piracy and armed robbery on condition that prior notification was given by the TFG to the Secretary-General. Acting under Chapter VII, the Council invited all those engaged in the fight against piracy to conclude special agreements with countries willing to take custody of pirates.[134]

On 3 December the Security Council released a statement condemning the terrorist attack at a graduation ceremony for Somali medical students at Benadir University in Mogadishu which had resulted in the death of civilians and the Somali Ministers of Health, Higher Education and Education.[135] In the same statement the President indicated that the Security Council reaffirmed its demand that all opposition groups immediately end attacks, put down their arms, renounce violence and join reconciliation efforts and further called on all parties to abide by their obligations under international humanitarian law and, in particular, to respect the security of civilians, humanitarian workers and AMISOM personnel.[136]

2.2.7 *Sudan*

The Security Council met several times to consider the situation in Sudan and adopted three Resolutions during 2009.[137] On 30 April, Resolution 1870 was adopted extending the mandate of the UN Mission in Sudan (UNMIS) for a further year.[138] The Resolution also called on all parties to the conflict to abide by their obligations under international humanitarian law.[139]

The second Security Council resolution was adopted on 30 July 2009.[140] Determining that the situation in Sudan continued to constitute a threat to international peace and security, the preamble made explicit the reasons for the continuing involvement of the Security Council in Sudan and stated:

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132. UN Doc. S/Res/1872 (2009), 26 May 2009.
133. UN Doc. S/PV.6221 (2009), 18 November 2009.
134. UN Doc. S/Res/1897 (2009), 30 November 2009.
135. UN Doc. S/PRST/2009/31, 3 December 2009.
136. Ibid.
137. For the open meetings see UN Docs. S/PV.6079, 5 February 2009; S/PV.6096, 20 March 2009; S/PV.6112, 27 April 2009; S/PV.6139, 11 June 2009; S/PV.6170, 24 July 2009; S/PV.6175, 30 July 2009; S/PV.6199, 13 October 2009; S/PV.6227, 30 November 2009; S/PV.6230, 4 December 2009; S/PV.6251, 21 December 2009.
138. UN Doc. S/Res/1870 (2009), 30 April 2009.
139. Ibid., para. 25.
140. UN Doc. S/Res/1881 (2009), 30 July 2009.

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> '*Expressing concern*, two years after the adoption of resolution 1769 (2007), at the continued seriousness of the security situation and deterioration of the humanitarian situation in Darfur, and at the recurring attacks on the civilian population, *reiterating* its condemnation of all violations of human rights and international humanitarian law in Darfur, *calling* on all parties to comply with their obligations under international humanitarian and human rights law, *emphasizing* the need to bring to justice the perpetrators of such crimes and *urging* the Government of Sudan to comply with its obligations in this respect, …'

This resolution extended the mandate of the UN Assistance Mission in Darfur (UNAMID) for a further twelve months until 31 July 2010.[141] It also demanded that all parties to the conflict in Darfur immediately end violence, attacks on civilian, peacekeepers and humanitarian personnel, and comply with their obligations under human rights and humanitarian law.[142]

The final resolution was passed in October 2009. Resolution 1891 once more demanded an immediate and complete cessation by all parties to armed conflict of all acts of sexual violence against civilians, recruitment and use of children, and indiscriminate attacks against civilians.[143] The Security Council also extended for another year (until 15 October 2010) the mandate of the Panel of Experts which had been established to assist in monitoring the arms embargo and sanctions on those who impeded peace in the Sudan.[144]

3. REGIONAL ORGANISATIONS

3.1 **The European Union**

In March 2009 the Council of the European Union published its EU Guidelines Human Rights and International Humanitarian Law.[145] The guidelines were published with the purpose of assisting EU representatives in the field to better advance the EU Human Rights Policy. In the Introduction, the Secretary-General, Javier Solana, made express reference to the innovative inclusion in the Guidelines of a new section on promoting compliance with international humanitarian law. The inclusion of this section was explained as necessary given the explosive growth of operations and missions conducted under the European Security and Defence Policy and the equally pressing need to ensure that counterterrorism operations be conducted within the framework of international law.[146] The Guidelines contain

141. Ibid., para. 1.
142. Ibid., para. 7.
143. UN Doc. S/Res/1891 (2009), 13 October 2009.
144. Ibid., para. 1.
145. Council of the European Union, *EU Guidelines Human Rights and International Humanitarian Law* (European Communities, Brussels 2009).
146. Ibid., p. 3.

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instructions to all EU Heads of Missions and appropriate EU representatives, to include an assessment of the IHL situation in their reports whenever relevant.[147] Special attention was to be given to information that indicated that serious violations of IHL may have been committed. Such a report should include an analysis and suggestions of possible measures to be taken by the EU. Background papers for EU meetings were recommended to include, where appropriate, an analysis on the applicability of IHL. In a situation of a possible armed conflict, the Council Working Group on International Law should be informed and asked to make suggestions of future EU action to relevant EU bodies.[148]

To best promote IHL compliance, the Guidelines noted that there existed a variety of means at the EU's disposal including political dialogue, issuing general public statements, introducing restrictive measures/sanctions, co-operation with other international bodies and undertaking crisis management operations. In post-conflict situations compliance could best be promoted by ensuring there was no impunity for war crimes in accordance with the Agreement on Co-operation and Assistance between the European Union and the International Criminal Court. The Guidelines also indicated that the EU should consider providing funding for training and education in IHL in third countries. Finally, the Guidelines indicated that *The European Code of Conduct on Arms Export* provided that an importing country's compliance with IHL should be considered before export licences are granted.[149]

3.2 The European Court of Human Rights

There were several decisions rendered by the Court (ECtHR) in 2009 that considered issues of international humanitarian law but with the thousands of cases generated as a consequence of the Russia/Georgia conflict, that pattern is likely to increase.

A major decision by the Grand Chamber on disappearances from the 1974 Turkish invasion of Cyprus was released on 19 September. The applicants in the case of *Varnava and others* v. *Turkey* invoked Articles 2, 3, 4, 5, 6, 8, 10, 12, 13 and 14 of the European Convention on Human Rights (ECHR). A key part of the decision indicated that Article 2 of the Convention must be interpreted in light of the general principles of international law 'including the rules of international humanitarian law which play an indispensible and universally-accepted role in mitigating the savagery and inhumanity of armed conflict.'[150] The court further held that in a zone of international conflict Contracting States were under an obligation to protect the lives of those not, or who are no longer engaged in hostilities. This extended to the provision of medical assistance to the wounded and where combatants

147. Ibid., p. 78.
148. Ibid., p. 79.
149. Adopted on 8 June 1998, Doc. 8675/2/98 Rev.
150. ECtHR *Varnava and others* v. *Turkey*, Appl. Nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, Judgment 18 September 2009, para. 183.

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have died, or succumbed to their wounds, 'the need for accountability would necessitate proper disposal of remains and require the authorities to collect and provide information about the identity and fate of those concerned, or permit bodies such as the ICRC to do so.'[151] As Turkey had not put forward any material evidence to show that the nine missing men were found dead or were killed in the conflict zone under their control, or offered any convincing explanation of what happened to them, there was a continuing violation of Article 2 for failure to provide for an effective investigation.[152]

The Court also found a violation of Article 3 – inhuman treatment – with respect to the relatives of the missing who 'are kept in ignorance of the fate of their loved ones and suffer the anguish of uncertainty'.[153] The Court reasoned that the military operations following the Turkish invasion of Cyprus in 1974 had resulted in considerable loss of life, large-scale arrests and detentions, and as a consequence, 'the relatives of the missing men had suffered the agony of not knowing whether their family members had been killed in the conflict or had been taken into detention'. The Court further held that 'the silence of the authorities of the respondent state … could only be categorized as inhuman treatment'.[154]

Finally, the Court also found a violation of Article 5 with respect to procedural safeguards applicable to detention. This was on the basis that two of the missing had been included on an ICRC list of detainees even though the Turkish government denied that they were still in detention. The Court found that the Turkish government had a legal obligation to demonstrate that they had carried out an effective investigation into the whereabouts of the missing men and as a result there was a continuing violation of Article 5.[155]

This Grand Chamber decision reveals a comprehensive analysis of both the human rights and humanitarian law obligations that bind contracting states to the ECHR within an international armed conflict and more specifically their obligations with respect to the missing even after thirty-five years.

As Russia is a party to the ECHR, the ECtHR has been deluged with cases from the conflict in Chechnya. However, in these circumstances, the Court does not apply any of the rules of international humanitarian law and deals with the cases strictly on an analysis of Convention rights. During 2009 among the cases the Court considered concerning the Chechnya conflict, there were no findings of any sort of armed conflict even though the Russian Constitutional Court several years previously had declared the conflict in Chechnya to be a non-international armed conflict.[156] Within three of these cases the Court found violations of the right to life,

151. Ibid., para. 184.
152. Ibid., paras. 186 and 194.
153. Ibid., para. 200.
154. Ibid., para. 201.
155. Ibid., para. 207.
156. J. Pejic, 'Status of Armed Conflicts', in E. Wilmshurst and S. Breau, eds., *Perspectives on the ICRC Study on Customary International Humanitarian Law* (Cambridge, CUP 2005) and see Judgment of the Constitutional Court of the Russian Federation of 31 July 1995.

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detention rights, and inhuman treatment but did not consider the applicable IHL rules.[157] It is regrettable that the Court does not at least allude to humanitarian law obligations as the *lex specialis* as it did in the case of *Varnava and others* v. *Turkey.*

3.3 Organisation of American States

On 4 June, the General Assembly of the Organisation of American States passed a resolution entitled Promotion of and Respect for International Humanitarian Law.[158] This resolution urges member states to honor and fulfill their obligations under international humanitarian law and urges the member states to become parties to the following treaties:

a. The Convention for the Protection of Cultural Property in Time of Armed Conflict (Hague Convention, 1954), and its Protocols of 1954 and 1999;
b. The 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity;
c. The 1972 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction (Biological Weapons Convention);
d. The 1977 Protocols I and II Additional to the Geneva Conventions of 1949, as well as Additional Protocol III, of 2005, including the declaration contained in Article 90 of Additional Protocol I;
e. The Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects (CCW) of 1980, including the amendment to Article 1 thereof, adopted in 2001, and the five protocols thereto;
f. The 1989 Convention on the Rights of the Child and the 2000 Optional Protocol thereto on the involvement of children in armed conflict;
g. The 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction (Chemical Weapons Convention);
h. The 1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction (Ottawa Convention);
i. The 1998 Rome Statute of the International Criminal Court; and
j. The International Convention for the Protection of All Persons from Enforced Disappearance.[159]

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157. See for example *Arzu Akhamdova and Others* v. *Russia* (13670/03) Judgment 8 January 2009, *Sambiyev and Pokayeva* v. *Russia* (38693/04) Judgment 22 Janaury 2009 and *Khadisov and Tsechoyev* v. *Russia*, (21519/02), Judgment 5 February 2009.

158. Organisation of American States, AG/RES.2507 (XXXIX-0/09), 4 June 2009.

159. Ibid., para. 2.

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It also urged member states to adjust their criminal law in order to meet their legal obligations under the 1949 Geneva Conventions and, in the case of the states parties, the 1977 Additional Protocol I and the Rome Statute of the International Criminal Court, with respect to the definition of war crimes, universal jurisdiction for these grave breaches, and the responsibility of superiors for the acts of their subordinates, among other pertinent provisions.[160] Another obligation of particular relevance to the long standing phenomenon of disappearances, member states were urged to adopt effective measures to prevent the disappearance of persons in case of armed conflict or other situations or armed violance and to determine the fate of those who have disappeared.[161]

3.4 **The African Union**

The African Union adopted a Convention on Internally Displaced Persons.[162] The preamble specifically referred to the inherent rights of internally displaced persons as provided for and protected in human rights and humanitarian law. One of the principle obligations on state parties is to respect and ensure respect for international humanitarian law regarding the protection of internally displaced persons.[163] Furthermore, the obligation is set out that the parties shall respect and ensure respect for their obligations under international law, including human rights and humanitarian law, so as to prevent and avoid conditions that might lead to the arbitrary displacement of persons.[164] Within the prohibited categories of arbitrary displacement is enumerated individual or mass displacement of civilians in situations of armed conflict, unless the security of the civilians involved or imperative military reasons so demand, in accordance with international humanitarian law and displacement intentionally used as a method of warfare.[165] Finally, Article 7 of this new Convention provides for Protection and Assistance to Internally Displaced Persons in situation of armed conflict which provides that armed groups are to respect international humanitarian law including a prohibition from violating the civilian and humanitarian character of the places where internally displaced persons are sheltered.[166] This Convention, if ratified by all parties, will be an important supplement to the legal obligations within non-international armed conflict towards displaced persons.

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160. Ibid., para. 4.
161. Ibid., para. 8.
162. African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa, Kampala, 22 October 2009.
163. Ibid., para. 1(e).
164. Ibid., para. 4(1).
165. Ibid., para. 4(4)(b) and (c).
166. Ibid., Art. 7(5)(i).

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4. ARMS CONTROL AND DISARMAMENT

4.1 **Conventional weapons**

4.1.1 *Small arms and light weapons*

On 28 October, the General Assembly passed a resolution committing the United Nations to hold a preparatory conference in 2010 and 2012 and a negotiating Conference over four weeks in 2012 for an Arms Trade Treaty (ATT). 131 states voted in favour of the ATT and 20 abstained, with only Zimbabwe voting against. As part of the introductory paragraphs the resolution acknowledged the growing support across all regions for concluding a legally binding instrument to establish the highest possible common international standards for the import, export and transfer of conventional arms.[167]

In a related and important development the Western African Convention on small arms control entered into force on 29 September 2009. 10 of the 15 member states of the Economic Community of Western African States have ratified the Convention.

The provisions include:

- A prohibition on all international transfers (imports, exports, etc) unless an exemption is granted beforehand by the ECOWAS Executive Secretary in consultation with the member states.
- No exemptions for international transfers if the weapons are destined to be used for violations of human rights or serious violations of international humanitarian law, among many other stringent criteria for refusing authorisation.
- A complete prohibition on international transfers to non-state actors without the approval of the importing state.
- prohibits possession, use and sale of small arms by civilians unless they fulfill strict criteria to receive authorisation by national authorities.
- all manufacturing must be registered nationally (this includes local craft manufacturing, widespread across the sub-region).
- national and regional databases of small arms must be created.[168]

4.2 **Nuclear weapons**

2009 also resulted in important progress on nuclear weapons. The Geneva-based Conference on Disarmament ended 12 years of deadlock and agreed to a programme

167. UN Doc. A/C.1/64/L.38/Rev.1, 28 October 2009.

168. ECOWAS Convention on Small Arms and Light Weapons, Their Ammunition and other Related Materials, Abuja, 14 June 2006, the EU has a Code of Conduct on Conduct of Arms Exports but not a legally binding treaty.

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of work on 29 May. The 65-member conference agreed to negotiate a treaty banning the production of fissile material for use in nuclear weapons, or a fissile material cutoff treaty (FMCT). It also agreed to enter into substantive discussions on nuclear disarmament, the prevention of an arms race in outer space, and assurances that non-nuclear-weapon states will not be attacked with nuclear weapons. The conference agreed to establish working groups to consider all four issues. However, they were not able to agree on a decision on how to implement this work programme.[169]

The Conference on Disarmament (CD) is the successor to various Geneva-based arms control bodies dating back to 1960. It is an autonomous body but it has a close relationship with the United Nations. It meets on UN premises, is serviced by UN personnel, and its budget is included in the UN budget.[170]

169. Annual Report of the Conference on Disarmament CD/WP.554/Rev.1 and CD/WP.554/Rev.1/Amend.2.

170. At <http://www.acronym.org.uk/un/index.htm#02>.

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